

(2018) 03 GAU CK 0056
In the Gauhati High Court
Case No : MACApp. 92 of 2011

NEW INDIA INSURANCE CO. LTD

APPELLANT

Vs

KANESWAR BARUA AND ORS

RESPONDENT

Date of Decision : 20-03-2018

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 173
Code of Civil Procedure, 1908 — Order 41 Rule 33

Citation : (2018) 03 GAU CK 0056

Hon'ble Judges : KALYAN RAI SURANA

Bench : Single Bench

Final Decision : Allowed

Judgement

„

1. Heard Mr. K.K. Bhatta, the learned counsel for the appellants as well as Mr. G.P. Bhowmik, the learned Senior counsel, assisted by Ms. M.",,

Kalita, the learned counsel appearing for the respondents No. 1 to 5. None appears on call for the respondents No. 6 and 7 i.e. the owner and driver",,

of the offending vehicle.,,

2) This appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "MV Act") is preferred against the judgment and",,

award dated 17.02.2011, passed by the learned Member, Motor Accident Claims Tribunal, Tinsukia in MAC Case No. 16/2008, by which an award of",,

Rs.5,59,000/- was made in favour of the respondents No. 1 to 5.",,

3) The case of the respondents No. 1 to 5 in the claim petition was that the deceased Haibha Kanta Baruah, who was the son of respondent No. 1",,

and 2, was coming from Makum towards Nagaon by driving a scooter bearing registration No. AS-23/8972. On 03.11.2016 at about 6.00 pm, while he",,

reached near the staff quarters of Tengapani Tea Estate, a mini truck bearing registration No. AS-23/C-3864, which was coming from the opposite",,,

direction in a rash and negligent manner, knocked down the deceased. As a result of the accident, the deceased sustained grievous injuries and he died",,,

on spot. The owner and the driver of the vehicle i.e. the respondent No. 6 and 7 herein did not contest the claim. One Tanuram Barua, the registered",,,

owner of the scooter (OP No. 4 in the claim petition) submitted his written statement wherein, it was submitted that on 12.05.2006 by executing a sale",,,

letter, the scooter, which was being driven by the deceased was sold to the deceased. The appellant had filed their written statement and by taking",,,

usual pleas of denial had put the respondents No. 1 to 5 to strict proof of their claim.,,,

4) The respondents No. 1 to 5 had examined two witnesses including the respondent No. 1 (PW.1) and one Bijoy Dutta (PW.2), who was a pillion",,,

rider, who was travelling with the deceased in his scooter.",,,

5) On the basis of the pleadings, the learned Tribunal framed the following issues for adjudication:",,,

(i) Whether a motor vehicle accident took place on 03.11.2006 involving vehicle Nos. AS-23-C-3864 (Ape Truck) and AS-23-8972 (Vespa Scooter)?,,

(ii) Whether the deceased (son of the claimant) died in the accident?,,

(iii) Is the claimant entitled to compensation? If so to what extent and from whom?,,

6) In respect of issue No. 1, it was held that the offending vehicle was the truck insured by the appellant. In respect of issue No. 2, it was held that the",,,

deceased had died in the said road accident. In respect of issue No. 3, it was held that the accident had happened due to gross negligence on part of",,,

the driver of the offending truck. It was held that the deceased, who was stated to be a vegetable vendor had a monthly income of Rs.4,000/- per",,,

month. By deducting 1/4th of his income towards personal expenses, the compensation was awarded by the learned Tribunal as under:",,,

Rs.4,000/- (monthly income) X 12 X 7 = Rs.8,16,000/-",,,

(Rs.8,16,000/- X 1/4th)",,,

= Rs.2,72,000/-",,,

(Rs.8,16,000/- - Rs.2,72,000/-) = Rs.5,44,000/-",,,

The total contribution of the deceased would stand as-,,

Rs.5,44,000/-",,,

Loss of Estate - Rs.5,000/-",,,

Loss of consortium - Rs.5,000/-",,,

Funeral expenses - Rs.5,000/-",,,

Total - Rs.5,59,000/-",,,

(Rupees five lakh fifty nine thousand only).,,

The respondents No. 1 to 5 was awarded compensation of Rs.5,59,000/-, payable by the appellant herein together with the interest @ 6% per annum.",,

