IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

FAO(MVA) No. 330 of 2018 a/w
FAO No. 29 of 2018

Date of decision: 31.07.2018.

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1. FAO No. 330 of 2018

Nirmala ...Appellant.

Versus

Yog Raj and others ...Respondents

For the Appellant : Mr. Dharmender Verma and Mr. Satpal Chauhan, Advocates.

For the Respondents : Mr. Karan Singh Kanwar, Advocate, for respondent No.1.

2. FAO No. 29 of 2018

National Insurance Co. Ltd. ...Appellant

Versus

Nirmala and others ...Respondents.

For the appellant : Mr. Lalit K. Sharma, Advocate.

For the respondents : Mr.Dharmender Verma and Mr. Satpal Chauhan, Advocate, for respondents No.1 & 2.
Mr. Karan Singh Kanwar, Advocate, for respondent No.3.
Mr. Parveen Thakur, Advocate, for respondent No.4.
Mr. Vipender Roach, Advocate, for respondent No.5.

Coram:

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting?[1] No

Tarlok Singh Chauhan, Judge (Oral).

Since common question of law and facts arise for consideration in both these appeals, therefore, these were taken up together for hearing and are being disposed of by a common judgment.

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[1] *Whether reporters of Local Papers may be allowed to see the Judgment ?Yes*

2. The Insurance Company has primarily filed the instant appeal, being FAO No. 29 of 2018, assailing therein the quantum of compensation, whereas the appeal, being FAO No. 330 of 2018, filed by the mother of the deceased Nirmala is only directed against the apportionment of the award amount.

3. Insofar as the appeal filed by Nirmala is concerned, the same can conveniently be disposed of as the claimants therein have mutually agreed that instead of 30%, appellant Nirmala be awarded 40% of the compensation amount. Since the wife of the deceased has already got re-married and has also taken away the minor Ms. Angel with her.

4. In this view of the matter, the appeal filed by Nirmala being FAO No. 330 of 2018 is partly allowed and the appellant is held entitled to 40% of the compensation amount instead of 30% as had been awarded by learned Tribunal below. In view of re-marriage of the mother of minor Ms. Angel coupled with the fact that she is now staying away at a different place from her in-laws house, the award passed by learned Tribunal is modified to the extent that the share of the minor shall remain deposited in any fixed deposit scheme of any Nationalised bank till her majority and in case of any exigency, a part thereof may be got released, however, with the tacit consent and approval of her mother Smt. Monu.

5. Adverting to the appeal, being FAO No. 29 of 2018, filed by the Insurance Company, certain bare minimal facts need to be noticed.

6. Deceased Sunil Kumar on 5.3.2012 was returning from Chauhan Milk Plant where he was serving as Manager-cum-Accountant to deliver milk buckets and empty gallons to Kepu Milk Plant in a vehicle bearing registration No. HP-35-1305 driven at the relevant time by Harish Kumar and owned by Yog Raj. At about 7.30 p.m. when the vehicle arrived at Shain Kepu near Petrol Pump, Kumarsain its driver due to rash and negligent driving lost control, as a result whereof, vehicle rolled down deep into a nullah resulting into multiple injuries to the deceased. After the accident, he was taken to CHC where he remained under treatment till 14.3.2012 on which date he was referred to IGMC, Shimla, but unfortunately died on the same day. Deceased was stated to be drawing a salary of Rs.6500/- per month, besides Rs.50/- per day as travelling charges, in addition thereto, was earning about Rs.2,00,000/- per annum by pursuing agricultural and horticultural pursuits on the land belonging to his father, who on account of old age is not in a position to work in the fields.

7. The owner and driver of the vehicle had contested the petition on the ground that the vehicle being driven by the driver and the accident in question had not occurred on account of rash and negligent driving of the driver, who had tried to avoid the accident in question. Whereas, the Insurance Company has raised preliminary objections qua objections there being collusion between the claimants and owner and driver and non-maintainability of the petition on the ground that the

vehicle was being driven by its driver, who was not possessing valid and effective driving licence and was being plied without valid registration certificate, fitness certificate and permit. The learned Tribunal below found the defence raised by the owner, driver and insurance company to be not tenable and then proceeded to award a sum of Rs.15,28,904/- to the claimants.

