

(1984) 07 BOM CK 0011
In the Bombay High Court

Padmadevi Shankarrao Jadhav and Others

APPELLANT

Vs

Kabalising Garmilsing Sardarji and Others

RESPONDENT

Date of Decision : 18-07-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : (1985) 2 ACC 99

Hon'ble Judges : V.V. Vaze, J; Dharmadhikari, J

Bench : Division Bench

Judgement

Dharmadhikari, J.—This is an appeal filed by the claimants against the Award passed by the Member, Motor Accidents Claims Tribunal, Satara, dated 20th February 1982 in Claims Petition No. 16 of 1979, awarding an amount of Rs. 39,600/- to the minor children and dismissing the claim made by the widow.

2. It is an admitted position that the deceased Shankarrao was working as a Head master in the New English High School at Atit, Taluka and District Satara. On 21st April 1979 he went to Karad for purchasing materials for the High School building which was then under construction. On that day he halted at Karad. On 22nd April 1979 he left Karad early in the morning at about 6 a.m. on his motor-cycle. When he came near the Milk Dairy, a goods truck bearing No. MTD 2812 driven by opponent no. 1 Kabalsing came from the opposite direction. It was being driven a high speed. The said truck all of a sudden, swerved to its right side and after coming near the motor-cycle of Shankarrao, it gave a dash to it. After the impact, Shankarrao was thrown away from his motor-cycle receiving a number of injuries on his person on account of which he died on the spot. Thus, it is the case of the claimants that the death of Shankarrao was caused on account of the rash and negligent driving of the truck by opponent no. 1 and, therefore, they are entitled to get compensation from the owner of the truck as well as the insurer the New India Assurance Co. Ltd. The claimants had further stated in their application that the deceased was getting a pay of Rs. 1,060/- per month at the time of his death. He was about 38 years of age and was of sound

health. He would have earned an amount of Rs. 4,25,000/- in case he had not died in the accident. By making allowance for deductions etc. the claimants restricted their claim to Rs. 2,00,000/-.

3. Opponents Nos. 1 and 2 filed their joint Written Statement. They denied that the accident took place on account of the rash and negligent driving of the truck by the truck driver. According to them, the truck driver was driving the truck cautiously and at the normal Speed, but the deceased who was coming on his motor-cycle drove it rashly and negligently and dashed against the truck, causing the accident. Thus, according to the opponents, the accident took place because of the rash and negligent driving by Shankarrao, the deceased. They also contended that the amount of compensation claimed by the applicants is excessive and exorbitant. The Insurance Company adopted the contentions raised by opponents nos. 1 and 2, It also contended that the liability of the Insurance Company is limited to Rs. 50,000/- only.

4. On the basis of the pleadings of the parties, the Motor Accidents Claims Tribunal framed the necessary issues. In support of their case, the claimants examined, Padma, widow of the deceased Shankarrao, a Clerk from the New English School at Atit and one Chandulal Momin, a panch witness to the spot panchnama. The opponents examined the driver of the truck, Kabalsing. After appreciating all the evidence on record, the Claims Tribunal came to the conclusion that the death of Shankarrao was caused on account of the rash and negligent driving of opponent No. 1 Kabalsing, the driver of the goods truck. However, so far as the quantum of compensation is concerned, the learned Member dismissed the claim made by the widow on the ground that she would be getting Rs. 116/- per month by way of family pension. She was also entitled to get the amount of the Provident Fund and gratuity to the tune of Rs. 9,732/- and Rs. 10,000/-. She was also paid the amount of the Insurance Policy to the tune of Rs. 2,060/-. The learned Member found that she would be getting interest at least at the rate of Rs. 175/- per month and this taken together with the amount of her family pension, she would be getting at least Rs. 300/- per month which would be sufficient for maintaining herself and, therefore, she is not entitled to get any amount by way of compensation. So far as the children are concerned, the learned Member granted an amount of Rs. 39,600/- as compensation. As already observed, it is this award which is challenged in the present appeal by the claimants.

5. Shri Thorat, the learned Counsel appearing for the appellants, contended before us that instead of awarding compensation, the learned Member of the Tribunal has merely awarded maintenance to the widow and the minor children. The whole approach of the learned Member is not only wrong, but is also perverse. According to Shri Thorat, taking into consideration the age of the deceased, the salary he would have earned till his retirement plus the loss of gratuity and provident fund benefits as well as the general damages, in any case, the learned Member should have awarded the total compensation of Rs.

