

(1981) 08 MP CK 0002

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 175 of 1976

Sumanbai and Others

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 03-08-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1939 — Section 110B, 110D

Citation : AIR 1982 MP 62 : (1982) JLJ 5

Hon'ble Judges : H.G. Mishra, J;G.L. Oza, J

Bench : Division Bench

Advocate : Y.I. Mehta and B.L. Joshi, for the Appellant; Surjeet Singh, Government Advocate and M.L. Dhupar, for Insurance Co., for the Respondent

Final Decision : Allowed

Judgement

Oza, J.—This appeal has been filed by the claimants-appellants against an award passed by Motor Accidents Claims Tribunal, Mandleshwar, in Motor Accident Claims Case no. 51/70 dated 14-6-1976.

2. The learned Tribunal awarded a compensation of Rs. 30,000/- so far as the widow and children of the deceased are concerned, Rs. 3,000/- to the Mother and Rs. 2,400/- to the father by the impugned order. The learned Tribunal also awarded interest at the rate of Rs. 4/- per cent per annum only from the date of award up to the date of realisation.

3. The deceased was an Assistant Surgeon in the employment of the Madhya Pradesh Government. At the time of his death, he was posted at Raipur Hospital. The jeep in question belonged to respondent No. 1, the State and was insured with Respondent No. 3. This vehicle was provided for touring duties which the deceased was to perform. The Respondent No. 2 is the driver of the vehicle. On 17-8-1970, the deceased was on tour to Ozar in the said jeep which met with an accident resulting in injuries to the deceased who ultimately died as a result of these injuries. The claim petition was submitted by appellants Nos. 1 to 7, as No.

1 is the widow and Nos. 2 to 5 are minor daughters and appellants Nos. 6 and 7 are parents of the deceased.

4. The appellants contended before the Tribunal that at the time of the accident the jeep was being driven in a rash and negligent manner as a result of which it suddenly over-turned on way and caught fire causing injuries to the deceased who later died in consequence of the injuries. The salary of the deceased was Rs. 630/- per month including the allowances and he had a private practice of about Rs. 350/- per month and was of about 35 years of age at the time of his death. The claimants, therefore, claimed Rs. 5,00,000/- as compensation.

5. The Respondent No. 1 before the Tribunal pleaded that the deceased himself was driving the jeep in question at the time of accident which occurred due to his own negligence and rashness. The Respondent No. 3 adopted the written statement of Respondent No. 1 and further contended that as deceased was a passenger or an unauthorised occupant in the vehicle, the policy did not cover the risk of such a person. The respondent No. 2 the driver of the vehicle, in his written statement admitted that he was driving the jeep at the time of accident which slipped on account of mud on the side of the road due to rains and, therefore, over-turned, as the vehicle, lost the balance and finally caught fire, ultimately resulting in death of the deceased. It was also admitted by him in a separate written statement that the balance was lost because the jeep was at a high speed at that time.

6. After trial, the learned court below came to the conclusion that the vehicle was being driven by the driver and was being driven rashly and negligently and before us, in this appeal, this finding arrived at by the learned court below has not been challenged by any one of the parties.

7. The appeal has only been preferred by the claimants. The respondents have not preferred any appeal nor they have preferred any cross-objections and the main contention advanced by the learned counsel for the appellants is with regard to the quantum. According to the learned counsel, the salary of the deceased is not in dispute but the learned Tribunal while assessing the compensation deducted the amount which was deposited towards G. P. F. It was also contended that in arriving at the figure of Rs. 300/- which according to the learned Tribunal, the widow and the children were getting from the deceased, the court below committed an error in deducting what he was paying to his brother and other members of the family. It was also contended that the learned Tribunal did not take into consideration the income from private practice which the deceased was earning. According to the learned counsel, the learned Judge accepted, in view of the evidence in the case, that the deceased would have lived up to the age of 70 years but so far as the father and mother are concerned, he only estimated to set the advantage for 8 and 10 years. But ultimately arrived at a figure of Rs. 30,000/- on the basis that by depositing the amount of Rs. 30,000/- the widow and minor children can get Rs 300/- per month. Similarly, the learned Judge felt that by depositing Rs. 3,000/- the mother can get interest

which according to the learned Judge was sufficient for her, which according to the learned Judge was Rs. 25/- to each. According to the learned counsel, there is no justification for this hypothesis especially in view of the fact that the deceased was a young doctor who had entered into service and was an Assistant Surgeon but was expected to be promoted and was also expected to earn more in private practice. According to the learned counsel, even according to the respondents' witnesses he was earning about Rs. 300/- or Rs. 350/- per month. It was, therefore, contended that the learned Tribunal has committed an error in arriving at this conclusion.