8. As observed earlier, it is mainly on the question of quantum that the present appeal has been filed on the ground that the same is not in accordance with the ratio of the judgment laid down by the Hon'ble Supreme Court in ***National Insurance Co. Ltd.*** *versus* ***Pranay Sethi and others 2017 ACJ 2700***.

I have heard learned counsel for the parties and have gone through the records of the case.

9. There is no quarrel with the proposition as regards the award of compensation, the same is now required to be assessed and determined in accordance with the decision of a Constitutional Bench of the Hon'ble Supreme Court in ***National Insurance Co. Ltd.*** *versus* ***Pranay Sethi and others 2017 ACJ 2700***.

10. Why this case came to be referred to the Constitutional Bench, the answer is not difficult to find and the same is set out in para-1 of the judgment itself which reads thus:

> *"Perceiving cleavage of opinion between Reshma Kumari v.Madan Mohan, 2013 ACJ 1253 (SC) and Rajesh v. Rajbir Singh 2013 ACJ 1403 (SC), both three-Judge Bench decisions, a two-Judge Bench of this Court in National Insurance Co. Ltd. v.*

Pushpa, (2015) 9 SCC 166, thought it appropriate to refer the matter to a larger Bench for an authoritative pronouncement, and that is how the matters have been placed before us."

11. The conflict between the judgments as extracted above was resolved by concluding that the decision in ***Rajesh*** *versus* ***Rajbir Singh, 2013 ACJ 1403 (SC)*** was not a binding precedent as it had not taken note of the decision in ***Reshma Kumari*** *versus* ***Madan Mohan, 2013 ACJ 1253(SC)***. The Hon'ble Supreme Court after considering the entire conspectus of law arrived at the following conclusions:-

"*i) The two-Judge Bench in Santosh Devi, 2012 ACJ 1428 (SC), should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, 2009 ACJ 1298 (SC), a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.*

(ii) As Rajesh, 2013 ACJ 1403 (SC) has not taken note of the decision in Reshma Kumari,2013 ACJ 1253 (SC), which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 and 50 years. In case the deceased was between the age of 50 and 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 and 50 years and 10% where the deceased was between the age of 50 and 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

> *(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 14 and 15 of Sarla Verma 2009 ACJ 1298 (SC), which we have reproduced hereinbefore.*
>
> *(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma, 2009 ACJ 1298 (SC), read with para 21 of that judgment.*
>
> *(vii) The age of the deceased should be the basis for applying the multiplier.*
>
> *(viii) Reasonable figures under conventional heads, namely, loss to estate, loss of consortium and funeral expenses should be Rs.15,000, Rs.40,000 and Rs.15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10 per cent in every three years."*

Conclusions (iii) to (viii) are relevant for the adjudication of these cases.

12. It is thus clear from the aforesaid that the compensation henceforth to be awarded in favour of the claimants is essentially to be abide by the aforesaid conclusions, more particularly, conclusions No.(iii) to (viii) which except for conclusions No.(v) and (vi) are self-speaking.

13. Now, as regards conclusions No. (v) and (vi), it would be apposite to extract paragraphs No.14, 15 and 21 along with table as referred to in ***Sarla Verma and others*** *versus* ***Delhi Transport Corporation and another, 2009 ACJ 1298 (SC)*** which read thus:-

> "*14. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra's case, 1996 ACJ 831 (SC), the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be*

one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceed six.

15. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent/s and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependant on the father. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where family of the bachelor is large and dependant on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

21. We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is,

M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

Age of the deceased	Multiplier scale as envisaged in Susamma Thomas	Multiplier scale as adopted in Trilok Chandra	Multiplier scale in Trilok Chandra as clarified in Charlie	Multiplier specified in second column in the Table in Second Schedule to MV Act	Multiplier actually used in Second Schedule to MV Act (as seen from the quantum of compensation)
(1)	(2)	(3)	(4)	(5)	(6)
Up to 15 years	-	-	-	15	20
15 to 20 years	16	18	18	16	19
21 to 25 years	15	17	18	17	18
26 to 30 years	14	16	17	18	17
31 to 35 years	13	15	16	17	16
36 to 40 years	12	14	15	16	15
41 to 45 years	11	13	14	15	14
46 to 50 years	10	12	13	13	12
51 to 55 years	9	11	11	11	10
56 to 60 years	8	10	9	8	8
61 to 65 years	6	8	7	5	6
Above to 65 years	5	5	5	5	5

14. Evidently, the judgment in ***Pranay Sethi's case*** (supra) has brought about radical and fundamental changes with regard to award of compensation. For this purpose, this Court would deal with the case by drawing a comparative table of the amount actually awarded by the learned Tribunal along with modified award.

15. Now, adverting to the award of compensation, it would be noticed that virtually there is no dispute regarding the income of

the deceased. However, in terms of ***Pranay Sethi's*** case (supra) only 40% of the total income of the deceased added towards the future prospects as deceased admittedly was on a fixed salary. That apart, the amount awarded towards consortium and funeral expenses is also not in tune with the judgment in ***Pranay Sethi's*** case (supra), whereby only a sum of Rs. 40,000/- alone is permissible towards consortium and Rs. 15,000/- each towards loss of estate and funeral expenses.

16. In view of the aforesaid discussion, the award passed by the learned tribunal is required to be modified in conformity with the ratio of the judgment in ***Pranay Sethi's case (supra)*** and is accordingly modified as under:

Sr. No.	**Award passed by the Tribunal**	**Modified Award by this Court**
	Details/Particulars	Details/Particulars
(i)	Age of the deceased: 33 years	
(ii)	Assumed salary plus future prospects:Rs.6500+3250=Rs.9750/- (50%)	Assumed salary plus future prospects: Rs. 6500/- + 2600/-=Rs.9100/- (40%)
(iii)	After deduction of 1/4 : Rs.9750 (-) Rs.2438/-= Rs. 7,312/-	After deduction of 1/4 : Rs.9100 (-) Rs.2275= Rs. 6825/-
(iv)	Annual: Rs.7312x12=Rs.87744/-	Annual: Rs..6825 x 12=Rs. 81,900/-
(v)	Multiplier of 16: Rs.87744x16=Rs.**14,03,904/-**	Multiplier of 16: Rs.81,900x16=Rs.**13,10,400/-**
	Plus (I) Loss of consortium =Rs.1,00,000/- (ii)Funeral Expenses= Rs.25,000/- (iii) Loss of estate: Nil.	**Plus** (I) Loss of consortium = Rs.40,000/- (ii) Funeral Expenses= Rs.15,000/- (iii) Loss of estate: = Rs.15,000/-
	Total Award: Rs.15,28,904/- plus interest	**Total Modified Award: Rs.13,80,400/- plus interest**

17. It would be noticed that the learned trial Court has allowed the claim petition with interest at the rate of 7.5% per annum, which rate, according to the learned counsel for the

claimants, ought to have been 9%. Even though, no cross-objections or cross-appeals have been filed by the claimants, however, this Court in exercise of its power under Order 41 Rule 33 of the Code of Civil Procedure can always award the appropriate interest.

18. Order 41 Rule 33 of the Code of Civil Procedure reads as under:-

> *"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 under section 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."*

19. It cannot be disputed that the object of the aforesaid rule is to empower the Appellate Court to do complete justice between the parties. This rule gives the Court ample power to make an order appropriate to meet the ends of justice. It enables the Appellate Court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though the appeal is as to part only of the decree; and such party or parties may not have filed an appeal. The necessary condition for exercising the power under

the rule is that the parties to the proceedings are before the Court and the question raised properly arises out of the judgments of the lower Court. In that event, the Appellate Court can consider any objection to any part of the order or decree of the Court and set it right. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised and each case therefore must depend upon its own facts. Although, the general principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings. Ordinarily, the Appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal. But in exceptional cases, the rule enables the Appellate Court to pass such decree or order as sought to have been passed even if such decree or order would be in favour of parties who have not filed any appeal.

