
(1994) 09 OHC CK 0035

In the Orissa High Court

Case No : Miscellaneous Appeal No's. 241 and 259 to 265 of 1991

New India Assurance Co. Ltd.

APPELLANT

Vs

Sulochana Bewa and Others

RESPONDENT

Date of Decision : 28-09-1994

Acts Referred:

General Clauses Act, 1897 — Section 6
Motor Vehicles Act, 1939 — Section 110D
Motor Vehicles Act, 1988 — Section 168, 173(1)

Citation : (1995) ACJ 1267 : AIR 1995 Ori 153 : (1995) 1 OLR 205

Hon'ble Judges : R.K. Patra, J

Bench : Single Bench

Advocate : P. Roy, S. Roy and L. Dash, R.N. Mohanty, A.K. Pati, B.N. Rath and S.K. Mohanty in M.A. 241 of 1991, for the Appellant; M. Sinha, Public Prosecutor Misra, B.K. Panda, P.K. Misra, S.K. Mohanty, R.N. Mohanty, B.N. Rath and A.K. Pati, for the Respondent

Judgement

R.K. Patra, J.—The aforesaid appeals (except Misc. Appeal No. 241 of 1991 filed by the claimants) have been filed by the Insurance Company challenging a common judgment of the Second Motor Accident Claims Tribunal, Cuttack, by which it has disposed of seven claim petitions. As all the appeals are analogous and arise out of the same judgment, they were heard together and are disposed of by this judgment.

2, The common case of the claimants is that on 7-1-1987 at about 6 p.m. the offending truck bearing registration number OSU 2478 belonging to Harmohan Das who is one of the respondents and insured with the appellant was coming in high speed from Paradeep towards Chandikhole. At Hazari Chhak on the Paradeep-Chandikhole Express High Way the said truck suddenly swerved to its left and then capsized. On account of this accident which was due to rash and negligent driving of the driver of the truck, the helper Birabar Behera, a pedestrian Misra Abid Baig died due to the injuries sustained by them and other five claimants who were travelling in the truck (four of them as owners of goods

and fifth one as a coolie) got bodily injuries on their persons. On consideration of evidence on record, the Tribunal held that the accident took place due to the rash and negligent driving of the driver of the offending truck resulting in the death of two persons and injuries to other claimants. The Tribunal then considered each of the claims made by the claimants and granted compensation, the details of which are as follows :

Appeal No. Misc.Case No. Nature of Claim Amount Awarded

1. M.A. No. 259/91 66 of 1987 Death 30,000/-
2. M.A. No. 260/91 61 of 1987 Injury 5,000/-
3. M.A. No. 261/91 64 of 1987 Injury 5,000/-
4. M.A. No. 262/91 85 of 1987 Injury 3,000/-
5. M.A. No. 263/91 86 of 1987 Injury 1000/-
6. M.A. No. 264/91 315 of 1987 Death 30,000/-
7. M.A. No. 265/91 317 of 1987 Injury 3,000/-

Misc. Appeal No. 241 of 1991 filed by the claimants who are the widow and father of the deceased Birabar Behera is for enhancement of the compensation to Rs. 20,000/-, their claim case being Misc. Case No. 66 of 1987.

3. Shri R. N. Mohanty, learned counsel appearing for some of the claimant-respondents, relying on the decision of a Division Bench of Karnataka High Court in *New India Assurance Co. Ltd. v. Mahadev Jatta Naik*, 1992 (1) ACJ 100, and a decision of the Full Bench of the Madhya Pradesh High Court in *Gaya Prasad and Another Vs. Suresh Kumar*, raised preliminary objection-that the insurer having not deposited the necessary amount of the award as required in the first proviso to Sub-section (1) of Section 173 of the Motor Vehicles Act 1988 (hereinafter referred to as "the New Act"), the appeals filed by the insurer are not maintainable. Shri Roy, learned counsel appearing for the insurer-appellants, relying on a judgment of this Court in *Oriental Insurance Co. Ltd. Vs. Parbati Mohanta and Another*, submitted that the vested right accrued to the appellant on the basis of the claim petitions which were made prior to the New Act came into force cannot be taken away and as such the appellant is not obliged to comply with the requirement of deposit of the necessary amount of the award.

4. The accident took place on 7-1-1987 when the Motor Vehicles Act, 1939 was in force. The claim petitions were also made when the said Act was in force. The 1939 Act was repealed by the New Act which has come into force with effect from 1-7-1989. The impugned judgment was passed after coming into force of the New Act and the appeals have been filed against the said judgment.

