

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.1376 OF 2004

1. Smt. Bharati W/o Rameshlal Bajaj
Age : 45 years, Occ : Nil,
2. Ku. Poonam S/o Rameshlal Bajaj
Age : 18 years, Occ : Nil (Education),
3. Vitesh S/o Rameshlal Bajaj
Age : 6 years, Occ : Nil (Education),
4. Rahul S/o Rameshlal Bajaj
Age : 17 years, Occ : Nil (Education),

The appellant Nos.1 guardian of
appellant nos.3 and 4

All R/o 9698, Tarakpur,
Ahmednagar, Dist. Ahmednagar.

.. APPELLANTS
(Ori. Claimants)

VERSUS

1. Mr.Sultan Singh Aparsingh
Age : Major, Occ : Business,
(Owner of Truck Tanker)
R/o 26/1, Sadar Bazzar,
Endor, Madhya Pradesh
2. The National Insurance Company Ltd.,
Through its Branch Manager,
Ahmednagar Branch, Ahmednagar.

.. RESPONDENTS

...

Mrs. Madhaveshwari S. Mhase, Advocate for the
appellants.

Mr.Rupesh Bora h/f Mr. P.P. Bafna, Advocate
for respondent no.2.

...
CORAM : V.L. ACHLIYA, J.

RESERVED ON : 07.02.2020

PRONOUNCED ON : 24.07.2020

JUDGMENT:

. Being aggrieved by the impugned judgment and award dated 16.08.2004 passed by the Member, Motor Accident Claims Tribunal, Ahmednagar in Motor Accident Claims Petition No.822/2000, the appellants (original claimants) have preferred this appeal seeking enhancement of compensation.

2. For the sake of brevity and convenience, the parties to appeal are referred as they are referred and described in the impugned judgment.

3. Heard learned counsel for the appellants and learned counsel representing respondent no.2. Perused the record and proceedings.

4. The appellants-claimants herein had filed application under section 166 of the Motor Vehicles Act, 1988 (Hereinafter referred to as "the M.V. Act"), seeking compensation of Rs.11,00,000/- on account of accidental death of deceased Rameshlal Kisandas Bajaj, the husband of claimant no.1 and father of claimant nos.2 to 4, who died in motor vehicle accident occurred on 10.06.2000 at Ahmednagar. The claimants have approached with the case that on 10.06.2000 at about 2.45 p.m., the deceased was proceeding on his scooter bearing registration No.MH-16/C-6727 from D.S.P. Chowk to Patrakar Chowk. The offending vehicle i.e. truck bearing registration no.MP-09/K-3120 which was driven in an excessive and unmanageable speed came from the back side and gave dash to scooter on which deceased was proceeding. Deceased died on spot. The driver of truck prosecuted for

committing act of causing accidental death of deceased. At the time of accident, the offending vehicle was owned by the respondent no.1 and insured with the respondent no.2.

5. On account of accidental death of deceased, the claimants have claimed the compensation of Rs.11,00,000/- with contention that at the time of accident, the deceased was 45 years of age and businessman by profession. He was running the business of sale of country made and foreign liquor in the name of his business Concern "M/s Rahul Wines" in the city of Ahmednagar. By running said business, the deceased was earning not less than Rs.10,000/- per month. The entire family of the deceased i.e. claimants were dependent on the income of the deceased. At the time of incident, the claimant nos.2 to 4 were studying in Convent School. Due to accidental death of their father, they were

required to give up the convent school as they were unable to bear the expenses of convent school. It is claimed that the deceased was assessed for income tax and regularly submitting the income tax returns. On account of pecuniary and non-pecuniary damages, the claimants have claimed the compensation of Rs.11,00,000/-, making the respondent nos.1 and 2 jointly and severally liable to pay the compensation.

6. The respondent no.1 i.e. the owner-cum-insured of the offending vehicle though served failed to appear. The respondent no.2 alone appeared in the matter and contested the claim with contention that the claim made by the claimants is excessive. They denied the case of the claimants that the accident was occurred due to rash and negligent driving of the driver of the offending vehicle. The respondent no.2 has denied their

liability to pay the compensation with contention that there was breach of policy condition on the part of the insured as the driver of the truck was not holding valid and effective driving licence to drive the vehicle.

7. On the basis of the rival pleadings, the Tribunal has framed the issues vide Exhibit-19 including the issue as to breach of policy conditions to be proved by the respondent no.2. In support of their case the claimants have examined the claimant no.1. She has stepped into witness box and deposed as per the case put forth by claimants. She has produced number of documents to support the claim of the claimants. The respondent no.2 failed to adduce any evidence in the case.

