
(2016) 06 SHI CK 0173
In the High Court Of Himachal Pradesh
Case No : FAO (MVA) No. 599 of 2008

Shri Raj Pal Yadav

APPELLANT

Vs

Smt. Jamna Devi

RESPONDENT

Date of Decision : 24-06-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 146, 173

Citation : (2016) AAC 1923

Hon'ble Judges : Mr. Mansoor Ahmad Mir, CJ.

Bench : Single Bench

Advocate : Mr. Rajesh Mandhotra, Advocate, for the Appellants; Nemo, Advocate, for the Respondents No. 1; Mr. B.M. Chauhan, Advocate, for the Respondents No. 2

Final Decision : Disposed Off

Judgement

Mansoor Ahmad Mir, C.J. (Oral)—This appeal is directed against the order dated 23.6.2008, made by the Motor Accident Claims Tribunal-II Kangra, at Dharamshala, H.P. in C.M. Application No. 142-D/2005, titled Raj Pal Yadav and another v. Jamna Devi, for short "the Tribunal", whereby the application filed by the applicant under Order 9, Rule 13 of the Code of Civil Procedure, 1908 has been dismissed, hereinafter referred to as "the impugned order", for short.

2. The appellants have not questioned the basic award dated 23.12.2003, made by the Motor Accident Claims Tribunal-II Kangra, at Dharamshala, H.P. in MACP No. 43-D/2001, titled Smt. Jamna Devi v. Raj Pal Yadav and others, for short "the impugned award". However, I deem it proper to determine both the order and the award by this judgment.

3. This appeal is outcome of a vehicular accident which was allegedly caused by Leela Ram appellant No. 2 while driving Bus No. RJ-14-P-5578 rashly and negligently on 8.4.2001 at about 3.30.P.M. in front of Chaudhary Hotel Dhaba near Village Thikrien, P.S. Bagru, District Jaipur, in which Tarlok Chand sustained

injuries and succumbed to the injuries, constraining Jamna Devi mother of the deceased to file claim petition which was resisted and contested only by the insurer whereas driver and owner were set against ex parte.

4. The Tribunal framed the following issues on.5.2002.

(i) Whether deceased Tarlok Chand had died on account of rash/negligent diving of bus by respondent No.2? OPP

(ii) If issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP

(iii) Whether the respondent No. 2 was not holding a valid and effective driving licence? OPR.

(iv) Relief.

5. Claimant has proved that the driver had driven the offending vehicle rashly and negligently. Accordingly, issue No. 1 was decided in favour of the claimant and against the insurer.

6. The insurer has failed to discharge the onus on issue No. 3, thus, issue No. 3 was also decided against the insurer.

7. The Tribunal, after assessing the compensation awarded a sum of Rs. 1,18,000/- along with 6% interest from the date of petition till its realisation, but saddled the owner with the liability on the ground that the insurance policy was not on record.

8. The owner and driver filed application under Order 9, Rule 13 of the CPC for setting aside ex parte award which was dismissed vide order dated 23.6.2008, referred to supra.

9. The appellants have questioned the said order by the medium of this appeal but have not questioned the basic award, as referred to supra.

10. During the pendency of the appeal, the appellants made the copy of insurance available to Mr. B.M. Chauhan, Advocate, learned counsel for the insurer and he was asked to seek instructions. Mr. B.M. Chauhan, Advocate, today in the open Court stated at the Bar that the vehicle was insured at the time of accident and insurance was valid and effective on the said date. His statement is taken on record. He has also made the copy of the insurance policy available, made part of the record.

11. In the given circumstances, the question is whether the Tribunal has rightly saddled the owner with the liability? The answer is in negative for the following reasons.

12. In view of the statement made by the learned counsel for the insurer read with the insurance policy, the vehicle was insured and third party risk was covered. The owner has discharged his duty which was cast upon him, in terms

of Section 146 of the Motor Vehicles Act, for short "the Act". Thus, the insurer has to saddle with the liability. Accordingly, the impugned award merits to be modified to that effect.

13. The moot question is whether in this appeal, this Court can modify the impugned award. The answer is in affirmative for the following reasons.

14. The grant of compensation is a social legislation for the benefit of the victims of the vehicular accident.

15. The mandate of Chapter XI of the Motor Vehicles Act provides for the grant of compensation to the victim without succumbing to the niceties and technicalities of procedure. It is beaten law of the land that technicalities or procedural wrangles and tangles have no role to play.

16. My this view is fortified by the judgment delivered by the apex court in *Dulcina Fernandes and others v. Joaquim Xavier Cruz and another*, reported in (2013) 10 Supreme Court Cases 646, *N.K.V. Bros. (P.) Ltd. v. M. Karumai Ammal and others etc.*, reported in AIR 1980 Supreme Court 1354 and *Oriental Insurance Co. v. Mst. Zarifa and others*, reported in AIR 1995 Jammu and Kashmir 81.