5. Sub-section (1) of Section 217 of the New Act has expressly repealed the 1939 Act. What would be the legal position in case of repeal followed by fresh legislation on the same subject was considered by the Supreme in *Quadrat Ullah*

Vs. Municipal Board, Bareilly, at p 402 it was observed as follows:

"In cases where a repeal is followed by a fresh legislation on the subject, Section 6 of the General Clauses Act would apply generally in the absence of a special saving clause in the repealing statute, for when there is a saving clause in the repealing statute itself, then a different intention is indicated."

In view of the position of law aforesaid, it is therefore necessary to find out if there is any indication in the New Act evidencing a different intention, i.e., taking away the right of appeal vested in a litigant at the commencement of a lis. The saving clause contained in Sub-section (2) of Section 217 of the New Act is the key to the problem. It saves certain matters of the 1939 Act. Sub-section (4) of Section 217 specifically provides that the mention to particular matters in Section 217 shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act with regard to the effect of repeals. Section 6 of the General Clauses Act accordingly comes into play in its full force, Section 6(3) of the General Clauses Act provides that unless a different intention appears, the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

6. The question whether the right of appeal is a mere matter of procedure or a substantive one came up for consideration before the Constitution Bench of the Supreme Court in *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, . The majority consisting of four Hon'ble Judges after a detailed discussion in paragraph 23 of the judgment has decided the following principles. They are at page 553:

(i) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding;

(ii) The right of appeal is not a mere matter of procedure but is a substantive right;

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit;

(iv) The right of appeal is a vested right and such right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal;

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not

otherwise.

In *Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others*, , the Supreme Court observed as follows at page 224:

"The fact that the pre-existing right of appeal continues to exist must, in its turn, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. As the old law continues to exist for the purpose of supporting the pre-existing right of appeal that old law must govern the exercise and enforcement of that right of appeal and there can be then" no question of the amended provision preventing the exercise of that right."

In *State of Bombay Vs. Supreme General Films Exchange Ltd.*, the Supreme Court in paragraph 12 of the judgment observed as follows at pages 984 and 985:

"It is thus clear that in a long line of decisions approved by this Court and at least in one given by this Court, it has been held that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment."

What happened in that case was the Court-fees Act (Bombay Amendment) Act, 1954 which came into force on 1-4-1954 enhanced the levy of Court-fee. The plaintiff had paid the enhanced Court-fee according to the amendment Act although the suit was filed prior to the coming into force of the amended Act. After the disposal of the appeal, the plaintiff applied for refund of the Court-fee which was allowed by the Bombay High Court and when the matter came to the apex Court while affirming the decision of the High Court their Lordships made the aforesaid observation.

7. In the backdrop of the principles enunciated by the Supreme Court, if a combined reading of Section 217 of the New Act and Section 6(e) of the General Clauses Act is done, conclusion appears to be irresistible that legal proceedings commenced before the repeal of the 1939 Act are to be continued or enforced as if the repealing Act (New Act) had not been passed at all. The new Act being prospective and in absence of any provision expressly or by necessary implication destroying the vested right of appeal, it cannot be held that the appellant is obliged to comply with the precondition of depositing the amount of the award as required under the first proviso to Sub-section (1) of Section 173 of the New Act. Requirement to deposit certain amount of the award by the appellant is not a matter of procedure only. It affects a substantive right and the said provision being prospective, vested right of the appellant is in no way impaired by enactment of the New Act.

8. As already noted, in *Oriental Insurance Co. Ltd. (supra)*, this Court (Justice S.

C. Mohapatra) after elaborately considering the relevant case laws has formulated five propositions, with which I respectfully agree, in paragraph 11 of the judgment. One of the conclusions, which is relevant for the purpose of these appeals, is that where application was made under the repealed Act but the award was made after coming into force of the New Act, no deposit is necessary to be made as required in the first proviso to Section 173 of the New Act. Division Bench of Allahabad High Court in *Oriental Insurance Co. Ltd. v. Dhasram Singh* 1990 (1) ACJ 321 also held to which I have my respectful concurrence that on reading of Section 217 of the New Act and Section 6 of the General Clauses Act there is no iota of doubt that legal proceeding instituted before repeal are to be continued or enforced as if the repealing Act had not been passed at all and the Parliament never intended that all the proceedings which had been initiated prior to the new enactment would be governed by the new Act and not by the repealed Act.

