

Murari Lal Vs. Gomati Devi and ors.

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Court : Rajasthan

Decided On : Feb-20-1985

Reported in : 2(1985)ACC158

Judge : D.L. Mehta, J.

Appellant : Murari Lal

Respondent : Gomati Devi and ors.

Judgement :

D.L. Mehta, J.

1. This is an appeal preferred by Murari Lal, owner of Vehicle No. RJR/2278, against the Award passed by the learned Judge, Motor Accidents Claims Tribunal, Jaipur dated 31st May, 1977.

2. The claim arises out of an accident which took place on 31st March, 1969 at about 3 p.m. of a distance of 3 miles and 5 furlongs from Jaipur. A bus of the Rajasthan State Road Transport Corporation (In short RSRTC) was going from Jaipur to Bharatpur and Deoki Nandan was the driver. The bus No.: RJR/2278 was coming towards Jaipur and the accident took place near Ghash-ki-Chuni. It is alleged that Murari Lal was, the real owner and Copal Das was the registered owner.

3. Before dealing with the merits of the case, I would like to mention that the Motor accidents claims Tribunal Hereinafter referred to as the Tribunal) passed an Award on 22nd July, 1972. It was held by the Tribunal that the Driver Deokinandan was not negligent and as such, the RSRTC is not responsible for the payment of compensation. The Award was passed against Gopal Das non-petitioner to the extent of Rs. 31,104/- and cost Rs. 400/-. It was also held that non petitioner No. 4 Insurance company is responsible for payment of Rs. 2,000/- only. The petitioners were allowed interest of the rate of 6% from the date of decree till the date of realisation. An application was moved by M/s. Gopal Das Kedar Nath subsequent to the Award that, in fact, M/s. Gopal Das Kedar Nath were the registered owner of the vehicle and the work of running of the vehicle was carried on and looked into by Murari Lal and, he kept the petitioner in dark and did not contest the claim in the manner desired by the petitioner (M/s. Gopal Das Kedar Nath). A prayer was made to set aside the Award. The learned Tribunal held as under:

After hearing the parties, I find that it is in the interest of justice that the decree passed ex-parte against the petitioners (M/s. Gopal Das Kedar Nath) should be set aside and the petitioners be allowed an opportunity to cross-examine the witnesses already examined by the parties and to lead evidence, if so desires.

4. Further direction was given that the decree will be set aside and the cost will be allowed for re-calling the witnesses already examined at the cost of the petitioner, Gopal Das Kedar Nath.

5. The Tribunal vide it's award dated 31st, May, 1977 awarded a sum of Rs. 31,104/-to the present appellant Smt. Gomati and Others and interest at the rate of 6% was awarded and the cost of litigation amounting to Rs. 500/- was also awarded. No award was passed against the RSRTC on the ground that in the year 1972 award was passed against the RSRTC and the restoration was qua Murari Lal only. It seems that the present respondents Smt. Gomati and Others who were legal representatives of deceased, were satisfied with the award and they have not filed any appeal or cross-objection before this Court. No Award was passed against the RSRTC and, hence, the question of filing an appeal did not arise at all. Murari Lai was the aggrieved party as the award was passed against him only. As

such, this appeal was directed by Murari Lal against the Award dated 31st May, 1977. It will not be out of place to mention that Smt. Har Pyari lost her husband in the same accident and the Award was passed against the RSRTC as well as Murari Lal. The RSRTC preferred an appeal before this Court challenging the finding of composite negligence. However, during the pendency of the appeal, a compromise was arrived at and RSRTC without accepting the finding of composite negligence gave an amount of Rs. 11,000/- to Smt. Har Pyari on compassionate grounds.

6. Mr. R.N. Munshi, at the very outset, submitted that the names of the respondent, RSRTC, should be deleted as RSRTC is not a necessary party. It was submitted that in the memo of appeal no relief has been claimed against RSRTC and, as such, the name of RSRTC should be deleted no relief can be granted against RSRTC. It was also countered by Mr. Munshi, that the claimants Smt. Gomati Devi and Others who were the legal representatives of the deceased, were satisfied with the Award and they have not filed any appeal against RSRTC and they did not claim any relief against RSRTC. It was also contended that no cross-objection has been filed by Smt. Gomati Devi and Others who are the legal representatives of the deceased and, as such, the appeal against RSRTC does not survive of all and the name of RSRTC should be deleted.