17. This Court has also laid down the similar principles of law in FAO No. 692 of 2008 decided on 4.9.2015 titled *Cholamandlan MS General Insurance Co. Ltd. v. Smt. Jamna Devi and others*, FAO No. 287 of 2014 along with connected matter, decided on 18.9.2015 titled *Tulsi Ram v. Smt. Mena Devi and others*, FAO No. 72 of 2008 along with connected matter decided on 10.7.2015 titled *Anil Kumar v. Nitim Kumar and others* and FAO No. 174 of 2013 decided on 5.9.2014 titled *Kusum Kumari v. M.D. U.P Roadways and others*.

18. This Court in series of cases, i.e., in FAO No. 663 of 2008 titled *Mani Devi v. Sh. Baldev and another* decided on 7.8.2015, FAO No. 224 of 2008 titled *Hem Ram and another v. Krishan Ram and another* decided on 29.5.2015, along with connected matters, FAO No.226 of 2006 titled *United India Insurance Co. Ltd. v. Kulwant Kaur and another* decided on 8.3.2014 and FAO No.524 of 2007 titled *Jagdish v. Rahul Bus services and others* decided on 15.5.2015, has held that in case the claimant has not questioned the award, the Court, while hearing the appeal, can suo motu modify the award and enhance the compensation.

19. This Court in FAO No.203 of 2010, titled *Nati Devi and another Maya Devi and others*, along with connected matters decided on 20.5.2016, has held that if any order is required to be passed and impugned award is to be modified or reversed, the appellate Court has power to do so, in order to achieve the goal of social legislation, without their being any cross appeal or cross-objections. It is apt to reproduce paras 15 to 32 of the said judgment herein.

15. Now, the question is whether the Appellate Court while hearing an appeal under Section 173 of the Act can pass such an order which ought to have been passed by the Tribunal, without there being any appeal or cross objections from

the person against whom the order has been made. The answer is in the affirmative for the reasons given herein above, read with the mandate of the Apex Court and of the High Courts.

16. Part VII and Order 41 of the CPC deal with the powers and the scope of the Appellate Court in appeal proceedings.

17. The Apex Court in *Sharanamma and others v. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation*, (2013) 11 SCC 517, has held that there are no fetters on the powers of the appellate Court to consider the entire case on facts and law, while hearing an appeal under Section 173 of the Act. It is apt to reproduce paragraphs 10, 11 and 12 of the said decision hereunder:

"10. When an Appeal is filed under Section 173 of the Motor Vehicles Act, 1939 (hereinafter shall be referred to as the "Act"), before the High Court, the normal Rules which apply to Appeals before the High Court are applicable to such an Appeal also. Even otherwise, it is well settled position of law that when an Appeal is provided for, the whole case is open before the Appellate Court and by necessary implication, it can exercise all powers incidental thereto in order to exercise that power effectively. A bare reading of Section 173 of the Act also reflects that there is no curtailment or limitations on the powers of the Appellate Court to consider the entire case on facts and law.

11. It is well settled that the right of Appeal is a substantive right and the questions of fact and law are at large and are open to Review by the Appellate Court. Thus, such powers and duties are necessarily to be exercised so as to make the provision of law effective.

12. Generally, finding of fact recorded by Tribunal should not be interfered with in an Appeal until and unless it is proved that glaring discrepancy or mistake has taken place. If the assessment of compensation by the Tribunal was fair and reasonable and the award of the Tribunal was neither contrary nor inconsistent with the relevant facts as per the evidence available on record then as mentioned herein above, the High Court would not interfere in the Appeal. In the case in hand, nothing could be pointed out to us as to what were the glaring discrepancies or mistakes in the impugned Award of the Tribunal, which necessitated the Appellate Court to take a different view in the matter."

18. It is also beaten law of the land that Claims Tribunal is within its powers to award compensation more/higher than claimed and compensation can be enhanced by the appellate Court while deciding the appeal under Section 173 of the Act, even in the absence of any appeal or cross objections. The Apex Court in the case of *Nagappa v. Gurudayal Singh and others*, reported in AIR 2003 Supreme Court 674 has taken the same view. It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred

to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is ? it should be "Just" compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is subsection (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed.

8.

9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act. 10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be "just". There is no other limitation or restriction on its power for awarding just compensation."

