
(1995) 06 OHC CK 0013
In the Orissa High Court
Case No : Misc. Appeal No. 526 of 1991

New India Assurance Co. Ltd.

APPELLANT

Vs

Smt. Lalita Harijan and Another

RESPONDENT

Date of Decision : 27-06-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1
Constitution of India, 1950 — Article 14
Motor Vehicles Act, 1988 — Section 149, 166(3), 173

Citation : AIR 1996 Ori 6

Hon'ble Judges : P.C. Naik, J

Bench : Single Bench

Advocate : P. Roy, L. Dash and S. Rey, for the Appellant; P.K. Handa, S.K. Panda, P.C. Das, S.K. Padhi and D. Mohapatra, for the Respondent

Judgement

P.C. Naik, J.—This order will also govern the disposal of Misc. Appeal No. 527 of 1991 (New India Assurance Co. Ltd. v. Arjun Harijan) and Misc. Appeal No. 528 of 1991 (New India Assurance Co. Ltd. v. Sambaru Harijan).

2. The facts which give rise to these appeals are simple. On 26-3-1985, 3 persons namely, (sic), Nara and Surya were killed when a truck in which they were travelling was involved in an accident. Their dependants filed separate claim petitions on 14-9-1987 which were registered as M.J.C. No. 79/87 (Smt. Lalita Harijan v. Shyamsunder) M.J.C. No. 80/87 (Sambaru Harijan v. Shyamsunder) M.J.C. No. 81/87 (Arjuna Harijan v. Shyamsunder). In each case, compensation amounting to Rs. 50,000/- was claimed from the owner and insurer of the truck.

In the claim petitions initially filed, it was alleged that the deceased (in each case) was a labourer and also used to sell firewood. It was further averred, that on the date of the accident the deceased was travelling in the truck as a passenger on payment of Rs. 5/- as fare. Subsequently on 22-7-1988, the each petition was substituted by another petition in which the averments made in the earlier petition that the deceased was a labourer and was travelling in the truck

as a fare paying passenger was withdrawn and, a new case was made out namely, that at the time of the accident the deceased was travelling in the truck as a collie who was engaged by the owner for loading and unloading the goods being carried in the truck. Alleging that the deceased died in an accident during the course of his employment, a claim for compensation was made.

3. As all three claim petitions arose out of a common accident, they were consolidated and were disposed of by the Second Motor Accident Claims Tribunal (S.O.) Berhampur by a common award dated 31-7-1991. In such claim, the claimant was held entitled to Rs. 50,000/- as compensation with interest " 6% per annum from the date of application i.e. 14-9-1987 till realisation. Aggrieved by the award, the insurer has filed these appeals namely, M.A. No. 526/91, M.A. No. 527/91 and M.A. No. 528/91, which arise out of M.J.C. No. 79/87, M.J.C. No. 80/87 and M.J.C. No. 81/87 respectively.

4. Admittedly, the accident took place on 26-3-1985 and the claim petitions were filed on 14-9-87, i.e. after a delay of nearly two years and six months. Along with each claim petition, an application for condonation of delay was also filed. As is clear from the order-sheet dated 15-2-1988 (M.J.C. No. 79 / 87), the Tribunal for the reasons best known to it, passed an order that "the application for condonation of delay was provisionally allowed subject to the final hearing, at the time of hearing, if raised". It may be mentioned that this order was passed before the opposite parties were noticed i.e. it was passed behind the back of the opposite parties. The order sheet also does not indicate whether notice on the question of limitation was issued to the opposite parties or they were heard.

5. On notice of the claim being served, the opposite parties i.e. owner and the insurer entered appearance and filed their respective written statements. The insurer raised an objection in para 10 of his written statement "that the claim is barred by time and as such the application is not maintainable." Thus, a specific plea that the claim was barred by time was raised.

6. It is apparent that during trial the Tribunal completely overlooked the fact that the delay was provisionally condoned subject to objection and, even though a specific objection was raised in the written statement, a specific issue on the question of limitation was not framed. Evidence was recorded and on the basis of the material on record, the Tribunal passed an award in the sum of Rs. 50,000/- in each case against the owner and, as the vehicle was insured with the opposite party No.2 (appellant), saddled the entire liability on the insurer. The fact that the claim petition was barred by about two years six months was not taken note of by the Tribunal in the Award. Aggrieved by the award dated 31-7-1991 passed by the Tribunal in the M.J.C. No. 79/87, the insurer has filed this appeal.

7. Though a number of grounds were urged, the only ground which requires consideration is the one of limitation. The learned counsel for the insurer submits that as the claim was filed after a delay of about two years and six months, the learned Tribunal could not entertain the application without first determining the

question of limitation and that after due notice to the opposite parties. Further, as the delay had not been condoned, submits the learned counsel for the appellant, the award in question cannot be sustained.