7. On behalf of Murari Lal appellant, it was submitted that he is not the real owner and M/s. Gopal Das Kedar Nath are the registered owners and they should be considered as owner for the purpose of awarding compensation and, no award can be passed against him. On the question of quantum of Award, it was not contented. Mr. Shrivastava, appearing on behalf of Smt. Gomati Devi and others, Legal representatives of the deceased, has admitted that no appeal or cross-objection has been filed. However, it was contended by Mr. Shrivastava that looking to the findings arrived at by the Tribunal relating to the opposite negligence of both the drivers, the Tribunal ought to have awarded compensation against RSRTC. He has submitted that under Order 41 Rule 33, CPC, this Court can pass an award against RSRTC.

8. Before dealing with the contention of Mr. Munsbi and Mr. Shrivastava, it is necessary to appreciate the submission made by the counsel for Murari Lal. The counsel for Murari Lal has submitted that Murari Lal is not liable. Ex. D-1 is the agreement, which was arrived at between Gopal Das, Proprietor of M/s. Gopal Das Kedar Nath and Murari Lal, Proprietor of M/s. Murari Lal Gujar Mal. In this agreement, it has been specifically mentioned that Murari Lal shall be responsible in future i.e. from 6th February, 1968, for losses and damages. It has also been mentioned that Murari Lal shall manage the vehicle, and shall get it transferred in the name of Gopal Das so that the vehicle can be plied on the basis of the permit which is existence in the name of Gopal Das, Ex. D/2, D/3, D/4, D/5 and D/9 are other documents to show that Murari Lal was the Incharge of the vehicle and was in possession of the vehicle. Apart from that, DW 3 Ram Gopal has stated that:

x x x

No cross-examination on this point has been made. DW/2 Satya Narain Pareek has also stated that Murari Lal was managing the affairs of the bus and was in his possession. He was taking the collections and was also spending out of it. He has also stated that Murari Lal used to appoint drivers and conductors and he was treating Murari Lal as the owner of the bus. He has further stated that Gopal Das has never done anything in relation to the bus. He has also stated that Murari Lal was the owner of the bus. Gordhan Singh (DW/41) and Gopi Lal (DW/3) have also proved Ex/DI) DW/5 Madho Prasad, DW/6 Jagdish Narain, DW/7 Ram Gopal Sharma and other witnesses have supported the case of Gopal Das.

9. Under Section (9), the word 'owner' has been defined as under:

'Owner' means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire purchase agreement, the person in possession of the vehicle under that agreement.

10. In common parlance, the word 'owner' has a different meaning and is understood in a different way. However, for the purpose of this Act, the said definition which is restricted and technical will prevail over definition or meaning

which is understood in common parlance. The person who is in possession of the vehicle and who is in charge of the vehicle and who is dealing with the vehicle for his benefit is the owner of it as defined Under Section 2(19) of the Motor Vehicle Act. This Court in the case of Automobile Transport (Rajasthan) Private Ltd., v. Deva Lal 1977 ACJ 150 has held as under:

Thus, a person though registered as owner may or may not be a real owner and for the purpose of awarding compensation it is the real owner who should be found out by the court on the facts of each case.

11. The finding given by the Tribunal that Murari Lal was the real owner and the real owner M/s. Gopal Das KedarNath was the registered owner on the basis of correct appreciation of the fact and evidence which has been produced by the parties, I do not find any infirmity and the finding on this question is maintained.

12. Now, remains the controversy which Mr. Shrivastava has raised about the applicability of Order 41 Rule 33, CPC. Order 41 Rule 33, CPC reads as under:

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 cross-suits or 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.