7) The learned counsel for the appellant has pressed all the grounds of appeal and has taken a specific issue for determination of this appeal that the,,

deceased was a bachelor and therefore, as per the ratio laid down in the case of Sarla Verma Vs. DTC and Anr., (2009) 6 SCC 121, 50% of the",,,

income was required to be deducted on account of personal and living expenses of the deceased and secondly, that as there was no proof of income",,,

the learned Tribunal had erred in law as assessing the income to be Rs.4,000/-, which ought to be considered on a notional basis by taking his notional",,,

income to Rs.3,000/-per month.",,

8) Per-contra, the learned Senior counsel for the respondents No. 1 to 5 has made his submission in support of the impugned judgment and award. By",,,

referring to the case of United India Insurance Co. Ltd. Vs. Urmila Chand, (2014) 6 GLR 332: (2016) 1 GLT 211, he has submitted that the plea of",,,

the insurer/appellant for reduction of the award below the sum awarded by the learned Tribunal was not maintainable and it is further submitted that,,

the learned Tribunal had given an award of Rs.5,000/- each on account of funeral expenses, loss of estate and loss of consortium, which according to",,,

him, is liable to be enhanced in terms of the quantum of compensation as settled and/or standardized by the Honâ??ble Supreme Court in the case of",,,

National Insurance Co. Ltd. Vs. Pranay Sethi & Ors., MANU/SC/1366/2017: (2017) 8 Supreme 107, wherein, it has been held that compensation on",,,

the conventional heads of funeral expenses, loss of estate and loss of consortium should",,,

9) On the basis of the submissions made by the learned counsel/Senior counsel appearing for the parties, the following points of determination has",,,

arisen for a decision in this appeal:,,

(i) Whether the award passed by the learned Tribunal requires any interference?,,

(ii) Whether the award under the conventional heads of loss of estate, loss of funeral expenses and loss of consortium is liable to be enhanced without",,,

there being an appeal or cross-objection by the respondents No. 1 to 5/claimants?,,

10) Insofar as the monthly income of the deceased is concerned, it is seen from the claim petition that the respondents No. 1 to 5/claimants had stated",,,

that the deceased was having a monthly income of Rs.4,000/- per month. It is further seen that in course of cross-examination of the claimant witness",,,

No. 1, the said witness was not confronted with any question in the cross-examination relating to any doubt expressed on the monthly income of the",,,

deceased. Under such circumstances, when the appellant had not cross-examined the PW.1 regarding the monthly income of the deceased, this Court",,,

does not see any reason to interfere with the finding recorded by the learned Tribunal, wherein it was held that the monthly income of the deceased",,,

was Rs.4,000/- per month.",,

11) The connected issue is as regards the admissible deductions from the monthly income of the deceased towards his personal and living expenses. It,,

is the admitted case of the respondents No. 1 to 5 that the deceased, who was the son of the respondents No. 1 and 2 had died as a bachelor. It has",,,

been settled by the Honâ??ble Supreme Court in the case of Sarla Verma (supra) that even if the deceased is survived by the parents and other,,

siblings, only the mother would be considered to be a dependent and 50% of the income of the deceased would be treated as the personal and living",,,

expenses of the bachelor and only 50% of such income would be treated as contribution for the family. Under such circumstances, by following the",,,

ration laid down by the Honâ??ble Apex Court in the case of Sarla Verma (supra), this Court is of the opinion that 50% of the income of the",,,

deceased was liable to be deducted towards his personal and living expenses, but the learned Tribunal had made deduction at the rate of 1/4th of the",,,

income of the deceased. Therefore, it is found that the amount of loss of dependency is required to be scaled down as follows- monthly income @",,,

Rs.4,000/- less 50% deduction on account of personal and living expenses = Rs.2,000/-per month. Thus, loss of dependency would be Rs.2,000/- X 12",,,

X 17 = Rs.4,08,000/-.",,

12) Therefore, as regards the point of determination No. 1, this Court is of the considered opinion that the computation of the compensation by the",,,

learned Tribunal is liable to be interfered with and accordingly, the compensation is scaled down as indicated in the foregoing paragraph. As deceased",,,

was bachelor, the parents or the siblings i.e. the respondents No. 4 and 5 are not found to be entitled to any compensation under the convention head",,,

of loss of consortium, which is mainly to compensate the spouse only. The point of determination No. 1 is answered accordingly.",,

13) As regards point of determination No. 2, this Court in the case of National Insurance Co. Ltd. Vs. Utpala Saikia, (2017) 2 GLR 406:(2017) 0",,,