2,00,000/- as claimed by the claimants. According to the learned Counsel, the claim of Rs. 2,00,000/- made by the claimants is practically on the lower side and in any case they, are entitled to the said amount. He also contended that the learned Member of the Tribunal committed an error in deducting the amount of the gratuity and provident fund as well as the family pension received by the widow while calculating the quantum of compensation.

6. Shri Trivedi, the learned Counsel appearing for the respondents, found it difficult to support the reasoning of the learned Member of the Tribunal so far as the quantum of compensation is concerned. However, according to Shri Trivedi, the finding recorded by the learned Member on the issue of negligence is perverse. It is contended by Shri Trivedi that from the evidence on record, it is more than clear that it was the deceased Shankarrao who was responsible for the accident. According to the learned Counsel, the accident took place on account of the rash and negligent driving of the motor cycle by the deceased himself and, therefore, the claimants are not entitled to any compensation. In any case, according to the learned Counsel, this is a case of the contributory negligence which should be apportioned as 50: 50. It was also contended by Shri Trivedi, that though the opponents have not filed any appeal or cross-objections, he is entitled to challenge the finding recorded by the Tribunal qua negligence by taking recourse to the provisions of Order 41, Rule 33 of the Code of Civil Procedure. In support of this contention, he has placed strong reliance upon the decision of the Supreme Court in Pannalal Vs. State Bombay and Others, decision of the Gujarat High Court in Bharatbhai Kasturchand Shah and Anr. v. Mafatbhai Bababhai Makwana and Ors. 1980 ACJ 152 and the decision of the Orissa High Court in Oriental Fire and Ins. Co. Ltd. v. Bidi and Ors. 1972 ACJ 187.

7. So far as the question as to whether the opponents can challenge the finding qua negligence of the opponent No. 1 Kabalsing is concerned, in our view, it is not open to the opponents to challenge the said finding in the absence of filing of an independent appeal or a cross-objection. It is not disputed that in an appeal filed under the provisions of the Motor Vehicles Act, it is open to the opposite party to file cross-objections, since the provisions of Order 41, Rule 22 will aptly apply to such an appeal. This position is not dispute even by Shri Trivedi and in our opinion, rightly. As held by the various High Courts, including Karnatak, Allahabad, Gujarat and Andhra Pradesh, in AIR 1973 Kar 18 ; U.P. State Road Transport Corporation Vs. Smt. Janki Devi and Others, National Insurance Co. Vs. Diwaliben, Srisailam Devastanam Vs. Bhavani Pramamma and Others, Srisailam Devastanam v. Bhavani Pramamma and Ors., the provisions of the CPC will be applicable to an appeal filed u/s 110-D of the Motor Vehicles Act. As a necessary corollary of this cross-objections could be filed in such an appeal. In our view, this position is placed beyond doubt by the amendment to the provisions of Order 41, Rule 22 of the Code of Civil Procedure. The Explanation to Order 41, Rule 22 clearly provides that a respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that

finding notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent. In the present case, admittedly the ultimate award for compensation passed by the Tribunal is based on the finding on the issue of negligence. Unless it was held that the truck was negligent in driving the truck and the accident took place because of his negligence, the award for compensation against the opponents cannot follow. Even if it is held that it was the case of contributory negligence on the part of the truck driver as well as the deceased, then also unless a finding in that behalf is recovered, an award for compensation cannot be passed in favour of the claimants. Therefore, the finding on the question or issue of negligence is not only germane, but is the foundation for awarding compensation. Hence a cross-objection could have been filed by the opponents challenging the said award based on the said finding. This has not been admittedly done. Therefore, in our view, unless a cross-objection is filed, it will not be open to the opponents to challenge the finding in that behalf. We are fortified in this view by the latest decision of the Supreme Court in Choudhary Sahu (Dead) by Lrs Vs. State of Bihar, Precisely a similar question fell for the consideration of the Supreme Court in the context of the provisions of Order 41, Rule 22 and Order 41, Rule 33 of the Code of Civil Procedure. After making a reference to its earlier decisions in 1965 SC 1874 and Giasi Ram and Others Vs. Ramjilal and Others, this is what the Supreme Court has observed in paras 12, 13 and 14 of the judgment:

12. The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the Power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-upon decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.

13. Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this rule the Court should not lose sight of the other provisions of the Code itself nor the provisions of the other laws viz. the Law of Limitation or the Law of Court fees etc.

