
(2012) 07 AHC CK 0022

In the Allahabad High Court

Case No : First Appeal From Order (Defective) No. 23 of 2012

Babu Khan

APPELLANT

Vs

Oriental Insurance Company Ltd. and Another

RESPONDENT

Date of Decision : 25-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 2, Order 16 Rule 21, Order 22 Rule 1, Order 22 Rule 3, Order 5 Rule 13
Limitation Act, 1963 — Section 5
Motor Vehicles Act, 1988 — Section 166, 5

Citation : (2012) 10 ADJ 526 : (2013) 1 AWC 911

Hon'ble Judges : Rakesh Tewari, J; Anil Kumar Sharma, J

Bench : Division Bench

Advocate : Preet Pal Singh Rathore, for the Appellant; Bhartendu Pathak, for the Respondent

Final Decision : Dismissed

Judgement

1. This defective appeal challenging the award dated 24.2.2007 passed by MACT/ Additional District Judge Court No. 4, Budaun in MACP No. 47 of 2007 Asif v. Babu Khan and another, whereby compensation of Rs. 1,57,000/- had been awarded to minor claimant-respondent No. 2, has been filed after delay of four years and 220 days alongwith an application u/s 5 Limitation Act for condonation of delay. We have heard the arguments of parties' counsel on delay condonation application and perused the documents filed alongwith appeal as also the affidavit filed in support of application.

2. The grounds for condonation of delay have been mentioned in paras-2 to 6, which are reproduced as under:

2. That due to misadvice of his counsel in the Court below against the judgment and decree dated 24.2.2007/27.2.2007 the appellant filed review petition No. 7/07 in the Court below.

3. That the above noted review petition was also decided and dismissed on 16.11.2011 by the Court below. As such the matter remained pending in the Court below for about four years and 10 months.

4. That after dismissal of the above noted review petition the appellant filed a Writ Petition No. 75030/11 before this Hon"ble Court which was also dismissed by this Hon"ble Court vide its order dated 22.12.2011 with the finding of an alternative remedy.

5. That under the above noted circumstances a long of more than 5 years has become expired due to misadvice of counsel for appellant in the Court below and the appellant is filing this appeal within two months from the date of dismissal 16.11.2011 of the review petition No. 7/2007, as such there is no deliberate default on the part of the, appellant in filing this appeal.

6. That under the above noted circumstances the delay in filing this appeal is by chance and is not by desire which is liable to be excused and condoned.

3. After hearing the parties" counsel we find that it is a case of gross negligence and latches and the application for condonation of delay is liable to be rejected for the following reasons:

(i) That there was no impediment in filing the first appeal from order pending disposal of review application if at all the appellant had any intention of doing so. It appears that in order to avoid the payment of amount of award, the appellants did not chose the correct forum. It is the wisdom of the party to choose forum, but they cannot be permitted to jump in one after the other Court and cannot take any advantage of their own misdeeds. It is relevant to note the observations of the Apex Court in the case R.B. Ramlingam Vs. R.B. Bhvaneswari, , wherein the Hon"ble Court has held that filing of review petition is no impediment in filing SLP and as a proposition per se that prosecution of review proceedings would not be a sufficient cause at all for purposes of Section 5 of the Limitation Act. In each and every case Court has to examine whether delaying in filing the SLP stands properly explained. True guide is whether petitioner has acted with reasonable diligence in prosecution of his appeal or petition.

(ii) That the review application has been filed in the year 2011, i.e. more than four years after the impugned award and in the affidavit the number of Review Petition has been incorrectly stated to be 7/2007, whereas it is 7 of 2011. This shows that the review petition was filed more than four years after impugned award. Learned counsel for the appellant could not offer any explanation when we brought this fact to his knowledge during the course of argument. In the certified copy of order dated 16.11.2011 and its folio, the number of Review Petition has been mentioned as 7 of 2011 and not 7 of 2007 as has been stated in the affidavit filed in support of the application u/s 5 Limitation Act.

(iii) That no review application is maintainable against the award of the Tribunal except on the grounds of fraud. Provisions of Order LXVII CPC pertaining to

review of judgment and orders are not applicable on petitions u/s 166 of Motor Vehicles Act, so the appellant is not entitled to get any benefit regarding pendency of Review petition before the Tribunal. In this regard it is relevant to quote the provisions of Rule 221 of U.P. Motor Vehicles Rules, 1998, which reads as under:

221. CPC to apply in certain cases.--The following provisions of the First Schedule to the Code of Civil Procedure, 1908 shall so far as may be apply to proceedings before the Claims Tribunal, namely, Rules 9 to 13 and 15 to 30 of Order V; Order IX, Rules 3 to 10 of Order XIII, Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of Order XXII.

(iv) That in the copy of Review Application date of the filing the application is noted as 9.3.2007, whereas it cannot of the year 2007, because as stated earlier the year of institution in the certified copy of the order had been mentioned to be 2011 and not 2007. In the affidavit filed before this Court in support of delay condonation application they have mentioned the number of Review Petition as 7/2007 and have not given its date of institution. No doubt they have filed copy of review application (Annexure-7) on which dated 9.3.2007 has been mentioned, but in view of above facts, it appears to be incorrect. When we drew attention of the learned counsel for the appellant on this discrepancy, he could not offer any explanation. It is thus quite clear that after the award, which was not ex parte, the appellant deliberately did not comply the directions of the Tribunal regarding payment of awarded amount but probably when recovery proceedings were drawn against him, he filed the review application before the Tribunal and after its dismissal instituted writ petition before this Court, which were rightly dismissed.

(v) That a litigant cannot take advantage of his own misdeeds in prosecution of the case and deprive the accrued rights of other party due to his inaction.

(vi) That the delay of about five years in this case is not bona fide and in the peculiar facts and circumstances of this case is not liable to be condoned.

4. For facts and reasons stated above, the application for condonation of delay has not merits, and is accordingly dismissed. As a consequence, the appeal stands dismissed as barred by time.