

(2010) 08 GAU CK 0007
In the Gauhati High Court
Case No : CRP No. 25 of 2010

National Insurance Company Ltd.

APPELLANT

Vs

Nani Gopal Debnath and Others

RESPONDENT

Date of Decision : 26-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 47 Rule 1(2), Order 47 Rule 7, 115
Constitution of India, 1950 — Article 136, 226, 227, 32
Motor Vehicles Act, 1988 — Section 149, 149(2), 166, 169, 170

Citation : (2010) 08 GAU CK 0007

Hon'ble Judges : T. Nandakumar Singh, J

Bench : Single Bench

Advocate : D.K. Biswas, for the Appellant; Somik Deb, for the Respondent

Final Decision : Dismissed

Judgement

T. Nandakumar Singh, J.—Heard Mr. D.K. Biswas, learned Counsel for the Petitioner-insurance company as well as Mr. Somik Deb, learned Counsel appearing on behalf of the Respondent-claimants.

2. This revision petition is directed against the judgment and order of the learned Motor Accident Claims Tribunal (M.A.O.) dated 13.7.2009 rejecting the application for review under Order XLVII, Rule 1 of the CPC filed by the Petitioner-insurance company for reviewing judgment and award dated 2.7.2007 passed by the learned Claims Tribunal in T.S. (M.A.C.) 241 of 2005.

3. For deciding the matter in issue, the only bare minimal facts loading to filing of T.S. (M.A.C.) 241 of 2005 are recapitulated:

The Respondent-claimants instituted T.S. (M.A.C.) 241 of 2005 u/s 166 of the Motor Vehicles Act, 1988 (MV Act, 1988) for a compensation of Rs. 13,27,000 (Rupees thirteen lakh twenty-seven thousand) only for the death of their full blood brother, Shri Rana Debnath, due to vehicular accident on 3.3.2005 near

Suijyamani Nagar ration shop over Agartala-Bishalgarh road due to rash and negligent driving of the offending vehicle (Commander Jeep) bearing registration No. TR. TR-01-A/2588 by its driver. The said offending vehicle is insured with the Petitioner-insurance company.

The Insurance Company on receipt of process of learned Claims Tribunal entered appearance and by filing their written statement keenly contested the said claim by denying each and every claim. The Petitioner-Insurance Company also denied the incident of the accident that had occurred for the rash and negligent driving of the offending vehicle by its driver and further asserted that the claim of the Respondent-claimants should be dismissed. The learned Claims Tribunal after perusal of the rival contentions of the parties in their respective pleadings had framed the following issues for deciding T.S (M.A.C.) 241 of 2005:

(1) Whether the deceased Rana Debnath died on 3.3.2008 over the Agartala-Bishalgarh road because of vehicular accident and if so whether the said incident of accident had occurred for the rash and negligent driving of the vehicle (offending vehicle) bearing registration No.TR-01-A-2588 by its driver?

(2) Who will pay the compensation? and

(3) Whether the Petitioners are entitled to any relief and if so up to what extent?

4. On perusal of records of the LCR of TS (M.A.C.) 241 of 2005 and also memo of the revision petition. It appears that the Petitioner-Insurance Company did not obtain the leave u/s 170 of the M.V. Act, to defend the claim of the Respondent-claimants on all or any of the grounds which are available to the persons against whom the claim is made.

The learned Claims Tribunal, for the reasons mentioned in the judgment and award dated 2.7.2007 passed in T.S (M.A.C.) 241 of 2005 by using the multiplier, "16" had calculated the total amount of compensation to the tune of Rs. 3,84,000; and also further awarded an amount of Rs, 2,000 as funeral expenses of the deceased, Rana Debnath and another amount of Rs. 2,000 as transportation charge. The Petitioner-Insurance Company was directed to pay the compensation, i.e., total amount of Rs. 3,88,000 (Rupees three lakh eighty-eight thousand) to the Respondent-claimants within two month with interest at the rate of 6% from the date of filing of the claim petition, i.e., 24.04.2005 and it the Petitioner-insurance company failed to pay the awarded compensation amount within two months from the date of passing the judgment and award, shall have to pay interest at the rate of 9% per annum over the awarded compensation till realization of the same from the date of filing the claim petition.