13. The power has been vested under this rule to make any order which ought to have been made or passed in the ordinary course of nature by the Trial court. The words 'which ought to have been passed' have been discussed by the Supreme court in the case of Kok Singh v. Deokabai : [1976]2SCR963 in which their Lordships of the Supreme court have held that 'the expression' 'which ought to have been passed' means 'What ought in law to have been passed' and if the 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. It was further held 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.

14. In the case of Anath Nath v. Dwarka Nath (1938) PC 86 it was held by their Lordships as under:

It was contended however that the language of Rule 33 of the same order was wide enough to cover the case. Even if their Lordships assume that the High court was not wholly without power to entertain this ground of appeal-an assumption to which they do not commit themselves-they are clearly of opinion that Rule 33 could not rightly be used in the present case so as to abrogate the important condition which prevents an independent appeal from being in effect brought without any notice of the ground of appeal being given to the parties who succeeded in the court below.

15. In the aforesaid case, their Lordships have left the matter about the scope on Order 41 Rule 33, C.P.C. open as is evident from the words used by their Lordship, 'so much they did not commit themselves.'

16. Mr. Munshi has cited before me the case of Budhan v. Lal Harbans Lal : AIR1973 All63 in which their Lordships of the Supreme court held as under:

In the instant case the appellant is not seeking any relief against Ved Prakash. His appeal is that the decree granted in favour of Harbans Lal is bad because there had been no agreement of sale. The applicability of Order 41 Rule 33, therefore, does not arise, the rule empowers the court to pass appropriate orders in the ends of justice and, it does occur at times where some persons appeal and it others do not that the court is put in a position of making impossible, contradictory or inequitable orders. It is in those conditions that the court is given a power to pass a decree in favour of persons who have not even approached. The normal rule is that the party who is aggrieved by the decree has to file an appeal within the time allowed but rule 41, Rule 33, CPC the appellate court is given power to interfere

where as a rule of interface in favour of the appellant it becomes necessary to readjust the rights of the parties or where the question is one of settling mutual rights and obligation or where the relief prayed is single and indivisible but is claimed against number of persons. The appellant in the instant case, is therefore, not entitled to invoke the aid of order 41 Rule 33, CPC.

17. The question now arises as, whether the case referred by the counsel for RSRTC apply to this case with full force or not. If this Court comes to the conclusion that there is a composite negligence, than the question of apportionment may arise. It may be argued that the appellant, Murari Lal, in para 10 of his memo of appeal that the learned Judge having found in the other case and also having found in this case that the Driver of both the buses namely Bus No.: RJR: 2278 and RSL: 5434 were equally responsible for the accident and that is why he has allowed half of he compensation to be borne by each of the owners of the bus in other case, but the has seriously erred in law and on facts in decreeing the entire amount of compensation in this case to be borne entirely by the appellant. This ground has been taken by the appellant. However in the relief clause, a prayer has been made for the dismissal of the claim only and no alternative prayer has been made about the apportionment of the amount of compensation between the persons who were negligent. Mr. Munshi submits that no alternative prayer has been made and, as such, his client cannot be compelled to make payment of compensation which has not been prayed in the memo of appeal filed even by Murari Lal. Order 41 Rule 33 CPC should generally be given a liberal interpretation, by which the court can pass order in the ends of justice. In accident cases, the poor claimants at times may not be kept on filing appeals and will have to be satisfied with the award which is already given. Justice means social justice and equitable justice. The court can exercise the persons under Rule 33 of Order 23, CPC, where it is faced writ-petitions of considering impossible, contradictory or inequitable order. This citation by Mr. Munshi has also dealt with Order 41 Rule 38, CPC and, their Lordships in this case has also held that wherever the Court comes to the conclusion that inequitable orders have been passed, this Court has power to exercise the jurisdiction vested in it by Rule 33 of Order 41, CPC. The question for determination in this case in the light of the judgment cited by the learned Counsel is whether the order passed by the Court

below is inequitable or not in the facts and circumstances of the case.