8. The learned Counsel for the owner, respondent No. 2 does not dispute the contentions raised by the appellant/insurer that delay was not actually condoned and that the order dated 15-2-1988 was merely provisional. She further submits that notice on the application for condonation of delay was not issued and the order dated 15-2-1988 was passed behind the back of the opposite parties.

9. On the other hand, the learned counsel for the claimant/respondent No. 1 submits that on the facts and the circumstances and in view of the order dated 15-2-88, the learned tribunal was justified in treating the delay as having been condoned and rightly proceeded to pass the award on merits. He further submits that it was open to the owner or the Insurer to file an application for framing of an appropriate issue on limitation and this having not been done, it should be taken that the objection of limitation was waived. He further submits that as the provisions relating to claims are in the nature of a benevolent legislation, these ought to be construed liberally and, in favour of the claimant. It was lastly submitted that a specific plea of limitation having not been raised in the memo of appeal, it ought not to be permitted to be raised at the stage of hearing.

10. It is true that bar of limitation has not been taken as a specific ground in this appeal but, not raising the objection of limitation cannot amount to waiver nor can it amount to an estoppel because it is the duty of the Court to notice the provision relating to limitation and give effect to it even though it has not been referred to in the pleading. Of course, if the defence of limitation rests upon a disputed question of fact and the opposite parties do not raise the plea in their written statement nor does the point of limitation arise upon the evidence, the court may refuse to frame an issue on that point at the stage of hearing. But, when the question of limitation is purely one of law capable of determination on the facts admitted or proved before the court, the court can itself raise the question suo motu and decide it. In the case at hand, disputed questions of fact are not involved for its determination. On the contrary, it is an admitted position that the claim application was filed two years and six months after the date of the accident whereas the period of limitation for filing a claim is six months from the date of the accident. In view of this admitted position, the appellant cannot be restrained from raising the plea.

11. The learned counsel for the respondent No. 1 also contended that in view of the specific provisions contained in Section 96(2) of the M. V. Act, 1939, the insurer cannot be permitted to raise the plea of limitation to defeat the claim. This submission, however, cannot be accepted. All that Section 96(2) does is that it debars the insurer from taking up any defence other than those enumerated in it to show that it is not liable although the insurer may have incurred the liability. In other words, the liability is not sought to be avoided on the ground that the insurer is not liable under the policy (though the insured may be liable). The plea

in fact is that though the risk is covered, yet, the insurer is not liable because no award can be passed against the insurer nor can he be held liable as the claim against him has become barred by time. In other words, all that is pleaded is, as the application for compensation has become barred by time, the Tribunal cannot entertain it as the remedy is barred. In my opinion, Section 96(2) cannot bar the insurer from raising the plea of limitation.

12. Under the Motor Vehicles Act, 1939, the period of limitation for filing a claim was laid down in Sub-section (3) of Section 110-A which reads thus:

"No application for compensation under this section shall be entertained unless it is made within six months of the occurrence of the accident.

Provided that the Claims Tribunal may entertain the application after the expiry of the said period of six months if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

Sub-section (3) casts a duty on the Tribunal to determine the question of limitation even though, such an objection may not have been raised by the contesting opposite parties. The words "no application shall be entertained unless it is made within six months of the occurrence of the accident" clearly indicates this. Once an application is filed, it becomes the duty of the Tribunal to ascertain whether or not it has been filed within six months from the date of the accident. If it comes to the conclusion that it has so been filed, it can straightaway entertain it and proceed with it on merits in accordance with the prescribed procedure. In case the Tribunal comes to the conclusion that the application has been filed beyond the period of six months, i.e. beyond the prescribed period of limitation, it has to stay its hands and not proceed on merits till such time as the claimant is able to establish sufficient cause for not making the application within the stipulated period of six months. In other words, the Tribunal should not entertain a claim which is apparently barred by time. The Tribunal has to first determine whether or not there was sufficient cause for not filing the application within the period of limitation. If sufficient cause is proved and accepted, the Tribunal will condone the delay and proceed with the application in accordance with law. If on the other hand, sufficient cause is not established, it will have to dismiss the application as barred by time. In the instant case, these facts have been completely overlooked by the Tribunal. It appears that the Tribunal did not carefully go through the provisions contained in Sub-section (3) of Section 110-A of the Act and therefore, entertained a time barred claim and proceeded with it on merits.