19. The Apex Court - In the cases, titled as State of Haryana and another v. Jasbir Kaur and others, reported in AIR 2003 Supreme Court 3696, The Divisional Controller, K.S.R.T.C. v. Mahadeva Shetty and another, reported in AIR 2003 Supreme Court 4172, A.P.S.R.T.C. & another v. M. Ramadevi & others, reported in 2008 AIR SCW 1213, and Oriental Insurance Co. Ltd. v. Mohd. Nasir & Anr., reported in 2009 AIR SCW 3717, while discussing the ratio laid down in the judgments rendered in the cases titled as Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. v. State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. v. Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. v. Zora Singh and Others (2005) 6 SCC 776;

A.P. SRTC v. STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621, has held that the Appellate Court was within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

20. The Apex Court in another case titled as Ningamma & another v. United India Insurance Co. Ltd., reported in 2009 AIR(SCW) 4916, held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce paragraph 25 of the judgment herein: "

"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."

21. The Apex Court in a latest judgment in a case titled Sanobanu Nazirbhai Mirza & others v. Ahmedabad Municipal Transport Service, reported in 2013 AIR SCW 5800, has specifically held that compensation can be enhanced while deciding the appeal, even though prayer for enhancing the compensation is not made by way of appeal or cross appeal/objections. It is apt to reproduce paragraph 9 of the judgment herein:

"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."

22. The Apex Court in a latest judgment in the case titled as Smt. Savita v. Bindar Singh & others, reported in 2014 AIR SCW 2053, has laid down the same proposition of law and held that the Tribunal as well as the Appellate Court can ignore the claim made by the claimant in the application for compensation. It is apt to reproduce paragraph 6 of the judgment herein:

"6. After considering the decisions of this Court in Santosh Devi as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."

22-A. The Apex Court in Giani Ram v. Ramjilal, 1969 (1) SCC 813, held that Order 41, Rule 33 CPC empowers the appellate Court to pass any decree which justice may require. It is apt to reproduce paragraphs 8 and 9 of the said decision hereunder:

"8. Order 41, Rule 33 of the CPC was enacted to meet a situation of the nature arising in this case. In so far as it is material, the rule provides:

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived, it would, be perpetrating grave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, CPC ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed."

23. The Apex Court in the cases in *Narayanarao (dead) through LRs and others v. Sudarshan*, 1995 Supp.(4) SCC 463, *Mahant Dhangir and another v. Madan Mohan and others*, 1987 (Supp.) SCC 528 and in *T.N. Rajasekar v. N. Kasiviswanathan and others*, AIR 2005 SC 3794 held that the High Court, in order to do complete justice to the parties, can invoke the powers under Order 41, Rule 33 of the CPC and pass orders accordingly.

24. The Apex Court in *Delhi Electric Supply Undertaking v. Basanti Devi and another*, JT 1999 (7) SC 486, while replying upon its earlier decision in *Mahant Dhangir* (supra), it was held as under in paragraph 19:

"19. Conditions as laid in provision of Order 41, Rule 33 are satisfied in the present case. When circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the Court cannot be found wanting when it comes to exercise its powers."

25. This Court in *H.P. Road Transport Corporation v. Pt. Jai Ram and etc. etc.*, AIR 1980 Himachal Pradesh 16, held that under Order 41, Rule 33 of the CPC, wide powers have been given to the appellate Court and once it is seized of a matter in its appellate jurisdiction, it is within its power to do complete justice between all the concerned parties. It is apt to reproduce relevant portion of paragraph No.39 and paragraph 40 of the said decision hereunder:

"?????...Moreover, theme of Order 41 and especially the wide powers given to the Court under Rule 33 Order 41 suggests that the intention of the Legislature is to see that "once the Court is seized of a matter in its appellate jurisdiction, it is able to do complete justice between all the concerned parties. To us, therefore, it is very clear that the provision enabling a respondent to file cross-objections made in Rule 22 is a procedural provision under which even if a respondent has not preferred any appeal, the Court is enabled to do complete justice to the parties by allowing the respondent concerned to prefer cross-objections within the period of limitation. Under these circumstances, with great respect to the learned Judges of the Allahabad High Court, we find ourselves unable to accept their view that provision enabling a respondent to file cross-objections is a substantive provision and not a procedural one."

40. In view of our finding that provision for filing cross-objections contemplated by Order 41, Rule 22 is a procedural provision, the ratio of the above referred two decisions of the Supreme Court would at once be attracted, and this Court being seized of an appellate jurisdiction conferred by Section 110-D of the Motor Vehicles Act, It has to exercise that jurisdiction in the same manner in which it exercises its other appellate jurisdiction allowing the respondents in such appeals to prefer cross-objections."

26. Keeping in view the ratio of the judgment supra, it can safely be held that the appellate Court is competent to pass any order in the interest of justice.