8. Learned counsel for the respondent No. 1 contended that the formula that the Tribunal has applied of interest that could be obtained from depositing the amount is on the basis of a decision of their Lordships of the Supreme Court reported in *Bishan Devi v. Sirbaksh Singh* (1979 ACJ 496): (: AIR 1979 SC 1862). It was also contended that the learned Tribunal did not give a deduction for lump sum payment and was right in deducting the G. P. F. and other deductions which were made from the salary. He, therefore, contended that the award passed by the Tribunal is just and fair and does not call for interference. Learned counsel for respondent no. 3 contended that although the liability of Respondent No. 3 has been settled by the court below and no appeal or cross-objection has been preferred by respondent No. 3 but he contended that in terms of the policy, the Respondent No. 3 cannot be held to be liable for payment of compensation. He contended that although respondent No. 3 had not filed an appeal nor had any cross-objection been filed but in view of Order 41 Rule 33, he is entitled to challenge the judgment as regards the liability of Respondent No. 3 and he further vehemently contended that he is also entitled to contest the question of quantum. In support of his contention, the learned counsel placed reliance on *Pannalal Vs. State Bombay and Others*, and *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, .

9. It is not disputed that the deceased was getting a salary of Rs. 630/- per month. As regards private practice, according to the claimants he was earning about Rs. 300/- to Rs. 350/- whereas the respondents' witness No. 3 Santoshchan- dra admitted in his statement that Dr. Joshi was seeing about 5 or 7 patients every day and was charging Rs. 5/- per patient. If this evidence of respondent is accepted, the deceased was earning about Rs. 25/- per day from private practice alone. The evidence of AH Hussain (D. W. 44) shows that out of his salary, Rs. 52/- were deducted as C. P. F., Rs. 34/- for Income Tax and other taxes and the doctor was setting Rs. 500/- net per month. According to the statement of the widow, Sumanbai (A. W. 10), the deceased used to give Rs. 500/- per month for expenses for household and the rest of the expenses of clothing and other things were being done separately. According to her, he was sending Rs. 100/- per month to his brother and was also sending some money to his parents. This statement also clearly shows that the deceased was earning at least Rs. 300/- per month from private practice. The learned Judge on the basis of this statement of Sumanbai (A. W. 10) felt that the family was getting only Rs.

300/- per month although there is no justification for it as admittedly according to the statement of the widow, out of Rs. 500/-Rs. 400/- were spent in the household per month and in the context of economic conditions existing when the statement was recorded, it could not be said that the statement was not reasonable. The learned Tribunal failed to consider that at that time (at the time of accident) all the minor daughters were very young but in course of time when they grow, the expenses are bound to increase and they are also bound to increase in view of change in the economic conditions. The learned Judge while omitting to consider the amount which was paid towards G. P. F. failed to consider that G. P. F. which was being deposited, will have been available to the family at the time of marriages of the daughters, as according to the statement of the widow of the deceased, the marriage of a daughter in their community is an expensive affair. The learned Tribunal also failed to consider that the money which the deceased was giving to his brother for education, when is not needed for his brother's education, will also be available to the family. The learned Judge omitted to consider that the extra expenses "of clothing and others about which sumanbai (A. W. 10) has made a statement and given a rough estimate of yearly expenditure, also was a benefit the dependents were drawing from the earnings of the deceased.

10. It was contended by the learned counsel that the learned Tribunal did not consider that with the passage of time, the deceased who was an assistant Surgeon would have been promoted and would have earned more emoluments by way of salary and also would have earned more from private practice. According to the learned counsel the learned Tribunal did not take into consideration any of these things but picked up from the evidence of Sumanbai (A. W. 10) that he was giving Rs. 500/- for the household expenses and taking that figure reduced it further to Rs. 300/-for which there is no justification whatsoever.

