
(2008) 06 BOM CK 0141
In the Bombay High Court
Case No : First Appeal No. 979 of 2007

New India Assurance Co. Ltd.

APPELLANT

Vs

Ashabai Kalyan Kothi and Others

RESPONDENT

Date of Decision : 19-06-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 163A, 166, 171

Citation : (2009) ACJ 163 : (2008) 5 ALLMR 839 : (2008) 6 BomCR 89

Hon'ble Judges : Oka Abhay S., J

Bench : Single Bench

Advocate : V.N. Upadhye, for the Appellant; S.P. Chapalgaonkar, for respondents 1 to 3, for the Respondent

Judgement

Oka Abhay S., J.—The submissions of the learned Counsel appearing for the parties were heard on the last date. Considering the controversy involved, the appeal was taken up for final hearing at admission stage. Today the appeal is kept for dictation of the judgment.

2. The appellant Insurance Company has taken an exception to the judgment and Award dated 30th March, 2007 passed by the learned Member of the Motor Accident Claims Tribunal at Beed. The first to third respondents herein are the claimants who filed a claim petition invoking Section 163-A of the Motor Vehicles Act, 1988 (hereinafter referred to as the said Act.)

3. According to the case of the claimants, the 4th respondent is the owner of the truck which was validly insured with the appellant on the relevant date. The case of the claimants is that deceased was an employee of one Deelip Kishanlal Munot drawing salary of Rs. 4000/- p.m. On 9th September, 2004, the deceased was looking after the construction site of his employer. At that time, paved flooring stones were brought to the construction site by the offending truck. The deceased was supervising the work of unloading the said stones. At that time, deceased was standing near the truck. Suddenly some paved flooring stones fell on the person of the deceased from the truck. He was crushed under the said

stones. After he was taken to the hospital, he was declared as dead.

4. The claim petition was resisted by the appellant insurer. Various contentions were raised by the appellant insurer. The first contention was that the accident had occurred at a private place owned by the alleged employer of the deceased. According to the appellant, the driver of the truck was not holding a valid driving licence at the relevant time. The claim petition has been allowed by granting compensation of Rs. 3,91,000/- and interest at the rate of 9% p.a. The appellant insurer was held liable to satisfy the Award.

5. Various submissions have been made by the learned Counsel appearing for the appellant on merits relating to liability of the appellant. Apart from all the submissions on merits, the learned Counsel for the appellant invited my attention to the averments made in the claim petition filed by the claimants in which they claimed that the monthly income of deceased was Rs. 4000/-. He invited my attention to the decision of the Apex Court in the case of Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda, . Relying upon the ratio of the said decision, he submitted that the remedy u/s 163-A is available only to a distinct class. He submitted that the said remedy is confined to those whose annual income is upto Rs. 40,000/-. He pointed out the assertion made in the Affidavit in lieu of examination-in-chief of the first claimant in which it was reiterated that the income of the deceased was Rs. 4000/- p.m. He submitted that the claim petition u/s 163-A was not maintainable and only on this ground, the impugned Award deserves to be quashed and set aside.

6. The learned Counsel appearing for the original claimants placed reliance on various judgments including a judgment of a Full Bench of Karnataka High Court in the case of (Guruanna Wadi and Anr. v. General Manager, Karnataka State Road Transport Corporation and Anr.) 2001(3) T.A.C. 329 (Kan). He submitted that the claimants can always notionally bring down the income of the deceased to Rs. 40,000/- per year and in such event, a claim u/s 163-A can be entertained. He submitted that in the present case, the claimants had notionally brought down the income of deceased for bringing the case within the purview of Section 163-A. He submitted that in any event, there is a finding recorded by the Tribunal that the claimants failed to establish that the income of the deceased was Rs. 4000/- p.m. He pointed out that infact the Tribunal found that the income of the deceased was Rs. 3000/- p.m.. He submitted that in view of the said finding of the Tribunal, the petition filed u/s 163-A was certainly maintainable.

