

(2008) 09 KAR CK 0075

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 2813 of 2005

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Akkayamma and Others

RESPONDENT

Date of Decision : 05-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 170, 35 A

Citation : (2006) ACJ 2635 : AIR 2009 Kar 37 : (2009) ILR (Kar) 24 : (2009) 1 KarLJ 484

Hon'ble Judges : V. Gopalagowda, J; K.N. Keshavanarayana, J

Bench : Division Bench

Advocate : R. Ravishankar, for the Appellant; R. Chandrashekar, for Lawyers Net Advs. for R1 to R6, for the Respondent

Judgement

1. Being aggrieved by the judgment and award dated 24.11.04 passed in MVC No. 6396/03 on the file of the IX Addl. Judge. Member, MACT-7, Court of Small Causes, Bangalore, (SCCH No. 7), the insurer of Motor Cycle bearing Registration No. KAO 4 XII2 has presented this appeal inter alia contending that the compensation awarded by the tribunal is excessive and exorbitant and therefore, it is liable to be reduced.

2. On service of notice of this appeal, respondents Nos. 1 to 6. who were petitioners before the Tribunal, have appeared through their learned Counsel.

3. We have heard both sides.

4. Respondent Nos. 1 to 6 herein being the wife, children and mother of one Bachegowda Gowda, filed claim petition before the tribunal seeking compensation of Rs. 30,00,000/- for the death of said Bachegowda in the motor vehicle accident that occurred at 7 p.m. on 15.11.2004. According to the claimants, on the date and at the time of the accident, the deceased while proceeding on motor cycle bearing No. KA 04 EF 4177 on Hosakote - Chintamani

road another motor cycle bearing No KA04 XII2 came from the opposite direction and dashed against the vehicle of the deceased. As a result, the deceased sustained grievous injuries to which he later succumbed. Thus according to the claimants the accident was solely due to the negligent act on the part of the rider of Motor Cycle No. KA 04 X 112. According to the claimants, the deceased was working as a Junior Messenger in BEL on a monthly salary of Rs. 9,913/- and he was the only earner of the family and on account of the untimely death, the claimants have suffered great financial loss and mental agony.

5. Upon service of notice of claim petition, the owner and the insurer of the offending motor vehicle appeared before the tribunal and contested the matter. The insurer admitted issuance of policy in respect of the motor vehicle in question and its validity as on the date of accident. However, it contended that its liability is subject to the terms and conditions of the policy. It was also contended that there is no negligence on the part of the rider of the motor vehicle and the accident was on account of the negligence of the deceased himself. After the parties led evidence, on assessment of the evidence on record, the tribunal by the judgment under appeal answered the issue regarding negligence in the affirmative holding that the accident was due to the negligence of the rider of the offending motor vehicle bearing No. KA 04 X 112 and that there was no negligence on the part of the deceased. On assessment of the documentary evidence, the tribunal computed the loss of dependency at Rs. 7,00,000/- and by awarding another sum of Rs. 50,000/- under conventional heads, the tribunal totally awarded compensation of Rs. 7,50,000/- and directed the compensation to be paid by the insurer of the offending vehicle with interest at the rate of 6% p.a. from the date of petition till the date of realisation.

6. Being aggrieved by the said judgment and award, the insurer has presented this appeal questioning the findings of the Tribunal both on the negligence and the quantum of compensation awarded. It is contended by the learned Counsel for the appellant that it had filed an application u/s 170 of M.V. Act and it was allowed on 20.9.2004, by the Tribunal.

7. We have perused the judgement under appeal. The oral and documentary evidence on record clearly establishes that the rider of the offending motor cycle came on to the wrong side and dashed against the motor vehicle ridden by the deceased. Admittedly criminal case was registered against the rider of the offending vehicle. Rider of offending vehicle is not examined. He is the best person to speak as to the manner in which the accident occurred. The rider of other vehicle namely the deceased was not available to give evidence. Petitioners have examined an eye witness as PW.2. His evidence is not seriously challenged. Non-examination of rider of offending vehicle entitles drawing of an adverse inference against the respondents.. The copy of the sketch produced as Ex.P3 and the oral evidence of PW.2 clearly establishes the negligence on the part of rider of motor cycle bearing No. KA 04 X112. In these circumstances, we see no error committed by the court below in answering the issue regarding negligence

in the affirmative and holding that the accident was due to the negligence of the rider of the offending motor vehicle.