18. Mr. Munshi has also cited before me the case of *Panchei Bewa v. Banchhandhi Padhan* AIR 1965 Orissa 52, in which their Lordship held that though very wide powers have been conferred on the appellate court under Order 41, Rule 3, C. P.C. the very amplitude of power conferred necessitates that the power must be very cautiously exercised. In this case, it was held that:

In a suit for declaration of title and recovery of possession of the disputed lead which the plaintiffs purchased from the husband of defendant by a registered sale deed for Rs. 80/-, the defence was that the sale-deed was not genuine and sale was not for consideration. The trial court found that there was no payment of consideration, but it decreed the suit on the finding that title had passed despite non-payment of consideration and directed that possession was to be delivered to the plaintiffs subject to payment of Rs.80/-. The defendant filed an appeal challenging the finding of the trial court that title had passed despite non-payment of consideration. Plaintiff neither filed an appeal nor filed any cross-objection.

Held that the appellate court would not be justified in exercising jurisdiction Under Order 41 Rule 31, in favour of the plaintiffs respondents when they themselves elected not to assail the adverse decree against them in the question of possession.

Once it was decided by the appellate Court that consideration had been paid, it amounted to confirmation of the decree of the trial court on question of title and it would be necessary for the appellate court to further discuss whether title had passed independent of the payment of the consideration. No inequity would be worked out if the trial court's decree was not set aside with regard to the finding that possession would be delivered subject to payment of Rs. 80/-.

Their Lordships in the case of *Bhanwar Lal v. Mathura Prasad* : AIR 1962 MP141 held as under:

The wording of Order 41, Rule 33, C.P.C. indicates that the Court has the power to vary the decree in favour of any of the non-appealing respondents, if it thinks it

necessary to do so and if it further thinks that such an interference with the decree is required on account of the decree in favour of an appellant being varied or reversed. But the said provision does not confer any right on any of the non-appelling respondent to claim it as matter or right, he having elected to be satisfied the decree passed by the trial court.

Mr. Munshi has cited the case of *BIG Insurance Co. v. Ramnath* : AIR 1962 MP368 in which it has been held as under:

The principle generally applicable is that a decree binds the parties unless, in appropriate proceedings, it is set aside or modified. A party desiring to have the decree modified must file an appeal or cross-objection where permissible. It follows that, generally speaking, the appeal court should not reverse or vary a decree in favour of a party who has not appealed. It is true that in exceptional cases Order 41, Rule 33, Civil Procedure Code, enables the Court to pass such a decree as ought to have been passed or as the nature of the case requires be even in favour of a party who has not appealed. But this is restricted to cases where, as a result of interference in favour of the appellant, further interference in favour of a party who has not appealed. But this is restricted to cases where, as a result of interference in favour of the appellant, further interference is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience.

Mr. Munshi has also cited the case of *Panna Lal v. State of Bombay* : [1964]1SCR980 wherein it has been held as under:

(12) Even a bare reading of Order 41 Rule 82 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 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 plaintiff's 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, CPC 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 Code of Civil Procedure has not done so, the appeal court can under no circumstances give him relief under the provisions of Order 41 Rule 22 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.

18. In our opinion, the view that has been accepted by all the High Courts that Order 41 Rule 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such as objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents that an objection Under Order 41 Rule 22 can be directed against the other respondent, is correct. Whether may have been the position under the old S 561, the use of the word 'Cross-objection' in Order 41 Rule 22 expresses unmistakably the intention of the legislature that the objection has to be directed against the appellant.

In the case of *Bhooramal v. Chunilal*, 1964 RLW 5, it was held as under:

As regards the submission of the learned Counsel for the plaintiffs that a decree may be passed against Narainlal by virtue of the powers given to the appellate court under Order 41 Rule 33 of the Code of Civil Procedure, it may be pointed out that in the present circumstances of the case, where the first appellate court has clearly found that Bhooramal had no authority from Narainlal to make acknowledgements and the suit was barred by limitation no decree can be passed against Narainlal also. It was the duty of plaintiffs to have filed an appeal against the dismissal of their suit against Narainlal. It is not necessary or this Court in this appeal to go into the question whether the suit is within limitation against Narainlal

or not in the absence of any appeal by the plaintiffs. There is a clear finding of fact that Bhooramal had no authority to make acknowledgements on behalf of Narainlal. In such circumstances, the provisions of Order 41 Rule 33 of the Code cannot be invoked.