11. It is, therefore, clear that according to the evidence in the case, the family was getting at least about Rs. 500/-per month at that time and with the passage of time and increase in income and increase in expenses as the minor children were to grow, it could not be said that Rs. 500/- would have remained the only benefit for the widow and the minor children. It could not be disputed that an Assistant Surgeon when was earning about Rs. 1000/- from his salary and private practice he had entered the service only a few years ago and as held by the learned Tribunal that he would have ordinarily lived up to the age of 70 he would have continued to earn the same amount and the family would have got the same benefit. Considering all these circumstances, in our opinion, at least on an average, the widow and the minor children would have got the benefit of at least Rs. 700/- per month which will come to about Rs. 8,000/- per year. And, if instead of multiplying it by 35 as was found by the learned Tribunal, it is only multiplied by 30. the amount of compensation would come to Rs. 2,40,000/- and even if 10 per cent of It is deducted because of lump sum payment it would come to Rs. 2,16,000/-.

12. Reliance was placed by learned counsel for the respondent No. 1 on a decision reported in *Bishan Devi v. Sir baksha Singh* (1979 ACJ 496) : : (AIR 1979 SC 1862). In this decision, the reliance has been placed on para 19 of the judgment but these observations in para 19 do not lay down the principle as has been done by the learned Tribunal in the present case. What their Lordships have done is to calculate the payment for 12 years and award that as lump sum compensation. In the Supreme Court decision, the monthly income of the deceased was shown to be Rs. 109/- per month and their Lordships awarded Rs. 35,000/- in order to secure a payment of Rs. 250/- per month and this Rs. 250/- per month, it appears was estimated in the circumstances of the case as fair amount for maintenance of the dependants. It appears that in that case, this formula was applied because the material about the expectation of life and other, things were not properly brought in evidence and, therefore, their Lordships on the basis of a decision of the Madras High Court took this figure as it was observed;

"17. We may point out that repeated suggestions have been made by this court and several High Courts expressing the desirability of bringing a social insurance which would provide for direct payment to the dependants of the victim. This court in *Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another*, has referred to the decision of the Kerala High Court in *Kesavan Nair v. State Insurance Officer* (1971 ACJ 219) where the High Court expressed itself thus:

"Out of a sense of humanity and having due regard to the handicap of the innocent victim in establishing the negligence of the operator of the vehicle a blanket liability must be cast on the insurance."

The Madras High Court in *Ruby Insurance Co. Ltd. v. Govindarai* (A. A. O. Nos. 607 of 1973 and 296 of 1974, D/- 13-12-1976) has suggested the necessity of having social insurance to provide cover for the claimants irrespective of proof of negligence to a limited extent say Rs. 250/- to Rs. 300/- a month.

In a recent decision in *State of Haryana Vs. Smt. Darshana Devi and Others*, this court observed (at p. 857 of AIR):--

"Now that insurance against third party risk is compulsory and motor insurance is Nationalised and transport itself is largely by State Undertakings, the principle of no fault liability and on the spot settlement claims should become national policy.

Unless these ideas are accepted by the legislature and embodied in appropriate enactments courts are bound to administer and give effect to the law as it exists to-day."

And it is in this context that this formula of years was applied as it was observed.

"19. The insurance companies are now nationalised and the necessity for awarding lump sum payment to secure the interest of the dependants is no longer there. Regular monthly payments could be made through one of the

nationalised banks nearest to the place of residence of the dependents. Payment of monthly instalments and avoidance of lump sum payment would reduce substantially the burden on the insurer and consequently of the insured. Ordinarily in arriving at the lump sum payable, the court takes the figure at about 12 years' payment. Thus in the case of monthly compensation of Rs. 250 payable the lump sum arrived at would be between Rs. 30,000/- and 35,000/-. Regular monthly payment of Rs. 250/- can be made from the interest of the lump sum alone and the payment will be restricted only for the period of dependency of the several dependents. In most cases it is seen that a lump sum payment is not to the advantage of the dependants as large part of it is frittered away during litigation and by payment to persons assisting in the litigation; It may also be provided that if the dependents are not satisfied with the minimum compensation payable they will be at liberty to pursue their remedies before the Motor Accidents Claims Tribunal."