8. With regard to the quantum of compensation, though the tribunal observed that the salary certificate Ex.P-8 indicates gross salary of the deceased at Rs. 9,913/- p.m., the tribunal has taken the net salary of Rs. 4,300/- as the basis for computing loss of dependency. To this net salary the Tribunal has added a sum of Rs. 1,700/- on the ground that there are large number of dependants and thereafter from out of total of Rs. 6,000/-, the tribunal has deducted 1/3rd towards personal expenses of the deceased and after holding that the appropriate multiplier applicable to the age of the deceased was 12, the tribunal has quantified the loss of dependency. While computing the total amount of loss of dependency, the tribunal applying split multiplier, at the first place by taking; the monthly contribution at Rs. 4,000/-, and annual contribution at Rs. 48,000/-, multiplied the same with 10 multiplier and computed the loss at Rs. 4,80,000/-. From this amount, it deducted Rs. 20,000/- towards income tax and the balance was taken as Rs. 4,60,000/-. At the second place, the tribunal by taking the monthly income for the subsequent multiplier period at 50% of the net salary i.e., at Rs. 3,000/- and by deducting 1/3rd towards personal expenses of deceased reckoned annual loss of dependency at Rs. 24,000/- and again applied 10 multiplier and arrived at Rs. 2,40,000/-. Thus, the Tribunal computed the total loss of dependency at Rs. 7,00,000/-. The above method adopted by the tribunal is not correct. Having regard to the fact that the deceased was drawing a gross salary of Rs. 9,913/- p.m. just before his death, and since he had another 12 years are of service before his retirement and in the light of the law laid down by the Apex Court in several decisions, the tribunal ought to have taken the gross salary of the deceased as reflected in Ex.P-8 for the purpose of computing the loss of dependency As the deceased had 12 more years of service and since the appropriate multiplier applicable was 12, the tribunal ought to have taken at least the gross salary as reflected in Ex.P-8 if not more at the basis for computing loss of dependency, for the whole of multiplier period. This is not a case to which split multiplier method as enunciated by this Court in *Union of India and others Vs. K.S. Lakshmi Kumar and Others*, to be applied. If the loss of dependency is assessed by taking the gross salary as mentioned in Ex.P.8, the amount would certainly go beyond Rs. 7,50,000/- awarded by the tribunal. Therefore, there is no merit in any of the grounds urged by the appellant in this appeal.

9. The learned Counsel appearing for the respondent Nos. 1 to 6 who are the claimants in the court below contended that though the claimants have not filed any cross objections or independent appeal, since the tribunal has committed serious error of law and procedure, while computing the loss of dependency by not taking the gross salary as reflected in the salary certificate at Ex.P-8, and has erroneously applied split multiplier method, this Court in exercise of its power under Order 41 Rule 33 CPC should grant the relief which ought to have been granted by the tribunal, as in a claim arising under Motor Vehicles Act, the

Tribunal is required to award just and reasonable compensation.

10. Order 41 Rule 33 of CPC reads as under:

Order XLI 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.

11. The question as to what is the power of Appellate Court under Order 41 Rule 33 of CPC and as to under what circumstances, the Appellate Court should exercise this discretionary power have come up for consideration both before the Apex Court and before this Court in several cases.

12. The leading case on this question is the decision of the Hon''ble Supreme Court in the case of Panna Lal v. State of Bombay reported in 1963 SC 1516. In this reported decision the Hon''ble Supreme Court, after referring to Rule 33 of Order 41, has stated thus in paras 12 and 14;

12. Even a bare reading of Order 41 Rule 33 is sufficient to convince any one that the wide wording, was intended to empower the appellate Court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent . It empowers the Appellate Court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as "the case may require". In the present case, if there was no impediment in law the High Court could therefore, though allowing the appeal of the State by dismissing the plaintiffs suits against it, give the plaintiff a decree against any or all the other defendants who were parties to the appeal as respondents. While the very words of the section make this position abundantly clear the illustration puts the position beyond argument

14. The whole argument is based on the assumption that the plaintiff could by filing a cross-objection under Order 41 Rule 22, C.P.C., have challenged the trial Court's decree in so far as it dismissed the suit against the defendants other than the State. We are not, at present advised, prepared to agree that if a party who could have filed a cross-objection under Order 41 Rule 22 of the CPC has not done so, the Appeal Court can under no circumstance give him relief under

the provisions of Order 41 Rule 33 of the Code. It is, however, not necessary for us to discuss the question further as, in our opinion, the assumption made by the High Court that the plaintiff could have filed a cross-objection is not justified.