9. Let me examine the two decisions cited by the learned counsel for the respondents.

(i) In *New India Assurance Co. Ltd.* (supra) the Karnataka High Court held that by requiring the appellant who has suffered the award to deposit certain amount of money under the first proviso to Section 173 of the New Act, the New Act has controlled the right of appeal. The New Act is admittedly prospective. There is nothing in the said statute and particularly in Section 173 or in Section 217 thereof to read that by enactment of the provision relating to pre-deposit of certain amount of the award by the appellant the vested right crystallised in his favour at the commencement of the lis has been taken away. The New Act being not retrospective, the condition precedent to deposit all the required amount of the award by the appellant is applicable to cases coming under the provisions of the New Act only. For the aforesaid reasons, I respectfully differ with the view expressed in the aforesaid decision of the Karnataka High Court.

(ii) In *Gaya Prasad* (supra) the Madhya Pradesh High Court has held that the law applicable for the exercise of the right of appeal against an award passed by the Motor Accident Claims Tribunal is the law in force on the date on which the appeal is preferred. The procedure prescribed under the new law would apply to the appeal to be preferred thereunder and as such the appeal cannot be entertained without making requisite deposit as provided under the first proviso to Section 173(1) of the Act. While expressing the opinion as aforesaid, in paragraph 31 of the judgment, it has been held that "however, in respect of any pending appeal, no deposit, as is contemplated under the new proviso, is required to be made; hearing of that appeal would proceed and decision on that appeal is to be rendered on merits. respect I am not persuaded to agree with the opinion.

10. The preliminary objection raised by the claimants being without substance for the reasons stated above, let me, therefore, consider each of the cases on merits.

10.1. M. A. No. 241 of 1991 has been filed by the claimants for enhancement of compensation. M.A. No. 259 of 1991 filed by the insurer is analogous to it. These two appeals arise out of Misc. Case No. 66 of 1987 filed by the widow and father of the deceased Birabar Behera who was the helper in the offending truck at the time of accident. A against the claim of Rs. 50,000/-, the Motor Accident Claims Tribunal awarded a sum of Rupees 30,000/- in favour of the claimants. The deceased was aged about 23 years and on the basis of his monthly income, the average contribution towards his wife and father was estimated by the Tribunal at Rs. 150/- per month. By applying the multiplier of 20, the total loss of dependency was worked out at Rs.36,000/-. After deducting a lump sum amount for uncertainties of life, the Tribunal fixed the compensation at Rs.30,000/-. On perusal of the evidence, I am satisfied that the award is just and reasonable and does not call for any enhancement. Consequently, both the appeals are dismissed being devoid of merit.

10.2. In M.A. No. 264 of 1991 arising out of Misc. Case No. 315 of 1987, an amount of Rs. 30,000/- has been awarded to the widow and son of the deceased Miram Abid Baig. On the basis of the monthly earning and his contribution to the family, the awarded amount of Rs. 30,000/- cannot be said to be excessive. Consequently, the same is dismissed.

10.3. In M. A. No. 260 of 1991 (arising out of Misc. Case No. 61 of 1987), M.A. No. 262 of 1991 (arising out of Misc. Case No. 85 of 1987), M.A. No. 263 of 1991, (arising out of Misc. Case No. 86 of 1987) and M.A. No. 265 of 1991 (arising out of Misc. Case No. 317 of 1987) the injured-respondents claims to be the owners of goods who were travelling in the offending truck.

A Full Bench of this Court in *New India Assurance Company Ltd. v. Kanchan Bewa*⁷⁷ (1994) CLT 104 has held that the owner of goods who has hired a goods vehicle does not become a person travelling in the vehicle in pursuance of a contract of employment and even if he is carrying his goods after hiring the vehicle, the vehicle does not become a vehicle meant for carrying passengers for hire or reward and consequently, such vehicle would not come within the proviso (ii) to Section 95(a)(b) of the 1939 Act. In view of this, the respondents in the aforesaid four appeals who were travelling in the offending truck as owners of their respective goods are not entitled to get compensation from the appellant. The Tribunal has clearly erred in law in granting compensation to them. The result therefore is that the concerned Misc. Cases stand rejected and the appeals are hereby allowed.

10.4. In M. A. No. 261 of 1991 (arising out of Misc. Case No. 64 of 1987) the injured-respondent was a coolie in the truck. Shri Roy for the appellant contended that there is no satisfactory evidence in support of the version that the injured-respondent Sunakar Sahu was a coolie in the truck. On perusal of the evidence on record, I am not persuaded to accept the said contention. The aforesaid appeal therefore being without any merit is hereby dismissed.

11. In the result, Misc. Appeals Nos. 241 of 1991, 259 of 1991, 264 of 1991 and 261 of 1991 are dismissed and Misc. Appeals Nos. 260 of 1991, 262 of 1991, 263 of 1991 and 265 of 1991 are allowed.