5. It is admitted case of both the parties that the Claims Tribunal has all the trappings of a Court and the proceedings before it closely resemble to the proceedings in a civil Court; and that Legislature purposely did not make all the provisions of the Code applicable to the proceedings before the Tribunal which are summary in nature as the whole intent of the Legislature was to ensure the

speedy disposal of the claim petition filed by the injured and/legal representative/ dependant of the person died due to motor accident. It is also admitted case of both the parties that in view of Section 169 of the Motor Vehicles Act, 1988 (M.V. Act), the Claims Tribunal has power to decide its own procedure for dealing with claim application and resort to any provisions of CPC on the principles of justice, equity and good conscience. Both the parties further or admitted the settled principles of law that the circumstances under which the judgment or/decree can be reviewed are provided under Order XLVII of the Code of Civil Procedure. It is well settled that the power of review is not an inherent power it must be conferred by law either specifically or by necessary implication. Regarding this point we may refer to the decisions of the Apex Court in (1) Patel and Narshi Thakershi v. Pradyuniansinghji Arjunsinghji AIR 1970 SC 123 , (2) Kewal Chand Mimani (d) by Lrs. Vs. S.K. Sen and Others,

6. After admitting that the Tribunal has all the trappings of a Court and the proceedings before it closely resemble to the proceedings in a civil Court the Petitioner-Insurance Company filed the application for review of the judgment and award dated 2.7.2007 passed in T.S. (M.A.C.) 241 of 2005 only on the ground that the computation of compensation has been made on the basis of wrong multiplier. What is the appropriate multiplier is to be decided by the learned Claims Tribunal in the MAC case by giving reasons; however, the multiple number/multiplier to be applied according to the Claims Tribunal in the given case may not be correct. As stated above, the Petitioner-insurance company has not obtained the leave u/s 170 of the M.V. Act, 1988.

7. As both the parties admitted in the instant case that the Claims Tribunal has all the trappings of a Court and the proceedings before it closely resemble to the proceedings in a civil Court; it is required to see what are the grounds for filing review petition under Order XLVII of the Code of Civil Procedure. It would be apposite to quote relevant portions of Order XLVII of the CPC as under:

ORDER XLVII-REVIEW

1. Application for review of judgment, -(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree issued or order made against him may apply for a review of judgment to the Court which passed the decree or

made the order.

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7. Order of rejection not appealable. Objections to order granting application.-(1) An order of the Court rejecting the application shall not be appealable but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under Sub-rule (2) unless notice of the application has been served on the opposite party.

8. On bare perusal of Order XLVII, Rule 1 of the CPC it is crystal clear that application for review of the order could be filed; (i) when there is error apparent on the face of the record, (ii) discovery of new and important matters or evidence, which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order is made; and (iii) for any other sufficient reason, desires to obtain a review of the decree passed or order made against him.

9. The learned Claims Tribunal who has treated the application for review as an application under Order XLVII, Rule 1 of the CPC passed the impugned judgment and order dated 18.7.2009 for rejecting the review petition for the reason that the grounds on which review of the judgment and order is sought for is not an error apparent on the face of record and it is an appeal in disguise. The impugned judgment and award dated 2.7.2007 passed by the learned Claims Tribunal in T.S (M.A.C.) 241 of 2005 is admittedly an appealable order and appeal could be filed against it u/s 173 of the M.V. Act, 1988. As stated above, the Petitioner-Insurance Company did not obtain leave u/s 170 of the M.V. Act, therefore, the appeal against the judgment and award dated 2.7.2007 passed. In T.S. (M.A.C.) 241 of 2005 by the Petitioner-Insurance Company should be confined only on the limited grounds mentioned in Section 149(2) of the M.V. Act. By filing review petition in disguise of an appeal, taking advantage of legal acumen in drafting the review petition, Petitioner-insurance company prayed for

re-hearing T.S. (M.A.C.) 241 of 2005 on different grounds over and above, limited grounds mentioned in Section 149(2) of the M.V. Act, 1988.

10. The Apex Court as early as 2003, in clear terms, in *Sadhna Lodh Vs. National Insurance Company Ltd. and Another*, hold that "right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Articles 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal." Paras 4, 5 and 6 of the SCC in *Sadhna Lodh*'s case (*supra*) read as follows:

4. It is not disputed that u/s 173 of the Act, an insurer has right to file an appeal before the High Court on limited grounds available u/s 149(2) of the Act. However, in a situation where there is a collusion between the claimant and the insured or the insured does not contest the claim and further, if the Tribunal does not implead the Insurance Company to contest the claim, in such a situation it is open to an insurer to seek permission on the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merit, in that case it is open to the insurer to file an appeal against the award of the Tribunal on merits. Thus, in such a situation, the insurer can question the quantum of compensation awarded by the Tribunal.

5. However, learned Counsel for the Respondent argued that since an insurer has limited grounds available u/s 173 of the Act, it is open to an insurer to file a petition under Article 226/227 of the Constitution.