8. On due appreciation of the rival

pleadings and the evidence adduced in the case, the Tribunal has partly allowed the claim petition and awarded the compensation of Rs.1,87,000/- (inclusive of N.F.L.), making the respondent nos.1 and 2 jointly and severally liable to pay the compensation along with interest @ 9% p.a. from the date of Petition till its realization with proportionate costs. Being aggrieved by the quantum of compensation awarded, the claimants have preferred this appeal seeking enhancement of compensation.

9. By referring to the rival pleadings and oral and documentary evidence adduced in the case, learned counsel for the appellants submitted that the reasons and findings recorded by Tribunal in assessing the compensation as Rs.1,87,000/- not sustainable in law. It is submitted that the Tribunal has erred in holding that there was no loss of

income to the claimants on account of accidental death of the deceased. It is submitted that only for the reason the licences to sale the liquor standing in the name of deceased transferred in the name of claimant no.1, the Tribunal has drawn inference that no loss of income resulted to claimants. It is submitted that the Tribunal has overlooked the ground reality that in Indian Society, the women from respectable family is unable to run liquor business on its own and derive same income as earned by her deceased husband from such business. It is submitted that it was travesty of justice on the part of the Tribunal to deny the legitimate claim of compensation of claimants made by the widow and minor children of the deceased on the basis of assumption and presumption made by tribunal without any evidence brought on record to support such contention. In support of the submissions,

the learned counsel has referred and relied upon the decision of this Court in the case of *Halimabai Abdul Jabbar and others V/s Rakesh Kumar Mukhastha and others* reported in *2002 (Supp.2) Bom.C.R. 242*.

10. By referring the overall facts of case and evidence adduced by claimants, learned counsel for the appellants submits that the compensation claimed by the claimants cannot be termed as excessive and exorbitant. It is submitted that the deceased was 45 years of age. He was carrying the business of sale of country made as well as foreign liquor under licences obtained from the State Government. He was running said business from the year 1992. Initially, he was carrying the business in partnership. Later on, both the licences were transferred in his name. He was running the said business in the name his business Concern "M/s Rahul

Wine Shop" in the city of Ahmednagar. Since 1992-93, the said licences were renewed and for the purpose of renewal of these licences the deceased was paying huge amount to the State Government. In this context, learned counsel invited attention to the copies of the licences with renewal receipts produced at Exhibit-24 and 25. It is submitted that the deceased was regularly assessed for income tax. He was filing income tax returns. In support of the submissions, learned counsel has invited attention to the copies of the income tax returns produced by Income Tax Officer, Ward-1, Ahmednagar pursuant to summons issued by tribunal.

11. By referring to the income tax returns and the copies of the balance sheets, learned counsel argued that the deceased had good earning from said business. He was owner of Car and Scooter. He was paying Rs.20,000/-

per year as premium towards Life Insurance Policy to L.I.C. Balance sheet of the year ending 31st March, 1999 reflects that the gross profit of deceased by way of business was Rs.4,10,017/-. After making expenditure the nett profit was Rs.88,180/-. In this background, learned counsel submits that, the Tribunal has erred in assessing the monthly loss of income on account of accidental death of deceased as Rs.1500/- p.m. It is submitted that the compensation awarded towards pecuniary and non-pecuniary loss are grossly inadequate and cannot be termed as just and fair.

12. It is submitted that the loss of income caused to claimants has not been assessed based upon actual loss sustained by the claimants and proved in evidence. The Tribunal has failed to consider the future prospects and increase in the income of the

deceased. While assessing compensation no addition has been made to existing income of deceased towards future prospects. So also the Tribunal has awarded very meager amount towards non-pecuniary damages. By referring the Constitutional Bench decision in the case of *National Insurance Company Ltd., V/s Pranay Sethi and others* reported in (2017) 16 SCC 680, learned counsel submits that the compensation assessed by Tribunal deserve to be reassessed and enhanced.

13. Learned counsel submits that considering the assessment of income tax for the previous financial year, the net income of the deceased being Rs.88,180/- no deduction to be made from said income. It is submitted that as the deceased was 45 years old at the time of accident, the multiplier of 13 deserve to be applied in assessment of compensation in terms of decision in the case of *Sarla Verma (Smt) and others V/s Delhi*

Transport Corporation and another reported in (2009) 6 SCC 121. Considering the net yearly income of deceased as Rs.88810/-, the monthly income of the deceased worked out as Rs.7,148/-. The deceased being self employed person in the age group of 40 to 50, the income to the extent of 25% to be added to the existing income of the deceased towards future prospects. It is submitted that under the conventional head such as the loss of estate, loss of company, funeral expenses etc., the claimants deserve to be awarded Rs.70,000/- in terms of judgment in the case of *National Insurance Company Ltd., V/s Pranay Sethi and others (supra)*. In this background, learned counsel submits that the appeal deserves to be allowed and the compensation awarded by tribunal be reassessed and computed in terms of principles laid down in the case of *National Insurance Company Ltd., V/s Pranay Sethi and*

others (supra).