Supreme (Gau) by relying on the case of Ranjana Prakash & Ors., Vs. Divisional Manager & another, (2001) 14 SCC 639 has held that the",,,

compensation cannot be enhanced in the appeal by the insurer and hence, the respondents No. 1 to 5 herein and held to be not entitled to seek",,,

enhancement of the compensation in the absence of any appeal or cross-objection. The relevant paragraphs 17 and 18 of the case of Utpala Saikia,,

(supra) are quoted below:,,

â??17. Per contra, the learned counsel for the appellant, by referring to the case of Ranjana Prakash & others V. Divisional Manager & ors,",,

reported in (2001) 14 SCC 639, refers to paragraph 6 to 8 thereof and submits that there is no cross appeal by the respondents No.2 to 5 and, as such,",,

the oral prayer for enhancement of the award should not be entertained at this first appellate stage. For the sake of convenience, paragraphs 6,7 & 8",,,

of the said judgment is quoted below:,,

â??6. We are of the view that the High Court committed an error in ignoring the contention of the claimants. It is true that the claimants had not,,

challenged the award of the Tribunal on the ground that the Tribunal had failed to take note of the future prospects and add 30% to the annual income,,

of the deceased. But the claimants were not aggrieved by Rs 23,134 being taken as the monthly income. There was therefore no need for them to",,,

challenge the award of the Tribunal. But where in an appeal filed by the owner/insurer, if the High Court proposes to reduce the compensation",,,

awarded by the Tribunal, the claimants can certainly defend the quantum of compensation awarded by the Tribunal, by pointing out other errors or",,,

omissions in the award, which if taken note of, would show that there was no need to reduce the amount awarded as compensation. Therefore, in an",,,
appeal by the owner/insurer, the appellant can certainly put forth a contention that if 30% is to be deducted from the income for whatsoever reason,",,
30% should also be added towards future prospects, so that the compensation awarded is not reduced. The fact that the claimants did not",,,
independently challenge the award will not therefore come in the way of their defending the compensation awarded, on other grounds. It would only",,,
mean that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in",,,
the absence of any cross-appeal or cross-objections.,,,

7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to,,
have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or",,,
cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code,,
can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to,,
litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek",,,
compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner",,,
challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even",,,
though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.,,,

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is",,,
to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the",,,
compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the",,,
owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court",,,

will dismiss any appeal by the claimants for enhancement, but allow any appeal by the owner/insurer for reduction. The High Court cannot obviously",,,

increase the compensation in an appeal by the owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the",,,

claimants seeking enhancement of compensation.â??,,

18. In light of the herein before quoted paragraphs from the above mentioned two cases, this Court is, therefore, confronted with the question as to",,,

which citation would constitute a binding precedent. It is seen that while the case of Rajbir Singh (supra) has been decided by a Full Court of 3 Judges,,

Bench. The other two cases have been decided by a Division Bench having strength of 2 Hon'ble Judges. It appears that in the case of Rajbir Singh,,

(supra), the issue which the Hon'ble Apex Court was deciding is reflect in the opening words of paragraph 10, which is â??Whether the Tribunal is",,,

competent to award compensation in excess of what is claimed? and, as such, this court is not persuaded to accept the argument that the said",,,

judgment can be said to be a binding precedent on the power of the appellate court to enhance the award without a cross appeal. The answer directly,,

on the point is found in the judgment in the case of Ranjana Prakash (supra), because in para 6 thereof, it has been held as follows - â??The fact",,,

that the claimants did not independently challenge the award will not therefore come in the way of their defending the compensation awarded, on other",,,

grounds. It would only mean that in an appeal by the owner/ insurer, the claimants will not be entitled to seek enhancement of the compensation by",,,

urging any new ground, in the absence of any cross-appeal or cross-objection.â? In para 8 thereof, the Hon'ble Supreme Court of India has further",,,

directly clarified and held on the very point by stating as follows - â??The High Court cannot obviously increase the compensation in an appeal by,,

the owner/ insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of",,,

compensation.â? On the well accepted legal principle that â??a judgment is an authority on what it decidesâ? and that â??a judgment is not to be,,

read as a statute, it has to be read in the context of the facts discussed in it.â? On reading paragraph 10 of the case of Rajbir Singh (supra), it is",,,

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