14. In these appeals the Collector on the basis of the material placed before him allowed certain units to the various appellants. In the absence of any appeal by the State of Bihar, there was no justification for the Commissioner to have interfered with that finding in favour of the appellants. The facts and circumstances of these appeals are not such in which it would be appropriate to exercise the power under Order 41, Rule 33. The Commissioner as well as the High Court committed a manifest error in reversing the finding regarding

allotment of units to the various appellants in the absence of any appeal by the State of Bihar when the same had become final and rights of the State of Bihar had come to an end to that extent by not filing any appeal or cross objection within the period of limitation.

In our view, these observations aptly apply to the present case also. This Court cannot exercise power under Order 41, Rule 33 by losing sight of the other provisions of the Code, or the provisions of other laws viz. the law of limitation, the law of Court-fees etc. In the present case, Shri Trivedi practically wants that not only the appeal should be dismissed, but the claim made by the claimants should be dismissed in both, which means that we should pass an order to the prejudice of the claimants, though the opponents have not filed any appeal or cross-objections and the award passed by the Tribunal has become final, so far as the opponents are concerned. In our view, the wide powers conferred upon this Court under Order 41, Rule 33 cannot be exercised to achieve such a design. This is not legally permissible, nor is it equitable.

8. However, assuming that it was open to the opponents to challenge the finding qua negligence, in our view, the contention raised by Shri Trivedi is also without any substance. So far as the claimants are concerned, they could only examine the panch witness, who was a witness to the spot panch-nama. It is admitted by Kalabsing, the driver of the truck, that the panchnama is based on the information given by him. Practically it was he who had shown the various spots to the police. From the evidence of Kabalsing, it is also clear that being early morning there was no vehicular traffic on the road and no pedestrian was seen walking on the road at that time. The width of the tar road at the spot of the accident was about 25 feet. On both sides of the road, there is Kutcha part of the road. The road at the spot of the accident is a straight one. He has also stated in his deposition that he saw one motor-cycle coming from the opposite direction. The motor-cyclist was driving his motor-cycle at a very fast speed and he was driving it by his left hand side. He then states that when the motor-cycle came near his truck, he tried to swerve the truck in order to save the impact, but in the meanwhile the impact took place. The impact took place between the back side of the truck and the motor-cycle. He admitted in crass-examination that there was no need for the driver of the motor-cycle to come near the motor truck all of a sudden. He also admitted that the impact took place on the western side of the road. After the impact his truck went ahead and it turtle in a field. If the truck driver had seen a motor-cycle coming from the opposite direction and if the motor cycle was being driven by the left hand side, then unless the truck driver was rash and negligent in driving the truck, the accident was an impossibility. The truck driver candidly admitted that there was no need for the motor-cyclist to come near the motor truck all of a sudden. This clearly shows that the motor-cyclist did not come suddenly near the motor truck, but it was the truck driver who was driving the truck in a rash and negligent manner and, therefore, the accident took place. This is further clear from the fact that after the impact the truck went ahead and turned turtle in a field. This inference is also irresistible

from the recitals in the spot panchnama. Therefore, in our view, the learned Member of the Tribunal was wholly justified in coming to the conclusion that the accident took place because of the rash and negligent driving of the truck driver. Therefore, even on merits it is not possible for us to accept the contention of Shri Trivedi.

9. So far as the quantum of compensation is concerned, a very peculiar method is followed by the learned Member. To say the least, he has not followed any well-established principle. Deciding the compensation wholly on the basis of the interest the lump sum will receive or derive is an unscientific "method. We had an occasion to consider a somewhat similar question in Maharashtra State Road Transport Corporation v. Babalal F.A. No. 73 of 1983, decided on 6-11-1984) in which also a contention was raised that ultimately the compensation should be quantified by giving a second thought as to what interest will be received on the lump sum. After making a reference to the decision in Joki Ram Vs. Smt. Naresh Kanta and Others, : Motor Owners" Insurance Company Limited Vs. Jadavji Keshavji Modi and Others, Motor Owners Insurance Co. Ltd. v. Jadavji Keshavji Modi and Ors. this Court held that deduction on the basis of interest theory is wholly unwarranted because of the rapidly falling rate of the value of the rupee. There is a good interest rate only for long term investments. Meanwhile there is increase in prices and cost of living and consequent fall in the value of rupee. This out weighs the rate of interest, even on long term investment. Further, because of illiteracy and ignorance, prudent investment itself is an exception and not a normality. Therefore, it is not possible to lay down a general rule that while fixing just and fair compensation, it should always be based on the basis of the interest which will be derived or received if the lump sum is prudently invested. Therefore, in our view, the principle applied by the learned Member for arriving at the figure of the compensation was wholly unjustified having regard to the facts and circumstances of the case.