Mr. Munshi has relief on the case of *Kedamath v. Ramchandra*, 1962 RLW 286, in which it has been held as under:

The language of Order 41, Rule 33 in very wide terms, but it should not be so read as to abrogate the other provision with regard to the filing of appeal, cross-objection etc. The general principle is that a decree is binding on the parties to it unless it is set aside apply, for example, it applies to cases where as a result of interference in favour of the appellant, further interference with the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience, the power may be exercised. This rule enables the appellate court where its decision interferes with or modifies or extends the decision of the lower court, to give effect to that decision if necessary in the interest of justice by interfering with rights of those parties which are not the subject of appeal before the court.

On the other hand, Mr. Shrivastava counsel for Gomati Devi has vehemently argued with all force at his command that the provisions of Order 41 Rule 33 CPC are wide enough and the order of the trial court is contrary and inequitable and the provision of Order 41 Rule 33, CPC should be applied in the instant case. He has referred before me the case of *Bharatbhai Kasturchand Shah v. Mafatbhai Babubhai Makwana* 1980 ACJ 152, in which it has been held as under:

8. In *New Asiatic Insurance Co Ltd. v. Passumal Dhanamal Aswani and Ors.* : [1964]7SCR867 in the context of a policy which was *pari materia* with the policy with which I am concerned in this appeal, the Supreme Court was required to consider the obligation of the insurance company under such policies, and it was held that the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties in view of the provision of the Act: and once the company had undertaken liability to third parties, incurred by the persons specified in the policy, the third parties right

to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. In my opinion, therefore, the Tribunal was clearly in error in overlooking this aspect of the question and various terms and conditions of the policy in question before me and, therefore, erred in holding that neither respondent No. 4 nor respondent No 3 was liable for the payment of the amount of the compensation as awarded. The root question, which really arises in this appeal on the only contention urged on behalf of the appellants is, whether this Court can now modify the award by holding respondents Nos. 2 and 4 liable, who have been absolved by the Tribunal to pay compensation to the original claimants-respondents Nos. 1 and 2 before me. In other words, whether an award can be made in favour of the original claimants, respondents Nos. 1 and 2 before me, against respondents No. 3 and 4 herein, though the original claimants have not come in appeal against the part of the award by which respondents Nos. 2 and 4 have been absolved of their liability to pay compensation so awarded?

2. In *Panna Lal v. State of Bombay* AIR 1962 SC 1516 a question arose whether the High Court of Bombay was in an error in refusing to exercise its power Under Order 41, Rule 33 of the Civil Procedure Code while allowing the appeal and reversing the decree of the trial court by granting a decree in favour of the plaintiff-respondent against the correspondents, who were above by the trial court. Two contentions were urged before the Supreme Court that the High Court of Bombay was perfectly justified in refusing to exercise the power under Order 4 Rule 33, because, in the first instance, no appeal was preferred by the plaintiff-respondent, who could not have, in any case, preferred cross-objections against the co-respondents since Order 4 I Rule 22 of the Civil Procedure Code permits filing of the cross-objections in an appeal against the appellant only. Rejecting both these contentions, the Supreme Court held that having regard to the wide wording of Order 41 Rule 33, it 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, and the appellate Court is empowered 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'. The Supreme Court further held that if there was no impediment in law, the High Court, in appeal could, therefore, though allowing the