14. On the other hand, learned counsel for the respondent no.2 submits that the respondent no.2 is not liable to pay the compensation on the ground of breach of policy condition. It is submitted that as per report submitted by the Investigator appointed by the respondent no.2 – insurance company it was revealed that the licence as claimed to be possessed by the driver of the offending vehicle was not issued by the Regional Transport Authority, Raipur. The licence was fake and bogus licence. In that view, the respondent has duly proved that there was breach of policy condition on the part of the insured. The driver of the vehicle involved in the accident was not possessing valid and effective driving licence to drive the vehicle. In that view, the findings recorded to issue no.2 is

incorrect and not sustainable in law.

15. Learned counsel further submits that the award passed by the Tribunal on the point of quantum of compensation awarded calls for no interference. It is submitted that the licence to run the liquor shop found to be renewed in the name of claimant no.1 after the death of deceased Rameshlal. As such the source of income from the business run by deceased remained to be intact. In that view, the Tribunal was justified to assess the compensation by considering the loss of income confined to managerial and supervisory loss.

16. In counter to the submissions advanced by learned counsel for the respondent no.2, the learned counsel for appellants pointed out that though the respondent no.2 has taken a plea that the

driver of the vehicle was not holding valid and effective driving licence to drive the vehicle and the insured has committed breach of policy condition still the respondent no.2 failed to adduce any evidence in that behalf and discharge its burden to prove the breach of policy condition on the part of insured. In that view, the Tribunal was fully justified to record finding to issue no.2 in negative and hold that the respondent no.2/appellant failed to prove the breach of condition of policy on the part of insured so as to exonerate from liability to indemnify the respondent no.2. It is further submitted that the respondent no.2 has not challenged the findings to issue no.2 by filing appeal or cross-objection. In absence of appeal challenging the finding to the issue no.2, the respondent no.2 is not entitled to raise such challenge in an appeal preferred by the appellants which is confined to quantum of

compensation awarded by tribunal.

17. In counter to submissions advanced by learned counsel for appellants, the learned counsel for the respondent no.2 contended that the respondent no.2 is entitled to raise such challenge under Order XLI Rule 33 of the Civil Procedure Code even though no appeal filed by respondent no.2 to findings recorded to issue no.2. In support of the submissions advanced, learned counsel has referred and relied upon the decision in the case of ***Ranjana Prakash and others V/s Divisional Manager and anr.*** reported in ***2012 AIR SCW 848.***

18. I have carefully examined the submissions advanced in the light of rival pleading, oral and documentary evidence adduced in the case and judgment and award passed by the Tribunal. Also perused the

record and proceedings.

19. On due appreciation of rival pleadings, the Tribunal has framed the following issues and recorded the findings thereto as under :-

Issues	Findings
1) Do applicants prove that deceased Rameshlal Bajaj died in the accident, which was occurred on 10.6.2000 at about 2.45 P.M. due to rash and negligent driving of tanker bearing No.MP-09/K-3120 by its driver?	.. Proved.
2) Does opponent No.2 prove that opponent No.1 has committed several breaches of the terms and conditions of the policy and the driver of the tanker was not holding valid and effective driving licence, at the time of the accident ?	 Not proved.
3) Are applicants entitled to compensation? If Yes, what quantum and from whom?	.. Yes. Rs.1,87,000 /-

inclusive
of NFL.

4) What order?

.. As per
order
below.

20. Thus if we consider the issues framed in the matter then the burden to prove the breach of policy condition entirely rests upon the respondent no.2 – insurance company. If we consider the pleadings of the respondent no.2 then no specific pleadings made to the effect that the respondent no.2 has verified the driving licence of the driver of the vehicle and same was found to be fake and bogus and thereby the insured has committed breach of policy condition. It is vaguely stated that there was breach of policy condition as the driver of the truck was not holding valid and effective driving licence to drive the vehicle. The pleadings in the written statement is not a substantive evidence. The respondent no.2 neither

examined the Officers of the respondent – insurance company nor examined any witnesses including the person, who alleged to have submitted report that the Transport Authority at Raipur has informed that the licence was not issued from their office. Even the report and alleged communication is not part of evidence adduced in the case. In that view, the respondent no.2 failed to prove its case that there was breach of policy condition.

