
(2002) 12 KAR CK 0007

In the Karnataka High Court

Case No : M.F.A. No. 2469 of 1995 c/w Cross-objection No. 221 of 2002

New India Assurance Co. Ltd. and Another

APPELLANT

Vs

Devi Kumari and Others

RESPONDENT

Date of Decision : 19-12-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Motor Vehicles Act, 1988 — Section 110 (2-A), 170

Citation : (2004) ACJ 927 : (2003) 4 KCCR 362 SN

Hon'ble Judges : M.F. Saldanha, J;K. Ramanna, J

Bench : Division Bench

Advocate : O. Mahesh, for the Appellant; D. Vijaya Kumar, for the Respondent

Judgement

M.F. Saldanha, J.—We have heard the learned counsel in both these appeals or rather in the M.F.A. filed by the insurance company and the owner and the cross-objections filed by the original claimants which have been separately numbered as the companion M.F.A. A very interesting, rather unusual but important aspect of the law has been thrown up before us which we shall summarise. The owner, though served before the Tribunal did not appear nor did he contest and he was placed ex parte. The insurance company has contested the claims on merits and being aggrieved by the order passed by the Claims Tribunal, the insurance company and the owner have filed M.F.A. No. 2469 of 1995. It is not as though the owner is not a party as often happens, but in this instance the owner is a co-appellant. We need to also clarify that despite the owner not having contested before the Claims Tribunal that the insurer was permitted by the Tribunal to cross-examine and to contest on merits. The respondents' learned counsel brings it to our notice that no leave had been applied for u/s 170 [Section 110(2-A)] of the Motor Vehicles Act, nor had it been granted and that this formality would make some difference particularly in view of the latest judgment of the Supreme Court. The maintainability of the appeal filed by the insurance company and the owner has been assailed by the other side and the basis for this is that the Supreme Court in the latest decision in National Insurance Co. Ltd.,

Chandigarh Vs. Nicolletta Rohtagi and Others, , has in terms held that in the absence of specific sanction being obtained u/s 170, that an appeal by the insurer alone directed against the aspect of quantum would not be maintainable. In the light of the law as now laid down by the Apex Court the respondents' learned counsel has submitted that M.F.A. No. 2469 of 1995 will have to be dismissed on the ground of maintainability.

2. The learned counsel who represents the appellants in this appeal put forward two propositions. First of all, he points out that the appeal was governed by the law as it was then in force, i.e., in the year 1995 and he demonstrates to us that the appeal was perfectly maintainable and was in keeping with the law then in force which position is undoubtedly correct. His submission is therefore that as far as maintainability is concerned, this is the legal position which we have to accept and apply because the Apex Court judgment cannot have retrospective effect and furthermore he is certainly entitled to argue that it is impossible to visualise sweeping changes in the law or interpretation of law that may take place at a later point of time. While the learned counsel accepts the position that the law as interpreted and in force on the date of hearing of the appeal will undoubtedly govern the appeal on merits, he submits that the court will have to make a distinction with regard to maintainability because of what has been pointed out by him. The second ground canvassed is that on paper and on record the owner is a co-appellant and that unlike many other cases where the owner is not a party this appeal will not be hit by the Apex Court decision. His submission is that in a given instance even if a party does not contest the proceeding in the first round for whatever reason which may include default, that if the order is unjust, unfair, excessive or vulnerable legally, the law does not preclude the aggrieved party from filing an appeal even if the party has not contested in the first round and invariably the only requirement is that the party has to satisfy the appellate court as to why the default had taken place before the trial court. As far as the second proposition is concerned, while there is considerable substance in what has been pointed out, on the facts of the present case we find that it may not be necessary to examine this proposition in depth because the co-appellant who is the owner has not appeared even at the hearing of the appeal nor has any ground been set out for his not having contested before the trial court and consequently, we will have to take it that in these circumstances the owner would be precluded from maintaining any appeal. This is precisely where the problem emanates because the learned advocate submits that if the owner is disqualified and is not suited the insurance company will be left alone as the sole appellant and the appeal would therefore have to fail in the light of the decision reported supra. In the present instance, having regard to the fact that the owner has not appeared and shown cause even before this court, we have no option except to dismiss the appeal filed by him and when that happens, ipso facto the same consequences would carry over to the insurance company.

3. As regards the first proposition canvassed by the learned counsel Mr. Mahesh what we need to observe is that while there can be no dispute about the fact that

issues such as maintainability are required to be governed by the law as it was in force when the appeal was filed, that at the same time, the court hearing the appeal is equally governed by the subsequent changes in law and this is not the only instance in which a party to a litigation has been prejudicially affected by such changes. But unfortunately, that is the scheme of working of the courts as otherwise, there may be serious complications which arise if the court were to close its eyes to the current law and apply the old law. It is in this situation that we are required to hold that M.F.A. No. 2469 of 1995 will have to be dismissed on the ground of maintainability.