appeal of the defendant-appellant by dismissing the plaintiff's suit against him give the plaintiff respondent a decree against any or all the other defendant who were parties to the appeal as respondents. The Court further held that if a party who could have filed a cross-objection under Order 41 Rule 22 has not done so it cannot be said that the appellate Court can, under the provision of Order 41 Rule 33. In the present case, I am of the opinion that this Court should exercise its power under Order 41 Rule 33 of the Civil Procedure Code otherwise the original claimants would be left high and dry since in a given case the claimants may not be able to execute the decree and obtain the complete relief granted under the decree from the opponents who are made liable under the award. In the present case, I am told the decree has not been fully satisfied by appellant Nos. 1 and 2. It should be recalled that on the facts and admitted by the respondents that present owner of the vehicle is respondent No. 4 and appellants Nos. 1 and 2 were in possession of the vehicle as hire purchasers and the appellant No. 1 was the driver of the vehicle at the relevant time. In other words, respondents No. 4 permitted or authorised appellant No. 1 being the hire purchaser to drive the car. Nonetheless respondent No. 4 continued to be the owner and, therefore, remained vicariously liable for the acts of tort committed by appellants No. 1 in occurrence of the existence of the hire purchase agreement. The state of affairs in the present case, therefore, in such the relief's claimed by the claimants against the different opponents are so interlined that unless this Court exercises its power under Order 41 Rule 33 of the Civil Procedure Code, the claimants may find themselves in a position where they might not be able to execute the decree fully. Therefore, in the circumstances of the case, though I do not find any justifying reasons to interfere with the order and award of the Tribunal so far as the appellants are concerned, I propose to exercise the powers of the appellate Court under Order 41, Rule 33 by holding that respondent No. 4 was also vicariously liable for the tortious act of appellant No. 1 and, therefore, responsible for payment of the compensation to the original claimants as awarded by the Tribunal. Consequently, respondent No. 2, being insurance company, would not be liable to pay the said amount. In that view of the matter, therefore, the order of the Tribunal requires to be modified.

In the case of *Jaimal Singh and Anr. v. Jawala Devi and Ors.* 1976 ACJ 207, it has been held as under:

Mr. M.L. Bbargava, counsel for the insured a company, has assailed these findings before me. He has taken me through the evidence adduced in the case. On a perusal of the witnesses, statements I have come to the conclusion that the Tribunal was right in holding that the accident was caused by the dangerous driving of the driver Hri Singh. This Tribunal I think has rightly believed the evidence produced on behalf of the claimants. Eye witnesses, appeared before the Tribunal. They deposed that the truck went to the wrong side of the road and hit the cyclist and threw him away. They also testified that the truck was opening at a fast speed and knocked down the cyclist after going to the wrong side. The cyclist fell at a distance of 5-6 feet towards Shahdara and truck, stopped after covering 30-25 feet. This was in the main evidence of Babu Lal PW(4). His evidence was accepted by the Tribunal. This however does not make any difference as there is positive circumstantial evidence to indicate that the accident happened as the result of the negligence of the driver.

In the case of Gujarat State Road Transport Corporation v. Malubai Menand, 1981 ACJ 36, it was held as under:

Mr. Oza for the insurance company submitted that the claims Tribunal has exonerated the insurance company and there was no appeal and consequently the question of liability of the insurance company could not be re-opened. It is difficult for us to accept that submission. There is a two-fold answer to the said submission, firstly, the claimants have already filed cross objections challenging that part of the award which was against them. Cross-objections are filed in both the appeals. It is true that the claimants have not taken specific contentions regarding the liability of the insurance company in their cross-objections but it would be an additional ground which can certainly be permitted as a pura question of law as emerging from the aforesaid F.B. decision. The second answer to Mr. Oza's submission is that we can always exercise our powers under Order 41, Rule 31 of the CPC. We can certainly go into the said question about liability of the insurance company to pay compensation. We therefore go into the said question and come to the conclusion that the original opponent No. 3 the the insurance company in both the cases would be liable to satisfy the compensation award in both the claim cases.