21. In order to prove the breach of policy condition on the part of the insured, the insurer is required to prove that owner/insured was guilty of willful breach of the conditions of insurance policy or the contract of insurance. Merely asserting that the Investigator appointed in the case has reported that he was communicated by the Licensing Authority that the licence in question was not issued by them is not

sufficient to prove the breach of policy condition on the part of respondent no.2. In this context, it is useful to refer the decision in the case of ***National Insurance Company Ltd., V/s Swaran Singh and others*** reported in (2004) 3 SCC 297, wherein in para 110, the Hon'ble Apex Court has held as under:-

"110. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under

Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant times, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not

only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving license produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case."

22. Thus the reasons and findings recorded by the tribunal that the respondent no.2 has failed to prove the breach of policy condition suffers from no infirmity even if it is presumed that the respondent no.2 can raise challenge to the findings to issue no.2 without filing appeal or cross-objection by taking recourse to Order XLIII Rule 33 of the Code of Civil Procedure. In that view, the submission advanced that the respondent no.2 – insurance company is liable to be exonerated from payment of compensation is devoid of merit.

23. Learned counsel for the respondent

no.2 has referred and relied upon the decision in the case of ***Ranjana Prakash and Ors. V. Divisional Manager and anr.*** reported in ***2012 AIR SCW 848*** in support of submission that the challenge can be raised to findings recorded against the respondent – insurance company even without filing appeal or cross-objection. In my view, the decision in the case cited have no bearing upon the facts of the case. The very object of Order XLI Rule 33 of the Civil Procedure Code is to empower the appellate Court to pass any decree and make any order which ought to have been passed by trial Court and to make such further or other order as the case may require even if the respondent has not filed any appeal or cross-objection. The power under Order XLI Rule 33 of the Code of Civil Code can be resorted and used to make the award more effective or maintain the award. In the case cited itself, the Hon'ble Apex

Court has observed that the powers have been vested with the appellate Court to do the complete justice between the parties so as to make the award more effective or maintain the award on other grounds or to make other parties to litigation to share the benefits or the liability. It is also made clear that the powers under Order XLI Rule 33 cannot be invoked to get a larger or higher relief. In para 6, 7 and 8, the Hon'ble Apex Court has observed as under:-

"6. We are of the view that High Court committed an error in ignoring the contention of the claimants. It is true that the claimants had not challenged the award of the Tribunal on the ground that the Tribunal had failed to take note of future prospects and add 30% to the annual income of the deceased. But the claimants were not aggrieved by Rs.23,134/- being taken as the monthly income. There was, therefore, no need for them to challenge the award of the

Tribunal. But where in an appeal filed by the owner/insurer, if the High Court proposes to reduce the compensation awarded by the Tribunal, the claimants can certainly defend the quantum of compensation awarded by the Tribunal by pointing out other errors or omissions in the award, which if taken note of, would show that there was no need to reduce the amount awarded as compensation. Therefore, in an appeal by the owner/insurer, the appellant can certainly put forth a contention that if 30% is to be deducted from the income for whatsoever reason, 30% should also be added towards future prospects, so that the compensation awarded is not reduced. The fact that claimants did not independently challenge the award will not therefore come in the way of their defending the compensation awarded, on other grounds. It would only mean that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or

cross-objections.

7. This principle also flows from *Order 41, Rule 33 of the Code of Civil Procedure* which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. *Order 41, Rule 33 of the Code* can, however, be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make

the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the

compensation in an appeal by the claimants seeking enhancement of compensation."

24. In the case of ***Ranjana Prakash and others V/s Divisional Manager and anr. (supra)***, the facts of case involved in appeal preferred by the insurance company against the award of the Tribunal, the appellate Court i.e. High Court has held that the Tribunal should have deducted 30% from the annual income of deceased towards income tax. Accordingly reduced the compensation awarded. However refused to consider the plea raised by claimants of non-consideration of addition of income on account of future prospects of deceased. In a challenge raised, in Special Leave Petition filed before the Apex Court, the appellants-claimants have claimed that the High Court has committed error in reducing the compensation. It is contended that the High Court has not considered the

