

(2011) 02 CAL CK 0028

In the Calcutta High Court

Case No : CO 1079 of 2007 and C.A.N. 7508 of 2010

National Insurance Company

APPELLANT

Vs

Jharna Ghosh and Others

RESPONDENT

Date of Decision : 07-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 115, 227
Criminal Procedure Code, 1973 (CrPC) — Section 115
Motor Vehicles Act, 1988 — Section 149(2), 170, 173, 173(2), 173(I)

Citation : (2011) 02 CAL CK 0028

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Abhijit Gangopadhyay, for the Appellant; Krishanu Banik, for the Respondent

Final Decision : Dismissed

Judgement

Prasenjit Mandal, J.—This application is directed against the judgment and order dated 20.06.2006 passed by the learned Judge, Motor Accident Claims Tribunal, 3rd Court, Burdwan in MACC No. 126 of 2005 thereby awarding compensation to the tune of Rs. 11,26,980/-.

2. This short fact is that on 17.05.2004 at 05.40 PM an accident took place between the motorcycle bearing No. WB-38J / 2734 and the offending bus bearing No. WB-39/0708 due to rash and negligent driving resulting in death of one Swapan Ghosh aged 42 years. The heirs of the deceased filed a claim case before the MACC Tribunal, Burdwan and in that case by the impugned order, the learned judge allowed compensation of Rs. 11,26,980/-. Being aggrieved by the said judgment and order, the Insurance Company has preferred this revisional application.

3. Mr. Avijit Gangopadhyay, learned advocate appearing for the Petitioner has submitted that the award cannot be supported at all. In the instant case, the

owner of the offending vehicle i.e. South Bengal State Transport Corporation (henceforth S.B.S.T.C) is contesting the said claim case by filing a written statement. For that reason the Insurance Company got no chance of contesting the said claim case. Even at the time of recording evidence, the Insurance Company was not allowed to adduce the evidence on the ground that the owner of the vehicle was contesting. He was severely prejudiced though he was to pay the compensation. In support of his contention Mr. Gangopadhyay has referred to the decision of M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd., particularly paragraph No. 6 and Major S.S. Khanna Vs. Brig. F.J. Dillon, and thus he has submitted that when the Petitioner was debarred from cross-examinaing the witnesses. He has the remedy by way of filing an application under Article 227 and no appeal lies in such circumstances.

4. On the other hand, Mr. Krishanu Banik, learned Counsel appearing for the claimants/opposite parties herein, has submitted that this application is not at all maintainable. The parties have already adduced evidence. Thereafter the evidence has been closed. Argument has been heard and then the judgment has been delivered awarding compensation. This being the position, an appeal lies u/s 173 of the Motor Vehicles Act, 1988 and no revision lies. In support of his decision he has relied upon Calcutta State Transport Corporation Vs. Sudama Ghosh, New India Assurance Co. Ltd. Vs. Rafeeka Sultan and Others, and Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, thus he has prayed for dismissal of the application.

5. Now, therefore, the question that arises for decision is whether the application is maintainable in law.

6. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that this application has been preferred by the Petitioner against the judgment and order dated 20.06.06 passed by the learned judge MACC Tribunal, 3rd Court Burdwan in MACC Case No. 126 of 2005 thereby awarding compensation to the tune of Rs. 11,26,980/- on contests. In that case the owner of the vehicle, namely S.B.S.T.C., participated in the proceeding. They filed a written statement and they cross-examined the witnesses of the claimants on all material points. The Insurance Company / Petitioner herein also contested the said claim application but it was not allowed to cross-examine the witnesses on the ground that there was no scope for cross-examination as the owner of the offender vehicle was contesting.

7. There is no dispute that both the owner of the offending vehicle and the Insurance Company are contesting the claim application. When the owner of the vehicle is contesting and the Insurance Company has adopted the situation that it was not required to cross-examine the P Ws and it has admitted such position by not filing any revision and allowed all the witnesses on behalf of the either of the parties to be examined, I am of the view that chapter of permission to cross-examine has become to an end and there is no scope for reopening of the same. Since judgment has already been delivered and such judgment is under

challenge, I am to consider whether there is any scope of entertaining this application under Article 227 of the Constitution. Now Section 173 of the Motor Vehicles Act, 1988, clearly lays down the provision for appeal which is quoted below:

173 Appeals. (1) Subject to the provisions of Sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent, of the amount so awarded, whichever is less, in the manner directed by the High Court:

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the Appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees.

8. The Petitioner has not been permitted to cross-examine the witnesses on all grounds, as available u/s 170 of the Motor Vehicles Act as the owner of the offending vehicle is contesting. This being the position the Insurance Company is permitted to challenge the claim case on limited grounds, i.e. permissible u/s 149(2) of the Motor Vehicles Act, 1988 and not on all points. This has been observed by a Bench of this Hon''ble Court the other Bench of the M.P. High Court and the Supreme Court of India. The Decision reported in 2008 ACJ 2627 clearly lays down that when an award is passed by a tribunal, the High Court should not invoke its power under Article 227 of the Constitution. This decision is based on the decision *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, [reported in 2003 (2) PSE 26. Similarly, in the case of *New India Assurance Co. Ltd. Vs. Rafeeka Sultan and Others*, (M.P. at Jabalpur, it has held that when the statute provides for an appeal, the quantum of compensation cannot be challenged at the instance of Insurance Company which has limited defences. The Insurance Company cannot challenge the quantum of compensation in revision u/s 115 of the Code of Criminal Procedure or in a petition under Article 227 of the Constitution.

9. In the case of *Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others*, it has been held that when the Insurance Company is not permitted to contest in the claim case u/s 170 and it did not challenge the award passed by the tribunal allowing interest u/s 173 of the Motor Vehicles Act, the Writ Application filed by the Insurance Company before the Hon''ble High Court is not maintainable.

10. Mr. Gangopadhyay has referred to the decision of *Major S.S. Khanna Vs. Brig. F.J. Dillon*, wherein it has mainly been observed that the High Court can exercise jurisdiction under Article 115 of the CPC when the Lower Court has

failed to exercise the jurisdiction vested in it or acted illegally or material irregularity. This deals with exercise of power when there is no provision of appeal but in the instant case I have already stated that Section 173 provides for preferring an appeal against the judgment and not revision. Therefore, this decision is not applicable.

11. In the other case namely M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd., preferred by Mr. Gangopadhyay, a revisional application was entertained against an order under Order 6 Rule 17 of the CPC i.e. amendment of pleading. This is permissible because there is no provision of appeal against an order under Order 6 Rule 17 of the CPC. This is not the situation at all in the instant case. Mr. Gangopadhyay has also referred to the decision of United India Insurance Co. Ltd. Vs. Netai Chandra Ghosh and Others, and submits that a revision is permissible under Article 227 of the Constitution. In that decision, it was decided that an award can be challenged if the company can show that the illegality in the award has come within the parameters of the exercise of jurisdiction under Article 227 of the Constitution of India. I have held earlier at that this is not the stage of challenging the fact that the company was not allowed to cross-examine the witness. So, with due respect to the learned Lawyer, I hold that this decision is not applicable in the instant appeal.

12. In view of the above findings I am of the clear view that the application is not maintainable at all in its present form and in law.

It is, therefore, dismissed.

13. Considering circumstances there will be no order as to costs.

14. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.