4. That brings us to an even more serious complication because the appellants' learned counsel Mr. O. Mahesh has pointed out to us that the consequences of the dismissal of his appeal would have the automatic effect of dismissal of the cross-objections because that litigation is not only interdependent but as learned counsel rightly points out it springs from or owes its existence entirely to the main appeal and if the main appeal is dismissed on the ground of maintainability then its existence will have to be held as having ceased ab initio. Mr. Mahesh points out to us that the court would be relegated to the position then, that there is no appeal before the court having regard to the ground on which it has been dismissed and anything that has sprouted or sprung from the appeal would turn out to be stillborn and would also meet with the same fate. To reinforce his argument learned counsel demonstrates to us that where the claimants have independently challenged the order of the Tribunal on merits, the position would be entirely different because that appeal has an independent existence. A cross-objection is wholly dependent and owes its existence to the appeal filed by the other side and Mr. Mahesh demonstrates that assuming that his appeal had not been filed, the period of limitation having expired, the respondents could never have maintained an appeal and as the present record indicates, the respondents have not indicated any desire to challenge the original order and were quite satisfied with it but, have only used the existing appeal as a platform to maintain the cross-objections for enhancement. The learned counsel therefore submitted that the only correct order which the court ought to pass if the first appeal is dismissed on the ground of maintainability is that the cross-objections would also have to go on the same ground.

5. His submission is not only logical but one which merits serious consideration and, in our opinion, the argument is virtually flawless: Normally, we would have accepted the argument and straightaway dismissed the cross-objections, but as sometimes happens, the law takes strange turns and the respondents' learned counsel has advanced certain submissions before us on the basis of which he has contended that his appeal even though termed as cross-objections is capable of surviving independently. For this purpose he has drawn our attention to the provisions of Order 41, Rule 22 of the Civil Procedure Code, first of all to point out that on the opposite party having filed the appeal his right to file cross-objections has germinated. In other words, he submits that even assuming that his clients were for whatever reason not inclined to or unable to challenge the

original order, that when they found that the other side has presented a challenge to it, the law provides them with the facility of presenting a counter challenge which includes the right to ask for enhancement. He submits that it is, for this reason that Order 41, Rule 22 clearly prescribes that the cross-objections are not treated as a counter application in the existing appeal but the law contemplates that they shall be numbered and treated as an independent appeal. The provisions of Rule 22 (1) do support this argument which is why the cross-objections have been numbered as an independent appeal. Our attention was then drawn to Sub-clause (4) of Rule 22 wherein it has been demonstrated that even if the original appeal is withdrawn or dismissed for default, the cross-objections shall nevertheless be heard and determined, or in other words, this appeal shall be heard independently on merits. The learned counsel raised the important point that Sub-clause (4) clarifies the legal position that even after disposal of the original appeal the cross-appeal does survive and will have to be heard and disposed of on merits. He had drawn our attention to a Division Bench decision of this court reported in *The Assistant Commissioner and Land Acquisition Officer, Gulbarga Vs. Chandrashekar Balgundgi*, wherein it so happened that the main appeal was disposed of on merits and the argument was canvassed that cross-appeal which came up for hearing independently would not survive as it would be covered by the original order. The Division Bench upheld the proposition that the cross-appeal was an independent appeal and even though the main appeal had been disposed of, the cross-appeal still required to be heard and decided on merits. This decision supports the respondents' learned counsel in his submission that the survival of the cross-objections does not depend on the existence of the original appeal nor for that matter would its life be co-extensive.

6. We do need to apply our minds to the last aspect because learned counsel Mr. Mahesh submitted that he is not being merely technical but he is only placing before the court the correct legal position, as he points out that Sub-clause (4) contemplates a situation where either because of default or mischief the main appeal is either withdrawn or dismissed for default and that naturally, the law postulates that the cross-objector should not be made to suffer because of this. His submission is that if the main appeal has been dismissed on the ground of maintainability then it affects the very genesis or the inception of the cross-appeal and even though it seems to be an unprecedented situation, which has not arisen earlier, his submission still holds good in the unusual situation that has arisen in these cases. We have examined this aspect of the law and what we find is that, had the appeal filed by the insurance company been dismissed on the ground of maintainability prior to notice being issued to respondent then there would have been no question of any argument with regard to the maintainability of a cross-appeal. When the notice was issued, the right accrued to the respondents to file their cross-appeal which they have done, and it so happens that in the circumstances set out by us the main appeal has been dismissed on the ground of maintainability and in our considered view, this would be very

similar to a situation in which the main appeal is dismissed on merits before the cross-appeal is heard and in that unusual situation it would be wrong to hold that the cross-appeal must fail merely because of what has happened to the main appeal. Though the situation did appear to be very complicated on a simple analysis and having examined the law laid down that when once one has filed the cross-appeal on an independent existence of its own, we cannot uphold the proposition that the fate of the main appeal must govern the fate of the cross-appeal because in fact, experience has shown that in many instances the main appeal has failed and the cross-appeal for enhancement has survived.