6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the ground of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided u/s 149(2) of the Act (see *National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others*, This being the legal position, the petition filed under article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court u/s 115 of the CPC ("Code of Civil Procedure"). Where remedy for filing a revision before the High Court u/s 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected,

and a State enactment has barred the remedy of filing revision u/s 115, Code of Civil Procedure, in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision petition before the High Court u/s 115, Code of Civil Procedure, no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution.

11. The ratio laid down in *Sadhna Lodh's* case (supra) is also followed by the Apex Court in *Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others*, Paras 17 and 18 of the SCC in *Bijoy Kumar Dugar's* case (supra) read as follows :

17. It is not in dispute that the right of appeal is a statutory right to the parties and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by MACT. u/s 173 of the Act, an insurer has a right to file an appeal before the High Court on limited grounds available u/s 149(2). The appeal being a product of the statute it is not open to an insurer to take any plea other than those provided u/s 149(2) of the Act. However, in a situation where there is collusion between the claimant and the insurer or the insured does not contest the claim and further, if MACT does not implead the Insurance Company to contest the claim, in such a situation it is open to the insurer to seek permission of MACT to contest the claim on the ground available to the insured or to a person against whom the claim has been made. If permission is granted and the insurer is allowed to contest the claim on merit, in that case it is open to the insurer to file an appeal against the award of MACT on merits. Thus, in such a situation, the insurer can question the quantum of compensation awarded by MACT. As noticed earlier in the present case, the insurer made a challenge to the award of MACT before the High Court in the writ petition on the ground of its liability to pay the interest on the amount of compensation for a specified period without obtaining the permission of MACT as contemplated under the statute. Thus, in the light of the decision of this Court in *Sadhna Lodh v. National Insurance Co. Ltd.* (2993) 3 SCC 524 dealing with the provisions of Sections 173 and 149(2) of the Act and the provisions of Articles 226 and 227 of the Constitution and also Section 115 of the Code of Civil Procedure, 1908 this Court held that since the insurer has a remedy by filing an appeal before the High Court on the available defences envisaged under the statute, writ petition under Article 226/227 of the Constitution by an insurer challenging the award of MACT is not maintainable.

18. In our view, the above judgment clinches the issue that the writ petition filed by the Insurance Company was not maintainable against, the order of MACT awarding interest at the rate of 10% per annum on the amount of compensation from the date of institution of the claim petition till the date of payment. The impugned order, accordingly, is set aside. This appeal is allowed. Consequently,

the writ petition is dismissed. The award of MACT granting compensation to the claimants along with interest is fully justified and it is accordingly maintained. The parties are left to bear their own costs.

12. In the case in hand, it is not the case of the Petitioner-Insurance Company that because of collusion between the Respondent-claimant and insurer, the insurer does not contest the claim and also the Petitioner-Insurance Company was not impleaded as party in the MAC case. As stated above, Petitioner-Insurance Company was one of the Respondents in the MAC case and Petitioner-Insurance Company also contested the MAC case; but the grievance made out in the present revision petition is that the learned Tribunal had not correctly decided the MAC case on merit vide impugned judgment and award and, therefore, Petitioner-Insurance Company wanted to assail the impugned judgment and award on different grounds over and above the grounds mentioned in Section 149(2) of the M.V. Act by taking advantage of legal acumen in drafting the review petition, which is not permissible under the law, for the reasons discussed above.

13. It is also settled position of law that principle of finality of the judgment of superior Court should be maintained inasmuch as review petitions are not to be taken as a routine course. It is also equally well settled that as early as 1941, the Federal Court had discussed the principles governing the power of review in AIR 1941 1 (Federal Court) and held that the Federal Court will not sit as Court Appeal from its own decisions nor will it entertain applications in review for rehearing and also that an order made is final.

14. The Apex Court in Col. Avtar Singh Sekhon Vs. Union of India (UOI) and Others, held that review is not a routine procedure and review does not lie even on a wrong decision. The Apex Court in Lily Thomas, Vs. Union of India and Others, held that review is not an appeal in disguise. The power to review cannot be exercised merely to substitute the point of law Relevant portion of the judgment of the Apex Court in Lily Thomas's case (supra) read as under:

The power of review is not an inherent power. It must be conferred by law. A review petition is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetuation shall result in a miscarriage of justice nothing would preclude the Court from rectifying the error.

The power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for

review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practiced. However, this Court in exercise of its powers under Article 136 or Article 32 of the Constitution and upon satisfaction that the earlier judgment have result in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment.

15. The Apex Court in *Sow Chandra Kante and Another Vs. Sheikh Habib*, held that an order passed by the Superior Court i.e., Supreme Court or the High Court is final and cannot be interfered with lightly. An application for review of the earlier judgment of superior Court cannot be entertained for the purpose of rehearing through different Counsel and once an order had been passed by the Court, a review thereof must be subject to the Rules of the game and cannot be lightly interfered with and review of the judgment is a serious step and reluctant resort to. It is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.