13. While dealing with the question of limitation, it will not be inappropriate to make a reference to Section 3 of the Limitation Act, 1963 which relates to bar of limitation on institution of suits. Sub-section (1) of Section 3 reads thus :

"Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted appeal preferred, and applications made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

Thus, u/s 3 of the Limitation Act, it is the duty of the Court to proceed with the suit, appeal or application, if it is made beyond the period of limitation prescribed irrespective of the fact whether the plea of limitation has been set up in defence or not. The Court has no choice in the matter when a suit is clearly time barred. It cannot be decreed in view of Section 3 of the Act. If any of the provisions contained in Sections 4 to 24 (inclusive) are inapplicable, the mandatory provisions of Section 3 are attracted and the result is that the Court is bound to dismiss the suit, appeal or application if it is barred by time. Even though the question was neither raised nor specifically pleaded before the trial Court, it is beyond the power of the Judge to ignore the plea of limitation, if it is raised. No doubt, the question of limitation is ordinarily a mixed question of law and fact. But when the question of limitation is purely one of law, capable of determination on the facts admitted or on record, or proved before the court, the Court is bound to raise the question suo motu and decide it. If a suit was barred by time and yet the court decides it, the Court would be committing an illegality but the aggrieved party would be entitled to have the decree set aside on the plea of limitation by preferring an appeal against it. See *Ittavira Mathai Vs. Varkey Varkey and Another*, .

14. While considering the effect of Section 184 of the Bihar Tenancy Act (8 of 1985), which is more or less similar to Section 3 of the Limitation Act, the Apex Court in the case of *Rama Shankar Singh and Another Vs. Mst. Shyam lata Devi and Others*, , observed thus (para 3, at p. 717 of AIR):--

"The High Court was right in allowing the defendant to raise the point of limitation, though the plea was not taken in the written statement. u/s 184 of the Bihar Tenancy Act a suit instituted after the expiry of the period of limitation is liable to be dismissed though limitation has not been pleaded. Learned counsel for the appellants could not tell us what further evidence his client could adduce on this point. In the circumstances, the absence of the plea of limitation in the written statement did not cause the appellants any prejudice."

It, therefore, follows that the duty is not dependent on any objection being raised by the opposite parties. But where the plea for its proper decision involves inquiry into facts, the appellate court may refuse to entertain a plea of limitation, if raised for the first time in the appellate court.

15. The Tribunal should have been conscious of the fact that as the application was barred, an order condoning the delay was required to be passed after due notice to the other side. Though Sub-section (3) of Section 110-A of the M. V. Act, 1939 in terms does not so provide, the issuance of notice is necessary in the interest of justice and fair play and also because it is in conformity with the principles of natural justice which have to be followed and observed. Thus, even though the application was entertained after provisionally condoning the delay and an award was passed without finally deciding the question of limitation the order cannot be sustained for having been passed without notice to and, behind the back of the opposite parties.

16. This Court is unable to appreciate as to how delay can be condoned provisionally without notice to the other side. As Sub-section (3) of Section 110-A stands, either the delay has to be condoned or the application for condonation has to be rejected depending on whether or not, sufficient cause has been made out. There is nothing like a provisional condonation. It is really strange why a provisional order was passed by the Tribunal, Needless to say this type of an order may result in unnecessary wastage of time and money. Suppose on the basis of such an order the proceedings are permitted to continue for a number of years on merits and ultimately delay is not condoned, it may be an exercise in futility. In other words, unless the Tribunal condones the delay it should not proceed to adjudicate the claim on merits. These are some factors which should be kept in mind by the Tribunal when dealing with claims which are barred by time. It is always desirable that in a claim which is barred, notice of the application for condonation of delay should be given to the opposite parties who should be given an opportunity to be heard and, it is only after the opposite parties are heard that appropriate orders shall be passed on the application for condonation of delay. If delay is condoned behind the back of the opposite parties, and an award is passed, it cannot and should not be allowed to stand.

17. As the award is being set aside on the plea of limitation, I have not considered the other grounds which may be involved in this appeal. It is accordingly made clear that this order will not be construed one precluding the party from raising other grounds in an appeal which may subsequently be filed by any party against an award that may eventually be passed in the case.

18. It is really unfortunate that because of the lapses as the part of the Tribunal and also of the contesting parties, such a situation has been brought out, but it cannot be helped. Unfortunate though it may be, as the delay was provisionally condoned without notice to the opposite parties and the question was not finally decided at the time of passing of the award, I have no option but to set aside the award and remit the matter to the Tribunal for proceeding with the case in accordance with law. It is hoped that as the matter is old, it will, with the active co-operation of all the parties, be disposed of by the Tribunal preferably within six months from the date of receipt of the order from this Court. The record be sent back to the appropriate Tribunal forthwith. In order to cut short delay. It is directed that all the parties i.e. the owner and insurer, will appear before the Tribunal on 24-7-1995 on which date the Tribunal shall fix a date for hearing on the question of limitation and thereafter proceed to dispose of the case on merits. Costs to abide the result.