7. Without prejudice to the aforesaid contentions, the learned Counsel for the claimants submitted that if this Court is inclined to take a view that the claim petition is not maintainable, the claimants may be allowed to convert the claim petition into a petition u/s 166 of the said Act.

8. By way of reply, the learned Counsel for the appellant placed reliance on the judgment and order dated 2nd March, 2007 passed by a Division Bench of this

Court in F.A. No. 1349/04 (New India Assurance Co. Ltd. v. Rukhminibai Ashok Gore). Inviting my attention to paragraph 8 of the said decision, he submitted that this Court cannot convert a petition u/s 163-A into a petition u/s 166 of the said Act. He submitted that knowing fully well that the claim petition will not be entertained u/s 163-A and knowing fully well that it will be difficult to prove negligence against the driver of the truck, the claimants have chosen to invoke Section 163-A of said Act and therefore, now they cannot be permitted to convert the petition into a petition u/s 166 of the said Act.

9. It will be necessary to refer the averments made in the claim petition filed by the claimants. There are specific assertions that the deceased was earning Rs. 4000/- per month. My attention is invited to the Affidavit filed by the first respondent in lieu of her examination-in-chief. In the said Affidavit, it is repeatedly asserted that deceased was earning Rs. 4000/- p.m. Inviting my attention to what is stated in paragraph 7 of the claim petition, learned Counsel for the claimants pointed out that the claimants have notionally brought down the income of the deceased to Rs. 4000/-.

10. In the case of The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc., , the Apex Court had an occasion to consider the scheme of Section 163-A of the said Act. The Apex Court also referred to the scheme of Section 140 of the said Act. The Apex Court held that income of Rs. 40,000/- p.a. operates only as a cap and a claimant can always notionally bring down the income to Rs. 40,000/-. The said judgment of the Apex Court was rendered by a Bench consisting of two Hon"ble Judges. However, a Co-ordinate Bench of the Apex Court doubted the correctness of the decision in the case of Kodala (supra) and referred the matter to the larger Bench. Accordingly, the issue was considered in the case of Deepal Soni (supra). The larger Bench came to the conclusion that the case of Kodala has been correctly decided except on one aspect. The Apex Court did not approve the view in Kodala's case that if a person invokes provisions of Section 163-A, annual income of Rs. 40,000/- shall be treated as a cap. The Apex Court considered the history of legislation leading to incorporation of Section 163-A and disagreeing with the view taken in the case of Kodala held thus ;

In our opinion, the proceeding u/s 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is up to Rs. 40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act.

11. In a claim petition u/s 166 of the said Act, the claimant is required to plead and establish negligence on the part of the driver of the offending vehicle. Section 163-A which is stated to be a social security provision was brought on the statute book which creates an exception to the requirement of Section 166. Now the larger Bench of the Apex Court in the case of Deepal Soni (supra) held that the social security provision is available for a distinct class of persons whose annual income is restricted to Rs. 40,000/-. Only the persons of that category can

take benefit of the said social security provision which was enacted by the legislature with the specific object of providing a speedy and effective remedy to that particular class of persons. The Apex Court in the case of Kodala had taken a view that it may be possible to notionally bring down the income for bringing the claim within the purview of Section 163-A of the said Act. However, the said decision is no longer a good law and the case of Deepal Soni settles the issue. Therefore, assuming that in the present case, claimant had notionally brought down the income to Rs. 40,000/- p.a., the claim petition u/s 163-A will not be maintainable. In view of the law laid down by the Apex Court, it is not possible to accept the submissions made by learned Advocate for claimants based on decision of Full Bench of Karnataka High Court and the decisions of certain other High Courts.

12. Now the only issue remains is whether the claimants can be allowed to convert the petition into a petition u/s 166 of the said Act.