In the case of *Giani Ram v. Ramlal* reported in AIR SC 1144, the Supreme Court while explaining the meaning of expression "which ought to have been passed" occurring in Order 41 Rule 33 of CPC has held that the said expression mean "what ought in law to have been passed". Following this observation, again the Apex Court in the case of *Koksingh Vs. Smt. Deokabai*, has observed thus:

5. In *Giasi Ram and Others Vs. Ramjilal and Others*, 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.

13. A learned Single Judge of this Court in the case of *Smt. Kanthamma v. Nanfuada Deoarua* reported in ILR 1995 Kar 4271 has followed the principles laid down by the Apex Court in the aforesaid cases. A division bench of this Court in the case of *Patel Chandrappa v. Hanumanthappa* reported in 1990 (3) Kar LJ 264 has granted reliefs to certain parties who have not come up in appeal against the judgment of the Trial Court. The Division Bench in this reported decision has observed that having regard to the provisions contained in Rule 33 of Order 41 of CPC, it is the duty of the Court to grant relief to them if in Law they are entitled to a share in the suit schedule property.

14. Again the Hon"ble Supreme Court in *Delhi Electric Supply Undertaking Vs. Basanti Devi and Another*, has considered the powers of Appellate Court under Order 41 Rule 33 of CPC, Relevant observations are found in para 18 and 19 which read thus:

18. This provision was explained by this Court in *Mahant Dhangir and Another Vs. Madan Mohan and Others*, in the following words (at P 58 of AIR):

The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order, which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only

constraint that we could see, may be these. That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the Judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties, The Court should not refuse to exercise that discretion on mere technicalities.

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.

15. In view of the law laid down by the Hon'ble Supreme Court and this Court in the decisions referred to supra, if it is clear from the judgment of the tribunal that the tribunal has committed grave error while computing the loss of dependency by applying improper method and when it is apparently noticed that the compensation awarded is grossly inadequate having regard to the legal evidence placed on record by the claimants, in order to do complete justice, this Court should exercise discretionary power under Order 41 Rule 33 C.P.C. In the light of discussion made above, we are of the opinion that this is a fit case in which the exercise of powers under Order 41 Rule 33 C.P.C. is warranted, as the compensation awarded by the Tribunal is grossly inadequate. As noticed above, Ex..P-8 is the salary certificate which shows that the deceased was earning a total salary of Rs. 9,913/- p.m. The contents of Ex.P.8 is not disputed. Ex.P.8 is issued by a public undertaking namely BEL. Therefore there is no difficulty in placing reliance on EX.P.8 for reckoning the monthly income of deceased just prior to his death. It is well settled law that the salary drawn by the deceased as on the date of his death should be taken into consideration for assessing the loss of dependency and except statutory deductions towards Income Tax and Professional Tax, no other deductions should be allowed from the gross salary. If gross salary of Rs. 9,913/- as shown in EX.P.8 is taken as monthly salary of the deceased, the annual salary works out to Rs. 1,18,956/-. As the deceased had 12 more years of service, it is reasonable to expect that his salary would not have been the same till the date of superannuation. Therefore, keeping in mind the hike in salary during the rest of the period of service, and no additional weightage is given on this count while computing the gross income, no deduction towards income tax or professional tax is warranted. Therefore, the annual gross salary income of deceased has to be taken as Rs. 1,18,956. If 1/3rd of this amount is deducted towards his personal expenses, the balance 2/3rd works out to Rs. 79,304/-. The appropriate multiplier applicable to the age of the deceased is 12. Thus, the total loss of dependency works out to Rs. 9,51,648/-. The tribunal ought to have awarded this amount under the head of loss of dependency. In addition to this, the claimants are entitled for compensation

under conventional heads. The tribunal has awarded Rs. 50,000/- under conventional heads. We confirm the said award.

16. Thus, the total compensation payable would be Rs. 10,01,648/- which is rounded off to Rs. 10,02,000/-. The claimants are entitled for the enhanced compensation together with interest at 6% from the date of petition till the date of payment.

17. In view of the above discussion, the appeal filed by the insurer is dismissed. However, in exercise of powers under Order 41 Rule 33 CPC we order enhancement of compensation to Rs. 10,02,000/- as against Rs. 7,50,000/- awarded by the Tribunal. The enhanced compensation of Rs. 2,52,000/- shall carry interest at the rate of 6% per annum from the date of the petition till the date of payment. The appellant - insurer shall deposit the enhanced compensation together with interest within eight weeks from the date of receipt of the copy of this order. The apportionment and disbursement of the amount shall be in the same proportion as ordered by the tribunal.

18. Office to draw an award in the above terms. Appeal is disposed of accordingly.