future prospects of the deceased though raised contention to that effect by respondents-claimants in appeal. The appellate Court refused to consider the same for want of appeal by the claimants. In that context, the Hon'ble Apex Court has held that there was no need for the appellants-claimants to have preferred appeal as to denial of claim on the ground of future prospects by tribunal. Such plea could have been raised in an appeal filed by insurer/owner by taking recourse to Order XLI Rule 33 of the Civil Procedure Code. While assessing the quantum of compensation awarded by tribunal the error or omissions in the award could have been raised without filing appeal. In that view, the ruling cited have no bearing upon the facts of the present case. Even in the instant case, respondent no.2 is entitle to raise plea without filing appeal to the extent of error or omission if

any made by the Tribunal in assessment of compensation by taking recourse to Order XLI Rule 33 of the C.P.C. But the right available under Order XLI Rule 33 of the Civil Procedure Code cannot be extended to challenge the findings recorded on other issues against the respondent no.2 without filing appeal or Cross-Objection.

25. In the case of ***Banarsi and others V/s Ram Phal*** reported in ***AIR 2003 SC 1989***, the Hon'ble Apex Court has observed that usually the power under Rule 33 of Order XLI can be exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate Court is so inseparably connected with the portion not appealed against or left untouched for the reason if the later portion being left untouched, which would result injustice or

inconsistent decrees being passed. However, the exercise of such power is subject to three limitation; firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, **a claim given up or lost cannot be revived**, and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party.

26. In the case of ***Banarsi and others V/s Ram Phal*** (supra), the Hon'ble Apex Court has explained the scope of exercise of power under Order XLI Rule 22 and Rule 33 of the Civil Procedure Code. In para Nos.6, 10, 11, 12, 14 and 15 the Hon'ble Apex Court has observed as under :

"6. The appeals raise a short but interesting question of frequent recurrence as to the

power of the appellate court to interfere with and reverse or modify the decree appealed against by the appellants in the absence of any cross-appeal or cross-objection by the respondent under Order 41 Rule 22 CPC and the scope of power conferred on the appellate court under Rule 33 of Order 41 CPC.

10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a *finding*. The difference which has resulted we will shortly state. A respondent may *defend* himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to *attack* any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is *partly* in favour of the appellant and *partly* in favour of the respondent.

(ii) The decree is *entirely* in favour of

the respondent though an *issue* has been decided against the respondent.

(iii) The decree is *entirely* in favour of the respondent and all the *issues* have also been answered in favour of the respondent but there is a *finding* in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any *finding* adverse to him as the decree is *entirely* in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a *finding* recorded against him either while answering an issue or while dealing with an issue. The

advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any *finding* by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any *finding* recorded against the respondent

12. The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross-objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage. The law continues to remain so post-1976 amendment. In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or

any other relief including the relief of refund shall be granted by the court unless it has been specifically claimed in the plaint by the plaintiff. Certainly the relief of specific performance is a larger relief for the plaintiff and more onerous to the defendant compared with the relief for compensation or refund of money. The relief of compensation or refund of money is a relief smaller than the relief of specific performance. A plaintiff who files a suit for specific performance claiming compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right to file an appeal against the original decree if the relief of specific performance is refused and other relief is granted. The plaintiff would be a person aggrieved by the decree in spite of one of the alternative reliefs having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent.

It follows as a necessary corollary from the abovesaid statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross-objection.

14. The learned counsel for the respondent forcefully argued that even in the absence of appeal preferred by the plaintiff or cross-objection taken by the plaintiff-respondent the appellate court was not powerless to grant the decree which it has done in exercise of the power conferred by Rule 33 of Order 41 CPC. Rule 33 of Order 41 as also Rule 4 thereof, which have to be read necessarily together, are set out hereunder:

ORDER 41

Appeals from original decrees

"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 35-A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order.

Illustration

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate court decides in favour of X. It has power to pass a decree against Y."

"4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.—Where there are more plaintiffs or more defendants than one in a suit, and

the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of the widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate court. While allowing the appeal or otherwise interfering with the decree or

order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage

of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41."

27. The ratio laid down in the case of ***Banarsi and others V/s Ram Phal*** (supra) squarely applicable to the facts of the present case. The appellant has preferred appeal being unsatisfied with the quantum of compensation awarded i.e. partly aggrieved by finding to issue no.(3). So far as liability to pay compensation by the respondent no.2/insurer the tribunal has specifically held that the respondent no.2 has failed to prove its defence as to breach of policy condition and recorded finding to issue no.3 in negative. The respondent no.2 has not challenged the finding to issue no.2 by

filing appeal or cross-objection. In absence of any appeal filed challenging the finding to issue no.2 the respondent no.2 can not raise such challenge in the instant appeal preferred by the appellant, raising issue of adequacy of compensation awarded by tribunal.