13. In this behalf, a reliance was placed by the learned Counsel appearing for the appellant on the decision of this High Court in the case of Rukhminibai (supra). Perusal of the said decision shows that the Division Bench has not decided the issue regarding the power of the Tribunal or this Court to allow the conversion of the petition u/s 163-A into a petition u/s 166. The Division Bench has not held that the Tribunal or this Court is powerless to do so in a given case. Perusal of paragraph 8 of the said decision shows that considering the peculiar conduct of the claimants in the said case before the Division Bench, the prayer for remanding the claim petition after converting the same into a petition u/s 166 of the said Act was rejected.

14. It must be noted here that in the present case, the claim petition filed u/s 163-A was not maintainable considering the averments made in the claim petition. When the said Act was enacted in the year 1988, Section 166 provided for a time limit for filing a claim petition. However, relevant sub-section of Section 166 was repealed by the Amending Act 54 of 1994. The provision regarding limitation for filing the claim petition u/s 166 was deleted by the legislature. In the present case, even if the claim petition u/s 163-A is liable to be dismissed on the ground that it is not maintainable, the claimants can always file a petition u/s 166 of the said Act.

15. The Tribunal as well as this Court always has a power to allow the conversion of a claim petition u/s 163-A into a claim petition u/s 166 of the said Act. The procedure is always a handmaid of justice. We are dealing with a beneficial legislation which provides for payment of compensation to the legal representatives of the victims of an accident involving a motor vehicle. The power of the Tribunal or this Court to allow conversion of the claim petition is discretionary. While exercising the discretion of allowing conversion, no doubt, the conduct of the claimants will be relevant. In a given cases, such as the case before the Division Bench in the case of Rukhminibai (supra), the Court can refuse to exercise the discretion. In the present case, the conduct of the

claimants is not such that the discretion should not be exercised in their favour. The claim petition was filed through an Advocate after setting out a specific case that income of the deceased was Rs. 4000/- p.m. The said stand was reiterated by the first respondent in the Affidavit in lieu of examination-in-chief. It cannot be said that the action of invoking Section 163-A was deliberate. The claimants have obviously acted as per legal advice. In my view this is a case where the claim petition u/s 163-A should be allowed to be converted into a petition u/s 166 of the said Act.

16. It must be stated here that there are various contentions raised by the appellant in this appeal which, if accepted, may affect the merits of the claim petition u/s 166 of the said Act and therefore, it is necessary to make it clear that all these contentions will be available to the appellant while defending the claim petition u/s 166 of the said Act and the said contentions are expressly kept open.

17. The learned Counsel for the appellant pointed out that if the claim petition u/s 166 is allowed, the appellant will be unnecessarily burdened with interest from the date of filing of the petition u/s 163-A till the date of disposal of the petition u/s 166 of the said Act.

18. The interest payable u/s 171 of the said Act is always at the discretion of the Tribunal. While passing final Award in the claim petition u/s 166 of the said Act, the Tribunal will certainly note that original claimants had filed a petition which was not maintainable and subsequently the said petition was allowed to be converted into the petition u/s 166 of the said Act. While passing final Award, the Tribunal is bound to consider this factual aspect while exercising discretionary powers u/s 171 of the said Act.

19. Hence I pass the following order.

(i) The impugned judgment and Award dated 30th March, 2007 is quashed and set-aside and M.A.C.P. No. 138/05 is restored.

(ii) On an application being made by the claimants, the learned Member of the Tribunal will allow the claimants to carry out necessary amendments to the claim petition for converting the claim petition into a claim petition u/s 166 of the Motor Vehicles Act, 1988.

(iii) It will be open for the respondents in the claim petition to file their written statements or to file supplementary written statements by adopting the earlier written statements which are already on record.

(iv) The claim petition shall be decided expeditiously.

(v) All contentions of the parties including various contentions raised by the appellant in this appeal are kept open.

(vi) The appeal is partly allowed in above terms with no orders as to costs.

(vii) In view of this judgment, it will be open for the appellant to withdraw the sums of Rs. 25,000/- and Rs. 4,68,624/- deposited in this Court.

(viii) Pending Civil Applications are disposed of.