13. So far as the present case is concerned, it is not in dispute that the evidence about the income and expectation for life have been led and the Tribunal has come to its own conclusions with regard to them and the Tribunal's assessment on the basis of 10% interest on fixed deposits cannot be justified as the rate of interest also is not always the same as it varies from time to time in accordance with the policy of the Reserve Bank and the Government of India.

14. As we have discussed earlier, the widow and the minors can reasonably be expected to get from the deceased on an average of Rs. 700/- per month and this average can only be reached after considering the payment of lump sum compensation and the uncertainties of life. Otherwise, it could not be disputed that if the deceased had lived up to a mature age he would have been earning much more and the family would have got from his earnings not less than double of Rs. 700/- per month. Even if the formula applied by their Lordships of the Supreme Court is applied to the present case, Rs. 700/- per month will come to Rs. 8,400/- per year and 12 times of it would be about a lakh of rupees and on this principle also the amount awarded by the court below is too less and, therefore, calls for interference. In our opinion, therefore, applying the formula applied by their Lordships of the Supreme Court, the appellants 1 to 5 are entitled to a compensation of Rs. 1 lakh.

15. As regards the parents, the learned Tribunal held that they were expected to have the benefit for at least 8 and 10 years. There is no justification for 8 years and 10 years for the father and mother and learned counsel for the parties conceded that although 11 years have elapsed after the accident, both the parents are still alive. With the increase in emoluments of the deceased and the increase in the cost of living it could safely be expected that the deceased would have at least given Rs. 100/- per month to both his parents and if this is calculated on the formula of their Lordships of the Supreme Court, it will work out to Rs. 14,400/- to each of the parents, in our opinion, therefore, the award is modified and it is directed that appellants 1 to 5 are entitled to a compensation

of Rs. 1 lakh. Appellants 6 and 7 are entitled to an amount of Rs. 14,400/- each.

16. As regards the interest, the learned Tribunal has awarded interest at Rs. 4% and from the date of the order. There appears to be no justification for awarding 4% interest as ordinarily 6 per cent per annum is the normal rate of interest and after the filing of the application if the award is delayed the claimants cannot be penalised and, therefore, the interest has to be awarded from the date of the application and not from the date of award. The award is, therefore, modified and it is directed that interest shall be payable to the claimants at the rate of Rs. 6 per cent per annum from the date of the application up to the date of realisation.

17. The learned counsel for the respondent No. 3 contended that in spite of the fact that respondent No. 3 has not challenged the award either by way of an appeal or by way of a cross-objection still in view of Order 41, Rule 33, Civil P. C. he is entitled to challenge the quantum. Order 41, Rule 33 reads :-

"Rule 33. power of court of Appeal, 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, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

Provided that the Appellate court shall not make any order u/s 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order." A reading of this provision clearly goes to show that if this rule has been made to provide for certain contingency where it may become necessary to pass a decree although a party may not have preferred an appeal but it does not provide that where a decree has become final against the defendant and defendant has not challenged that decree by way of appeal or cross-objection still it can be set aside because one of the parties has preferred the appeal where the question of the decree against the other defendant is not at all raised. It is not in dispute that so far as respondent No. 3 is concerned, the plea raised by the respondent No. 3 was that the Insurance Company is not liable because the deceased was a passenger in a private car. It is also not in dispute that except this, no other defence was raised by the Insurance company and so far as this defence is concerned, it was negated by the Claims Tribunal as admittedly the deceased was not a passenger carried in a private car but was in the car on behalf of the owner, that is the State, on duty and it appears that this having been decided by the Tribunal, on facts finally, the respondent No. 3 was well advised not to prefer an appeal as there was no substance in this contention. But it appears that the

learned counsel appearing for the respondent No. 3 attempted to raise all questions in spite of the fact that his client has not preferred any appeal or cross-objection and even contended that if his contentions are not accepted costs may be levied against respondent No. 3 but he should be allowed to raise all these contentions and consequently, the learned counsel raised all contentions including contention about quantum which was beyond the scope of the defence available to respondent No. 3.