10. Admittedly, at the time of death, the deceased was about 40 years of age. It has also come on record that he would have served as a Head master for another 18 years. At that time of the accident, he was getting a pay of Rs. 1018-80/-. The larded Member has rightly come to the conclusion that after deduction of the amount of Income Tax or towards gratuity and the Provident fund, the deceased was spending at least Rs. 500/- per month on the family. Therefore, this can safely be taken as the basis. There is evidence on record to show that at the time of his retirement he would have got Rs. 1150/- as his basic pay plus Rs. 460/- as dearness allowance. He would have obtained an amount of gratuity to the tune of Rs. 22,000/-. He was also entitled to get pension at the rate of Rs. 700/-per month after his retirement. Therefore, in any case, the award passed by the learned Member rejecting the whole claim of the widow and passing on award in favour of the minor children for an amount of Rs. 39,600/- cannot be sustained. Shri Trivedi also found it difficult to support this award. With the assistance of the learned Counsel appearing for both the sides and after applying the proper multiplier, and awarding compensation for loss of consortium etc. it

can safely be held that the claimants will be entitled to an amount of Rs.1 00,000/- towards compensation, The learned Member committed an error in deducting from the compensation the amount received by the widow towards gratuity, the provident fund or the family pension. The deceased would have received these amounts in any case even if he had survived. Therefore, the amounts of gratuity or provident Fund could not have been deducted in any case. So far as the family pension is concerned, it has to me on record that the deceased would have received a pension of Rs. 700/-per month after his retirement. It can safely be presumed that the deceased would have spent all this amount on the family. The widow is only getting Rs. 116/- per month towards family pension. Therefore, the said amount could not have been deducted or taken into consideration, while arriving at the correct figure of compensation. Such a view has been taken by this Court in First Appeal No. 1012 of 1980 with First Appeal No. 224 of 1981 The United India Insurance Co. Ltd. v. Abdul Munaf Majur Hussain Momin and Ors.) decided on 17th August 1984. In the said judgment the Division Bench of this Court has quoted with approval the Full Bench decision of the Madhya Pradesh High Court in Smt. Kashmiran Mathur and Ors. v. Sardar Rajendra Singh and Anr. 1983 ACJ 152 : AIR 1983 Mad Pra 24 and the judgment of the Punjab and Haryana High Court in Bhagat Singh and Sohan Singh Vs. Om Sharma and Others, Similar view seems to have been taken by the Delhi High Court in Smt. Nirmala Sharma, Etc. Vs. Raja Ram, Therefore, deductions are contemplated on this count from the compensation amount arrived at by bus. As already observed, taking any principle into consideration, the figure of compensation will be Rs. 1.00.000/- and not below it. Therefore, the First Appeal deserves to be allowed.

11. Therefore, the claimants are awarded a total amount of Rs. 1,00,000/- towards compensation. Obviously the liability of opponent No. 3, the Insurance Company, is restricted to Rs. 50.000/- in view of the policy of insurance. Therefore, though there will be a joint decree against all the opponents, the Insurance Company's liability will be restricted to Rs. 50,000/- only, though the other opponents will be liable to pay the whole amount of Rs. 1,00,000/-. So far as the apportionment of the amount of compensation is concerned, we confirm the order passed by the Tribunal, so far as the minor children are concerned. The appellant no. 1 Padmadevi will be entitled to receive the balance amount i e. Rs. 60,400/-. So far as the amount payable to the minors is concerned, already an order of deposit is made. It is needless to say that this amount of Rs. 1,00,000/- shall carry interest at the rate of 6% per annum from the date of the application till realisation of the amount. Therefore, the liability of the Insurance Company will be Rs. 50,000/- plus the interest payable on this amount. On such deposit being made or the realisation of the compensation amount, the learned Member of the Tribunal will pass appropriate orders in consonance with the guidelines laid down by this Court in Nav Bharat Builders and another Vs. Pyarabai and others, obviously after giving an opportunity of being heard to the claimants. We are informed by Shri Trivedi that the amount of compensation i.e. Rs. 39,600/- is

already deposited. If that is so, the opponents will not be liable to pay interest on the said amount from the date of deposit. Shri Trivedi appearing for the Insurance Company prays for eight weeks time to deposit the balance of the amount payable by the Insurance Company. Time granted.

12. In the result, the appeal is partly allowed with proportionate costs.