28. Having reached to the conclusion that the challenge raised as to correctness of the findings to issue no.2 recorded against the respondent no.2 cannot be raised in an appeal preferred by the claimants seeking enhancement of compensation by taking recourse to Order XLI Rule 22 and 33 of the Civil Procedure Code, the next question poses for consideration whether the judgment and award passed by tribunal in assessing compensation suffers from any perversity and required to be interfered in exercise of appellate jurisdiction.

29. The claimants have approached with the case that the deceased was the sole bread earner in their family and they were fully dependent upon the income of the deceased. The claimants have claimed that deceased was earning not less than Rs.10,000/- per month by carrying the business of sale of liquor. Out of Rs.10,000/- per month earned by the deceased, he was spending minimum Rs.8,000/- per month for maintenance of the claimants. The deceased was 45 years of age. On account of accidental death, the claimants have claimed compensation of Rs.11,00,000/- as pecuniary and non-pecuniary loss.

30. In support of the case of the claimants, the claimant no.1-the wife of the deceased stepped into witness box and deposed as per the case of the claimants. She has categorically deposed that her husband was doing the business of sale of liquor in the

name of his business Concern known as "Rahul Wine Shop". She has categorically deposed that her husband was having licence to sale the country liquor as well as foreign liquor. She has categorically deposed that her husband was assessed for income tax. In support of the oral evidence, the claimants have produced the liquor licences issued in the name of deceased Rameshlal, the copies of the licences with renewal endorsement are produced at Exhibit-24 and Exhibit-25. In support of the income of the deceased, the claimants have got produced the complete record in respect of computation of income of the deceased made from the year 1995-96 till the year 1999-2000. The record to that effect has been produced by the Income Tax Officer, Ward No.1, Ahmednagar pursuance to the summons to produce the documents issued by the Claim Tribunal. The documents in respect of assessment of income which include the

balance sheets and assessment orders from the assessment year 1995-1996 to 1999-2000 are produced at Exhibit-37 to Exhibit-60. She has categorically deposed that her children i.e. the claimant nos.2 to 4 were minor at the time of death of her husband and they were studying in Sacred Heart Convent High School, Ahmednagar. After death of her husband, they were required to be removed from the Convent School as her financial position become very weak and unable to bear the expenses of education of her children. She further deposed that for the purpose of performing the marriage of her daughter-the claimant no.2, she will require Rs.4,00,000/- to Rs.5,00,000/-. She incurred Rs.20,000/- towards funeral expenses.

31. The witness was cross-examined at length. If we consider overall cross-examination of the claimant no.1/PW-1 then

nothing concrete has been brought through her cross-examination to find favour to the case of respondent no.2 except the fact that the liquor licence standing in the name of her husband has been transferred in her name. The respondent no.2 has adduced no evidence in the case.

32. On due appreciation of the rival pleadings and evidence adduced in the case, the tribunal has assessed the compensation to be payable as Rs.1,86,000- (inclusive of no fault liability) as against the claim of Rs.11,00,000/- made by the claimants. On the basis of the evidence brought through the cross-examination that liquor licences standing in the name of the deceased were transferred in the name of claimant no.1, the tribunal has inferred that the claimant no.1 continue to run the business of her husband after his death and as such no loss of income

has been caused to the claimants on account of accidental death of the deceased. The tribunal has observed that in the facts and circumstances of the case at the most the claimants have suffered loss of income to the extent of managerial or supervisory loss to pay the salary to such person to supervise the business. On that count, the tribunal has assessed the monthly loss of income as Rs.1500/- per month as the remuneration to be paid to the person employed to supervise the business. Considering the monthly loss of income of Rs.1500/- per month, the tribunal has assessed the yearly loss of income as Rs.18,000/- per year. After making deduction to the extent of 1/3rd from the said amount towards personal expenses of the deceased, the tribunal has assessed the yearly loss of income on account of accidental death of deceased caused by claimants as Rs.12,000/- per year. By applying the multiplier of 15,

the tribunal has computed the monitory loss caused to the claimants as Rs.1,80,000/-. The tribunal has further awarded Rs.2,000/- for funeral expenses and Rs.5,000/- towards loss of consortium. Thereby awarded the compensation of Rs.1,87,000/- as against the claim of Rs.11,00,000/- made by claimants.