18. Learned counsel contended on the basis of Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, that respondent No. 3 is not liable. 1977 Acc CJ 343: (Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, considered the question of a passenger travelling in a company's car where the passenger had nothing to do with the business of the company but the manager who was driving permitted the passenger to travel in the car and in spite of these facts, their Lordships of the Supreme Court in this case held that even for such a passenger the company was liable. Their Lordships observed with approval a passage from Lord Denning :--

"In my opinion, when the owner of a lorry sends his servant on a journey with it, thereby putting the servant in position not only to drive it, but also to give people a lifts in it, then he is answerable for the manner in which the servant conducts himself on the journey, not only in the driving of it, but also in giving lifts in it, provided, of course, that in so doing the servant is acting in the course of his employment."

It is, therefore, clear that so far as this case is concerned, even the defence raised by respondent No. 3 before the court below, is fully against respondent No. 3 and the head-note (d) on which reliance, was placed by the learned counsel is of no help because it pertains to the risk of a passenger in a car other than that of the owner or owner's persons, as admittedly, on the facts of this case it is not disputed even by respondent No. 1, the owner, that the deceased was travelling on duty and the vehicle was being used for performance of the duty of the deceased. Still, on the basis of this decision, the learned counsel vehemently contended that respondent No. 3 is not liable although such a contention cannot be accepted.

19. On the basis of Order 41, Rule 33, it was contended by learned counsel that he was entitled to raise all questions in spite of the fact that no appeal or cross-objection was preferred and the learned counsel placed reliance on a decision reported in Pannalal Vs. State Bombay and Others, . In this decision, their Lordships were examining the scope of Rule 33 of Order 41 and this, their Lordships examined in the context of the scope of Order 41, Rule 22 as to whether a particular respondent could or could not file a cross-objection and it is in that context that their Lordships felt that where a respondent could not have filed a cross-objection, he could be allowed to raise the contentions. In the case, the plain-tiff's suit was decreed in the trial Court and later, on appeal the High

Court dismissed the suit and in the High Court a question under Order 41, Rule 33 was raised but admittedly that was not a case where the respondent had limited defences as under the Motor Vehicles Act and that the Court specifically decided those questions against the respondent as in the present case. It is not disputed that in a claim petition under Motor Vehicles Act, the defendant Insurance company has only limited defences and in this case, the only defence was, as has been stated above, decided against the defendant, i. e. the present respondent No. 3 and so far as that question is concerned it has become final. The Court below passed an award against the State as well as against respondent No. 3 and respondent No. 3, therefore, could have preferred an appeal or on receiving the notice of the appeal could have preferred a cross-objection as the question raised by the respondent No. 3 was decided against the respondent. In this view of the matter, therefore, on the basis of this decision, it could not be contended that the respondent No. 3, under Order 41, Rule 33 could be permitted to raise the question again when it has become final and as admittedly the decree passed against respondent No. 3 has now become final. But apart from it, as already discussed above; the contention of the counsel on the merits as regards the defence of respondent No. 3 also is groundless as has already been held above.

20. Learned counsel also raised contentions about quantum which the respondent No. 3 was not entitled to raise. But all that he said was mere repetition of what has already been argued by the learned counsel appearing for the State and we having examined the question about the quantum above, it is not necessary for us to go into that question afresh. The contentions advanced by the learned counsel for the respondent No. 3, therefore being without any substance are rejected.

21. In the light of the discussion above, therefore, this appeal is allowed. The compensation awarded to appellants Nos. 1 to 5 is raised to rupees one lakh and interest at the rate of Rs. 6/- per cent per annum from the date of the application up to the date of realisation. The compensation with regard to appellants Nos. 6 and 7 is also raised to Rs. 14,400/- each and the interest they are entitled to is also raised to Rs. 6 per cent per annum and it has to be paid from the date of application up to date of realisation. The appellants shall be entitled to costs as per schedule from respondents 1 to 3 jointly and severally. Counsel's fee as per schedule, if certified.