19. From a perusal of the above citations as a bare reading of Order 41 Rule 33, CPC, I am convinced that wide wording was intended to empower the appellate Court to make whatever order it thinks fit not only as between the appellant and respondent, but as also between a respondent and respondent. It also 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, the whole argument is based on any case, by filing cross-objection under Order 41 Rule 22, CPC should have challenged the Award. I am not inclined to agree with the arguments of Mr. R.N. Munshi that if the party has failed to file an appeal, or to file cross-objection under Order 41, Rule 22, CPC, the appellate court can under no circumstances give him relief under provisions of Order 41 Rule 33, CPC. However, it is necessary for the appellate Court to have a cautious approach in the matter and should apply the provisions of Order 41 Rule 33, CPC only to set aside inequitable orders or inconsistent orders or contradictory orders. The appellate Court has also jurisdiction where the question is inter-mixed with the relief granted to the other respondents so that relief against the appellant cannot be granted when the question is being re-opened, between the objecting respondents and other respondents.

20. Mr. Munshi has also raised the objection that the provisions of the Code of Civil Procedure, especially, Order 41 Rule 33, CPC in appeals under the Motor Vehicle Accidents Claims does not other. He has relied upon the case of Motor Owners Insurance Co. Ltd. v. Shrimati Ranuka Roy and Anr. AIR 1973 Gu 142 in which it has been held as under:

Cross-objection to appeal Under Section 110-D is not maintainable, Order 41 CPC has not been made applicable to proceedings before Claims Tribunal to appeal before High Court.

This Court relying upon the case of D. Chandra Shekar v. Narayana : AIR 1975 Kant 18 in Automobiles Transport v. Devalal held as under:

7. In respect of the cross-objection it was urged that it was not maintainable as there is no provision for filing cross-objections in the Motor Vehicles Act, 1939

(hereinafter referred to as the Act) Section 110-D thereof only provides for an appeal by any person aggrieved by an award of a claims Tribunal.

This provision, it is said, entitled the respondents to file an appeal if they felt aggrieved by the award of the Tribunal in question. Some decisions were also cited in Support of this contention but they do not appear to us to be good law. We agree respectfully with the opinion expressed in *K. Chandra Shekar v. Narayana* AIR 1975 Kant 18 (FB) that in an appeal Under Section 110-D of the Act, the respondents can file cross-objections by invoking the provisions of Order 41, Rule 22, Civil P.C. because where a statute directs that an appeal shall lie to a Court already established. That that appeal must be regulated by the practice and procedure of that Court, vide *Collector Varanasi, v. Gaurishankar* AIR 1978 SC 384. We accordingly overrule the contentions that it is not permissible to the claimants to invoke the provisions of Order 41, Rule 22, Civil P.C. in order to file their cross-objection. But as well presently follow, since the award has been reduced by us, we reject this cross-objection.

21. Thus, this objection of Mr. Munshi that order 41 Rule 33, CPC cannot be applied in the matters of appeal Under Section 110-D of the Motor Vehicles Act, is also without force.

22. Mr. Munshi, counsel for RSRTC, has submitted all force at his command that the Award passed by the Tribunal on 20th July, 1972 has become final qua the RSRTC and the finding that the driver of the RSRTC was not negligent and the finding that the driver of The RSRTC was not negligent cannot be disturbed in a subsequent award given on 31st May, 1977 and, for this reason also the finality should be given to the findings of facts given in the Award dated 22nd July, 1972. From a perusal of the order which was produced before me and part of which has also been reproduced, it is evident that the ex parte order which was passed against Gopal Das was set aside. If any proceeding which has been taken against a party is set aside on the bonafide grounds, than the position as it existed earlier to the passing of the order is restored. It will not be out of place to mention that Mr. T.B. Mathur was representing the RSRTC in that case and RSRTC was a party in that proceedings. The net result of the order dated 2nd December, 1972 is that the