16. The Apex Court in *Union of India (UOI) Vs. Paul Manickam and Another*, held that a review application for bringing a new case which could have been mentioned earlier is not maintainable. Relevant portion at para 19 of the SCC in *Paul Manickam's* case (*supra*) is quoted hereunder:

As noted *supra*, for the first time in the review application it was disclosed that the representation was made to the President of India and no representation was made to the State of Tamil Nadu or the Union of India who were arrayed in the writ petition as parties. This appears to be a deliberate attempt to create confusion and reap an undeserved benefit by adopting such dubious device. The High Court also transgressed its jurisdiction in entertaining the review petition with an entirely new substratum of issues. Considering the limited scope for review, the High Court ought not to have taken into account factual aspects which were not disclosed or were concealed in the writ petition.

17. As discussed above, it is crystal clear that the Respondent-claimant made an attempt by filing review petition for re-hearing T.S. (M.A.C.) 241 of 2005 which has been finally disposed of vide judgment and award dated 2.7.2007 on merit over and above the limited grounds mentioned in Section 149(2) of the M.V. Act, 1988.

It is so well settled that even the constitutional authority cannot do indirectly what is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing any act, such provision cannot be allowed to be defeated by adoption of any subterfuge; and that would be clearly a fraud on the constitutional provision. Ref.: Decision of the Apex Court (Constitution Bench) in *New Swadeshi Dittillery Vs. The State of Bihar and Others* .

It is also well settled that where power is required to be exercised by a certian

authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. Ref.: Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others, .

Where statute vests certain power in an authority to be exercised in particular manner, held, the power has to be exercised only in that manner. Ref.: Commr of I.T., Mumbai v. Anjum M.H. Gharwala (2002) 1 SCC (CB).

When a statutory authority is required to do a thing in a particular manner, the same must be done in that manner alone. Ref.: Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others,

The Apex Court in Haryana State Industrial Dev. Corp. Vs. Shakuntla and Others, held that "where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, deviation to act in a different manner which does not disclose any discernible principles which is reasonable itself shall be labeled as arbitrary."

18. Under Order XLVII, Rule 7 of the CPC an order of the Court rejecting the application for review is not appealable and in case of rejection of the application for review of the judgment and order the remedy left open to the review Petitioner is to file appeal against the original judgment and order against which application for review had been filed and rejected. Regarding this point we may refer to the decisions of the Apex Court in (1) Shanker Motiram Nale VS . Shilolsing Gannusing Rajput, (1994) 2 SCC 753 (2) Suseel Finance and Leasing Co. v. M. Lata and Ors. (2004) 13 SCC 675 and (3) M.N. Haider and Ors. v. Kendriya Vidyale Sangathan (2004) 13 SCC 677. The Apex Court in Shanker Motiram Male's case (supra) held that appeal against the order of the High Court rejecting review petition is obviously incompetent and appeal against would be against the basic judgment. Order XLVII, Rule 7 of the CPC bars an appeal against the order of the Court rejecting review. The ratio laid down by the Apex Court in Shanker Motiram Male's case (supra) has been followed in the subsequent case of Suseal Finance and Leasing Co.'s case (supra) and M.N. Haider's case (supra).

19. From the ratio laid down by the Apex Court in the cases discussed above, it is clear that appeal should be against the basic judgment and order against which review petition had been filed but rejected. In the present case, Petitioner-Insurance Company who knew quite well that the appeal against the judgment and order of the Claims Tribunal dated 2.7.2007. In T.S. (M.A.C.) 241 of 2005 could be filed only on the limited grounds available u/s 149(2) of the a M.V. Act, 1988 made an attempt by resorting to application for review for challenging judgment and order dated 2.7.2007 on different grounds over and above the limited grounds mentioned in Section 149 of the M.V. Act, 1988; and for re-hearing T.S. (M.A.C) 241 of 2005 on merit which is not at all permissible under the M.V. Act, 1988. As discussed above, what cannot do directly is not permitted to do indirectly and where power is required to be exercised by a certain

authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. This Court also reiterates that according to the ratio laid down by the Apex Court in the cases discussed above in the case of rejection of an application for review, proper remedy left open to the review Petitioner is to file appeal against the basic judgment and order against which review application had been filed but rejected.

Accordingly, the present application for revision against the impugned judgment and order dated 13.7.2009 passed by the learned Member (MACT) rejecting the application for review of the judgment and award dated 2.7.2007 passed in T.S (M.A.C.) 241 of 2005 is not maintainable and, accordingly, dismissed.