20. The scope of the rule has repeatedly came up for consideration before the Hon'ble Supreme Court, but I need only refer to the judgment rendered in ***Pralhad and others vs. State of Maharashtra and another (2010) 10 SCC 458*** wherein it was held:

> *"18. The provision of Order 41 Rule 33 CPC is clearly an enabling provision, whereby the appellate Court is empowered to pass any decree or 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. Therefore, the power is very wide and in this enabling provisions, the crucial words are that the appellate court is empowered to pass any order which ought to have been made as the case may require. The expression "order ought to have been made" would obviously mean an order which justice of the case*

requires to be made. This is made clear from the expression used in the said Rule by saying "the court may pass such further or other order as the case may require". This expression "case" would mean the justice of the case. Of course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.

19. In fact, the ambit of this provision has come up for consideration in several decisions of this Court. Commenting on this power, Mulla (Civil Procedure Code, 15th Edn., p. 2647) observed that this Rule is modeled on Order 59 Rule 10 (4) of the Supreme Court of Judicature of England, and Mulla further opined that the purpose of this Rule is to do complete justice between the parties.

20. In Banarsi vs. Ram Phal (2003) 9 SCC 606, this Court construing the provisions of Order 41 Rule 33 CPC held that this provision confers powers of the widest amplitude on the appellate Court so as to do complete justice between the parties. This Court further held that such power is unfettered by considerations as to what is the subject matter of the appeal or who has filed the appeal or whether the appeal is being dismissed, allowed or disposed of while modifying the judgments appealed against. The learned Judges held that one of the objects in conferring such power is to avoid inconsistency, inequity and inequality in granting reliefs and the overriding consideration is achieving the ends of justice. The learned Judges also held that the power can be exercised subject to three limitations: firstly, this power cannot be exercised to the prejudice of a person who is not a party before the Court; secondly, this power cannot be exercised in favour of a claim which has been given up or lost; and thirdly, the power cannot be exercised when such part of the decree which has been permitted to become final by a party is reversed to the advantage of that party. (See SCC p. 619, para 15 : AIR para 15 at p. 1997). It has also been held by this Court in Samundra Devi vs. Narendra Kaur (2008) 9 SCC 100 SCC (para 21), that this power under Order 41 Rule 33 CPC cannot be exercised ignoring a legal interdict. 22. In view of the aforesaid interpretation given to Order 41 Rule 33 CPC by this Court, we are of the opinion that the High Court denied the relief to the appellants to which they are entitled in view of the Constitution Bench decision in K.S. Paripoornan vs. State of Kerala, (1994) 5 SCC 593.by taking a

rather restricted and narrow view of the scope of Order 41 Rule 33 CPC and also on a misconstruction of the ratio in Paripoornan."

21. Adverting to the rate of interest, earlier the Courts had been granting interest at the rate of 12% for the accidents that had occurred in 80th and 90th. However, in recent cases, the rate of interests have been varying from 7.5% to 9%. The Hon'ble Supreme Court in its two recent decisions in **V. Mekala vs. M. Malathi and another 2014 ACJ 1441** and **Anjani Singh and others vs. Salauddin and others 2014 ACJ 1565** has awarded interest at the rate of 9% per annum from the date of filing of the petition.

22. Therefore, I am of the considered view that the interest instead of 7.5% as awarded by the learned Tribunal below, should be awarded to the claimants at the rate of 9% per annum. Ordered accordingly.

23. In view of the aforesaid discussion, the appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, stands disposed of.

(Tarlok Singh Chauhan)
Judge.

31st July, 2018.
(GR)