award has been set aside and it has been restored to its original position and are finding of fact which was given in that award automatically stands set aside. One cannot imagine that after setting aside the award the owner of the vehicle RJR 2278, namely, registered owner Gopal Das and the real owner Murari Lal cannot agitate the matter of Composite negligence. If the Court after recording the evidence and allowing the owner to cross-examine the witnesses comes to a different finding, then that finding is not vitiated only on the ground that a different finding was given initially while passing order or award earlier which has been set aside. The Tribunal has come to the conclusion that it is a case of composite negligence. The Award has not been passed against RSRTC only on the ground that in the award which was passed on 22nd July, 1972 on relief was granted against RSRTC on the ground that the claimant has failed to prove the negligence of the driver of the RSRTC. The claimant may fail to prove the negligence of the driver of the RSRTC but the dispute is also between RSRTC and the owner of the private but RJR 2274. In case, the owner of the private vehicle can agitate the matter that his driver was not negligent at all and in the alternative he can take the plea that it is a case of composite negligence. Thus, the fact of composite negligence can be proved by other non-petitioners (respondent) whose rights are also going to be affected. The rejection of the claim against RSRTC in spite of the finding that there was a composite negligence cannot be sustained and that part of the Award is set aside.

23. Now, I take up the instant case for the determination on the following points:

1. Whether the Tribunal was justified in arriving at a conclusion that there was composite negligence?
2. Whether there are sufficient grounds to apply the provisions of Order 41 Rule 33, CPC in the instant case?
3. If both the points are determined in affirmative what relief can be granted to the present appellant in the instant case?
4. Whether a decree can be passed also against RSRTC or not?

24. PW/2 Komal Chand Agrawal was passenger in Bus No. RJR 2278,

He has stated as under:

X X X X

PW/3 Raghuver Lal has stated as under:

X X X X

D/WI Ramji Lal is the Conductor of Bus No. RSL-5434. He has stated that there was no negligence on the part of their Driver. In cross-examination, he has stated that before four-five minutes of the accident, they saw a private bus coming towards them. In cross-examination, he has further stated that he cannot name who was the driver at the relevant time. DW 2 Madan Lal reached the spot after recording the first information report. From a perusal of the record to produce their drivers. The person who is driving can be in the better know about the fact of accident and how it occurred, then the conductor or any of the passengers who is plying on the vehicle. For the reasons mentioned above, adverse inference should also be drawn against both the parties for having failed to produce the driver who could have given the testimony of the fact of cause of accident. I am fortified in my view by the case reported in Adamkhan Mohamed v. Ramesh Raya Naik and Ors. 1978 ACJ 409.

25. Appreciation of evidence is generally done by the court below and if two views are possible, the appellate court should not disturb the finding of fact. In the facts and circumstances of the case, it cannot be said that the view taken by the learned Tribunal is in consistent with the evidence on record. In the instant, case, whether the provisions of Order 41 Rule 33, CPC and, it can be applied when the order is inconsistent or contrary or inequitable or so much intermixed that the application of rule is necessary. Apart from that in a beneficial legislation a very technical view should not be given to the law and it should be applied for the benefit of those for whose benefit the law has been enacted. If there is a finding of fact that there was a composite negligence, it cannot be said that RSRTC is not responsible. Negligence is evidenced from the record of both the drivers. However, it can be

said that from the record, as discussed earlier, that the driver of the private bus was more negligent than the driver of RJR 2278, but both were negligent and the negligence of both and result in the accident in which a good number of passengers had died and out of them only two representatives of those persons had filed the claim.

26. In the facts and circumstances of the case, I am of the view that applying the principle laid down in *Panna Lal v. State of Bombay* (Supra) *Gujarat State Road Transport Corporation v. Mafatbhai Babubhai Makwana* (Supra), wide interpretation should be given to the provision of Order 41 Rule 33 and an Award can be passed against RSRTC. Taking into consideration the fact that the driver of the private bus more negligent, I consider it proper that 2/3rd of the amount should be paid by the driver of the private bus RJR 2278 and 1/3rd should be paid by RSRTC. However, the claimant will have a right to realise the amount from any of the parties and in case, the amount is realised, the other party will have a right to get it recovered from the other party. Insurance company's liability is restricted, only to the extent of the liability already held by the Tribunal.

27. The appeal is, thus, partly accepted and the award is modified accordingly. The Tribunal has already awarded interest and it is maintained.

28. Looking to the facts and circumstances of the case, the parties shall bear the costs of this appeal.