33. In my view, the reasons and findings recorded by the tribunal to assess compensation to be payable as Rs.1,87,000/- are not sustainable in law. Only for the reason the licences standing in the name of deceased were renewed and transferred in the name of claimant no.1, the tribunal was not justified to draw inference that after the accident the widow of deceased running the business of her husband and deriving same income as earned by her deceased husband. It would be travesty of justice to deny the legitimate claim of the claimants only on the

basis of inferences drawn by the tribunal by ignoring the ground reality in the Indian society and overall position of the women in the society. In this context, learned counsel for the appellants has rightly placed reliance on the decision of this Court in the case of **Halimabai Abdul Jabbar and others Vs. Rakesh Kumar Mukhasia and others** reported in 2002(Supp.2) Bom. C.R. 242, wherein this Court has observed that it would be travesty of justice to deny the claim of widow to fair compensation for herself and her children only on the ground that she was able to run the business left by her husband. It is observed that the law cannot be oblivious to the social reality. In para no.10, it is observed as under :-

"10. The next aspect of the matter which needs consideration is as regards the claim for compensation which has been made on behalf of the claimants. The deceased was, according to the deposition of P.W. 1. 50 years of age at the time of the accident. The learned

Counsel for the contesting parties agreed that that is also the age which is disclosed in the post-mortem report. The deceased was the sole earner of the family and had as many as 11 children. P.W. 1 stated that deceased was running his own shop by the name "Janata Kawelu Bhandar", and that he was carrying on that business for 25 or 26 years. P.W. 1 has however stated in the cross-examination that he had no personal knowledge regarding the income of his father and he had not produced the shop and establishment certificate. He stated that the shop was in a Gram Panchayat area. He further stated that the deceased was the Mutawali of Masjid. The witness denied the suggestion, that the deceased was not carrying on any business. On behalf the claimants an effort was made to examine three witnesses in support of their plea that a large business was being conducted by the deceased. P.W. 2 deposed that the deceased had purchased articles of the value of Rs. 15,000 to 20,000/-, from his shop every month. The learned trial Judge discarded the testimony of this witness, who had stated that the deceased was purchasing roof tiles and flooring from his shop situated at Gandhi Bag, Nagpur. The learned trial Judge was of the view that given the extent of the turnover, the deceased ought to have been an income-tax assessee. But, no such details were forthcoming. One of the witnesses, P.W. 3, stated that for a period of five years after the death of the deceased,

his widow was assisting her sons and that they were running the shop. The learned trial Judge has, therefore, concluded that some income has been derived after the death of the deceased from the shop and, therefore, there was no loss as a result of the death. This reasoning is, to say the least completely unsustainable. I find merit in the contention of the learned Counsel appearing on behalf of the applicant that the mere fact that the widow of the deceased had continued to run the shop after the death of deceased, is not a reason to discard the claim for compensation. There was a shop belonging to the deceased. After the death of the sole bread earner in the accident, it was left to the widow to eke out a living for herself and for the 11 children whom the deceased left behind. The fact that she took over the reins of the shop would not justify the inference that she was not entitled to compensation or that she has derived income to the same extent, as the deceased in the conduct of the business. To deny a widow a claim to fair compensation for herself and eleven children on the ground that after all, she was left with a shop to run, would simply be a travesty of justice. The law cannot be oblivious to social reality. The learned Counsel appearing on behalf of the applicant has submitted that the claimants belong to a muslim family and it is not unlikely that the widow of the deceased would have had in this case little wherewithal to

run the business is effectively as did the deceased is."

34. While assessing the compensation, the Tribunal is expected to award just and fair compensation. What can be the just and fair compensation is to be assessed on the basis of overall facts of the case. No hard and fast view can be laid down as to the assessment of compensation. In the case of ***National Insurance Company Ltd., V/s Pranay Sethi and others (supra)***, the Apex Court has laid down the following principles to be borne in mind while assessing the compensation :-

"59. In view of the aforesaid analysis, we proceed to record our conclusions:

59.1. The two-Judge Bench in *Santosh Devi* 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*, 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.

59.2. As *Rajesh* has not taken note of the decision in *Reshma Kumari*, which was delivered at earlier point of time, the decision in *Rajesh* is not a binding precedent.

59.3. 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 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4. 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 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

59.5. For determination of the multiplicand, the deduction for personal and living

expenses, the tribunals and the courts shall be guided by paras 30 to 32 of *Sarla Verma* which we have reproduced hereinbefore.

59.6. The selection of multiplier shall be as indicated in the Table in *Sarla Verma* read with para 42 of that judgment.

59.7. The age of the deceased should be the basis for applying the multiplier.

59.8. Reasonable figures on conventional heads, namely, loss of 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% in every three years."