27. The High Court of Rajasthan, while dilating upon the powers of the Appellate

Court under Order 41, Rule 33 , held in *United India Insurance Co. Ltd. v. Dama Ram and others*, 1994 ACJ 692, that the appellate Court can rectify the error invoking Order 41, Rule 33 even in the absence of Cross Objections or appeal by the claimants. It is apt to reproduce paragraph 7 of the said decision hereunder:

"7. The Tribunal has not passed award in any case against the owner (insured) of the vehicle. It has passed awards against the appellant insurance company only. It is not in dispute that the Tribunal has categorically held that the said accident took place due to rash and negligent driving of the truck by its driver. As such his employer, namely, Mohd. Rafiq, owner of the said truck, was liable for his negligent act. Thus the Tribunal committed a serious error in not making liable the owner and driver of the offending truck to pay the said amounts of compensation. This error can well be corrected by this court by invoking the provisions of Order 41, Rule 33 , Civil Procedure Code, even if no cross-objection or appeal has been filed by the claimants respondents. It has been observed in *Kok Singh v. Deokabai* AIR 1976 SC 634, paras 6 and 7, as follows: In *Giani Ram v. Ramji Lal* AIR 1969 SC 1144, the court said that in Order 41, Rule 33 , the expression "which ought to have been passed" means "what ought in law to have been passed" and if an appellate court is of the view that any decree which ought in law to have been passed was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

(7) Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge.

Reference of *Murari Lal v. Gomati Devi* 1986 ACJ 316 (Rajasthan), may also be made here. Similar view has been taken by me while deciding *United India Ins. Co. Ltd. v. Dhali* 1992 ACJ 1057 (Rajasthan)."

28. The High Court of Orissa at Cuttack, in *M. Adu Ama v. Inja Bangaru Raja and another*, 1995 ACJ, 670, has laid down the same principle of law.

29. This High Court in *Himachal Road Transport Corporation v. Saroj Devi and others*, 2002 ACJ 1146, held that appellate Court is not precluded from passing order which it considers just in the facts of the case, without there being any cross objection or cross appeal. It is profitable to reproduce paragraph 15 of the said decision hereunder:

"15. Keeping in view the aforesaid decisions of Supreme Court and different High Courts including this Court, we feel that there being no prohibition in law, i.e., either under Motor Vehicles Act or under the provisions of Civil Procedure Code, this Court is not precluded from passing order which it considers just in the circumstances of a case without there being either cross-objection or cross-appeal. As such we are further of the view that Order 41, Rule 33 is fully applicable to the appeals under the Motor Vehicles Act."

30. In National Insurance Co. Ltd. v. Mast Ram and others, 2004 ACJ 1039, the question arose before this High Court was ? Whether the appellate Court can modify the award in the absence of cross-appeal. This High Court answered in the affirmative. It is apt to reproduce paragraph 13 of the said judgment hereunder:

"13. Because of what has been held in this judgment, it is felt necessary to exercise power vested in this court under Order 41, Rule 33 of the Civil Procedure Code to set aside the findings in the operative portion of the award requiring the appellant to pay the amount and then to recover it from the "insurer" (it should have been "insured"?). This is a direction in the impugned award that needs to be set aside. On this aspect, Mr. Sharma had argued that there is no cross-appeal by the owner of the vehicle. To meet such a situation, legislature had enacted Order 41, Rule 33 in the Civil Procedure Code even in cases where an appeal is not filed by a party, like the owner in the present appeal. As such, this plea cannot be accepted."

31. This High Court in LAC Solan and another v. Bhoop Ram, 1997(2) Sim.L.C. 229, modified the awards in exercise of powers under Order 41, Rule 33 of the CPC.

32. Faced with the similar situation, the Jammu and Kashmir High Court, in State Bank of India v. M/s Sharma Provision Store and another, AIR 1999 J&K 128, held that a High Court can pass a decree which ought to have been passed by the trial Court. It is apt to reproduce relevant portion of paragraph 7 of the said decision hereunder:

"7. ???????.This is an exceptional situation which authorises this Court in the present appeal to pass such decree as ought to have been passed or as the nature of the case demands. Similarly discretion vested in this Court under the aforesaid provision of law will not be refused to be exercised simply because respondents have not either filed an appeal or cross-objections."

20. Having said so, I deem it proper to modify the impugned award by providing that the insurer has to satisfy the award. Ordered accordingly.

21. In terms of the note of the Registry, respondent No.1-claimant has died during the pendency of the appeal and the appellant has not brought his legal representatives on record.

22. The insurer is directed to deposit the amount in this Registry within six weeks from today. The Registry, on deposit of the amount, is directed to release the same in favour of the legal representatives of the claimant in terms of the terms and conditions contained in the impugned award, through payees cheque account, or by depositing in their accounts.

23. The statutory amount of Rs.25,000/- deposited by the appellant, is awarded as costs in favour of the legal representatives of the claimant.

24. The impugned judgment is modified as indicated herein above.
25. The appeal stands disposed of, along with pending applications if any.
26. Send down the record forthwith, after placing a copy of this judgment.