7. Coming to the merits we need to point out that since learned counsel who represents the appellants in the main appeal are also respondents in the cross-appeal, that no real prejudice has been caused to the insurance company because it is only the limited issue of whether enhancement should be granted or not. We have heard both the learned counsel on merits and we have also examined the record threadbare. The main submission canvassed on behalf of the claimants is that the deceased was aged 28 years that he had a young wife who had just given birth to twins hardly 8 days prior to the date of accident and that the Tribunal has taken his age as 35 years which ultimately reduced the quantum awarded under this head. The Tribunal has proceeded on the basis of the record, i.e., post-mortem report which set out the age as 35 and the only evidence produced on behalf of the claimants is the copy of the horoscope. We have been extremely liberal in this field of law in the matter of computation of compensation where the facts justify, but with all of that, despite a strong plea being made by learned counsel that the horoscope be accepted, we are unable to do so for only one reason because this is a mere piece of paper of which the authenticity has not been established and it would be hazardous to use that as the evidence for proof of age. Under these circumstances we are required to proceed on the basis that the age was 35 years,

8. Next, the learned counsel points out to us that even assuming the age as 35, having regard to the law as has been interpreted by the Full Bench that the correct multiplier would be 15 and not 13. The opponents' learned counsel had objected to any variation on the ground that this is not an accident that has taken place just prior to or shortly before the amendment of 1994 but he demonstrated that it had occurred in the year 1988 which is a good six years earlier and that therefore, pre-1994 (Sic. post) tabulation would really not apply to this case. We find it difficult to uphold this objection because the tabulation drew a line between pre-1994 and post-1994 and the courts, have irrespective of how much earlier the accident occurred applied that formula and we cannot make any distinction as far as the present case is concerned. Upholding this contention therefore, the compensation payable under head 2, namely, loss of dependency would have to be enhanced from Rs. 4,16,052 to Rs. 4,80,060. To this we have also added on the traditional amounts aggregating to Rs. 30,000 but what we need to point out is that there is one another head in respect of which some enhancement is necessary.

9. The claimants learned counsel did argue extensively before us in support of the proposition that income which has been held to be Rs. 4,000 p.m. be enhanced at least to Rs. 6,000 p.m. He advanced several reasons for this including the fact that the income tax returns themselves show an escalation in the last 2 years and, secondly, that all the records of the firm have been produced to show that the deceased was doing business of a considerable volume and that therefore, the court would have to take judicial notice of this. We would have perhaps done an evaluation of this material except for the fact that we consider it improper to depart from the figures that are set out in the income tax returns and the assessment order which binds claimants as it would be tantamount to upholding the argument that the income tax returns do not represent the true income and that the deceased was in fact earning more and declaring less. This is not permissible and it is only for this reason that despite persuasion from the applicants' advocate, we are unable to evaluate the other heads of material and alter the income figure. We only need to observe that the Tribunal has not stuck to the income tax returns and has been a little more liberal possibly in view of what has been pointed out by the applicants' learned counsel and has therefore computed the income at Rs. 4,000 p.m. which figure we confirm.

10. This is a case which has been well conducted before the Tribunal unlike the majority of others where we had occasion to make some observations and the applicants have produced even the air tickets for travelling to Jodhpur from Bangalore via Bombay with the body as the deceased belonged to Rajasthan. His native place is some distance away from Jodhpur. Apart from the air tickets the invoice for the carriage of the body has also been produced and totalling up these amounts we need to enhance the heads 1 and 4 by a further amount of Rs. 10,000. In the aggregate, therefore, compensation amount payable to the applicants would stand enhanced to Rs. 5,20,060.

11. The applicants' learned counsel has advanced a very strong plea to the court pointing out that deceased had a promising business, that he left behind a young wife and newly born children, that the record shows that the whole of the business had to be closed down as there was nobody to run it and that in these difficult circumstances every rupee of the compensation would virtually go to help the aggrieved party and on this ground he has requested this court that this is a fit case to step up the rate of interest that has been awarded by the Tribunal which was 6 per cent. We accept these submissions and enhance the rate of interest to 8 per cent.

12. The respondent insurance company is directed to deposit the balance amount with the Tribunal within an outer limit of 12 weeks from today. On receipt of the amount the Tribunal to release the same to the applicant No. 1 wife.

13. Normally, we would have directed that some apportionment be done and some investment also be done. We are not inclined to award any of the enhanced amount to the parents. We would prefer that all of it should go to the benefit of

the children and the wife and the mother being the guardian the whole of the amount be released to her because we would not be aware as to what her commitments would be, i.e., education etc. If the amount is to be invested we leave it to her good sense to provide income, not only for her benefit but also for the benefit of the children. This is the reason why we are not directing any apportionment or investment and we direct that the amount be released to the applicant No. 1 wife. We need to clarify, that the enhancement of interest from 6 per cent to 8 per cent will apply to the enhanced amount awarded by this court and not to the original amount.

14. It is pointed out to us that 50 per cent of the amount earlier awarded has been invested in the bank pending disposal of this appeal. Now that the appeal is disposed of, necessary steps be taken by the office of the High Court to ensure that the amount deposited is realised and paid to the claimants.

M.F.A. No. 2469 of 1995 accordingly fails and stands dismissed. The Cross-objection No. 221 of 2002 succeeds and stands disposed of.

The learned counsel Mr. O. Mahesh who represents the appellants in the first appeal is permitted to file his formal appearance with the office in the Cross-objection No. 221 of 2002 within a period of four weeks.