35. The claimant no.1 is the wife of the deceased and claimant nos.2 to 4 are the children of the deceased, who were minor at the time of accidental death of the deceased. It is not in dispute that the deceased was businessman by profession and running the Wine Shop in the name of his business Concern Rahul Wine Shop in city of Ahmednagar. He secured the licence to sale the country made liquor as well as foreign liquor way back in the year 1992, which was renewed time to time

till the death of deceased. The copy of licence in respect of sale of country made liquor i.e. CL-III with renewal endorsement produced at Exhibit-24. Similarly, the copy of licence to sale the foreign liquor i.e. FL-II with endorsement of renewal till the year 2000-2001 issued in the name of deceased produced at Exhibit-25. Thus the oral testimony of the claimants coupled with the documentary evidence adduced in case more than sufficient to prove that the deceased was businessman by profession and running liquor shop.

36. The deceased had a PAN-CARD issued by the Income Tax Department in which the birth date of deceased shown as 18.03.1955. The accident was occurred on 10.06.2000. Which proves that the deceased had completed 45 years of age. He was running 46 years at the time of accident. Thus, considering the

deceased being 46 years old, the multiplier of 13 required to be made applicable as applicable to victim in age group of 46 to 50 in terms of decision in the case of ***Sarla Verma (Smt) and others V/s Delhi Transport Corporation and another (supra)***.

37. Although the claimants have claimed that the deceased was contributing Rs.9,000/- to Rs.10,000/- per month, the evidence adduced in the case has established that as per the income tax returns filed for the Assessment Year 1999-2000, the deceased was assessed nett income of Rs.88,180/- for the assessment period 01.04.1998 to 31.03.1999 i.e. for the year preceding the death of deceased. In that view, the nett income of the deceased prior to his death can safely be considered as Rs.88,180/-. The assessment order reflects that the deceased was required to pay income tax to the extent of Rs.6,636/-. In that view, the nett yearly

income available for the deceased to contribute to claimants worked out as Rs.81,544/-. Since the deceased was self employed business person and regularly assessed for income tax, the income to the extent of 25% deserves to be added to the existing income of the deceased. In that view, the amount of Rs.20,386/- to be added to the nett yearly income of the deceased. Thus, the yearly loss of income on account of accidental death of the deceased worked out as Rs.1,01,930/- ($\text{Rs.81,544} + 20,386/- = \text{Rs.1,01,930/-}$). The deceased being married person with liability of four persons, the amount to the extent of 1/4th to be deducted from the said amount towards personal expenses of the deceased. In that view, the nett yearly loss of income to the claimants on account of accidental death of deceased worked out as Rs.76,448/- ($\text{Rs.1,01,930/-} - \text{Rs.25,482/-} = \text{Rs.76,448/-}$). Thus by applying

the multiplier of 13, the pecuniary loss caused to the claimants on account of accidental death of the deceased worked out as Rs.9,93,824/-. Since the claimant no.1 being widow and claimant nos.2 to 4 are the minor children of the deceased, they deserves to be awarded reasonable compensation towards non-pecuniary damages. In the facts and circumstances of the case, the award of compensation of Rs.35,000/- under conventional head such as funeral expenses, loss of estate, consortium etc would meet the ends of justice. In that view, the total compensation to be payable to claimants worked out as Rs.10,28,824/-. The said compensation to be payable by respondent nos.1 and 2 jointly and severally alongwith interest @ 6% p.a. from the date of Claim Petition till its realization to claimants.

38. In view of the above, the appeal

deserves to be allowed. Accordingly, the appeal is allowed and the award passed by tribunal is modified. The following order is passed :-

ORDER

- (i) The appeal is allowed with costs.
- (ii) The compensation awarded by the Tribunal is enhanced from Rs.1,87,000/- to Rs.10,28,924/- (inclusive of no fault liability) with interest 6% p.a. from the date of application/Petition till its realization with proportionate costs of proceedings making the respondent nos.1 and 2 liable to pay the compensation jointly and severally to claimants.
- (iii) The amount if any deposited and paid in terms of award passed by the Tribunal be adjusted towards the compensation to be payable in terms of modified award.
- (iv) The balance amount with interest be

deposited with the Tribunal within 12 weeks from the date of judgment and order passed by this Court.

(v) The amount of enhanced compensation be apportioned and paid to claimants in equal proportion.

(vi) The additional court fees if any payable in terms of modified award then same shall be paid within 8 weeks.

(vii) The appeal is disposed of in above terms.

(viii) The award be drawn accordingly.

[V.L.ACHLIYA]
JUDGE

SGA