

(1973) 09 GAU CK 0004

In the Gauhati High Court

Case No : Misc. Appeal First No. 17 of 1971

Oriental Fire and General Insurance Co. Ltd.

APPELLANT

Vs

Nani Choudhury and Others

RESPONDENT

Date of Decision : 06-09-1973

Acts Referred:

Arbitration Act, 1940 — Section 12, 36, 37, 46, 6(1)
Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20, 100, 104, 109, 110
Criminal Procedure Code, 1898 (CrPC) — Section 195
Defence of India Act, 1939 — Section 19(1), 75
Land Acquisition Act, 1894 — Section 54
Motor Vehicles Act, 1988 — Section 110, 110A, 110B, 110C(2), 110D
Trade Marks Act, 1940 — Section 76

Citation : (1973) 09 GAU CK 0004

Hon'ble Judges : R.S. Bindra, J

Bench : Single Bench

Advocate : K.P. Sen and N. Chakravarty, for the Appellant; A.S. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Bindra, J.—This appeal by Messrs Oriental Fire and General Insurance Company Ltd., hereinafter called the Company, is directed against the award dated 29.03.70 of the Motor Accident Claims Tribunal, Dibrugarh, awarding a sum of Rs. 15000/- by way of compensation to Probodh Chandra Ghosh, a minor. The claim petition had been presented to the Tribunal in connection with the death of Subodh Chandra Ghosh, the father of the claimant, who had died as a result of car accident on 02.10.65 near the Circuit House at Dibrugarh. The claimant had pleaded that his father was killed when he was proceeding on his cycle with the claimant sitting on the bar of that cycle, to witness the Durga Puja festival and was hit by an Ambassador car No. ASE-248 owned by Ram Gopal Sarma of Longsoal Tea Estate. That car, it was pleaded further, had been insured with Messrs Hanover Insurance Company Ltd., of which the present Appellant is the successor-in-interest. Subodh Chandra Ghosh was aged about 35 years at

the time of his death and he was employed in those days with Messrs Art Gallery, Dibrugarh, as a photographer. It was Nani Choudhury who was the proprietor of the said Art Gallery and it is in his capacity as next friend that Nani Choudhury lodged the claim for compensation on behalf of Probodh Chandra Ghosh.

2. Notice of the proceedings was served on Messrs Hanover Insurance Company. This Company and Ramgopal Sarma contested the claim on grounds inter alia that the accident had been caused for the reason of negligence of the deceased himself, the contention being that the deceased was driving the cycle rashly, being drunk, and dashed against the car which had been parked on the left side of the road running close the Circuit House for the purpose of replacing a tyre. The contesting Respondents also denied that the monthly income of the deceased, as alleged in the claim petition, was Rs. 250/- per month. Ramgopal Sarma, it may be mentioned, admitted that the car belonged to him.

3. The Tribunal negated the contention of the contesting Respondents that the deceased was either drunk to an extent that he could lose control over the cycle or that he had dashed against the car when it was parked. The Tribunal was rather critical of the fact that neither the owner of the car nor the insurer had taken the precaution of examining the driver of that car. The Tribunal took note of the fact that Ramgopal Sarma failed to turn up after having filed the objections against the claim. Practically speaking, therefore, it was the Hanover Insurance Company which fought out the claim for compensation.

4. The Appellant has challenged the award on various grounds including that the claimant had failed to establish that the driver of the car was responsible for the mishap, that the Tribunal having not passed any judgment against the insured it had no right or authority in determining the liability of the insurer, and that the amount of compensation was excessive.

5. The claimant Probodh Chandra Ghosh filed cross-objection praying that the amount of compensation should be enhanced from Rs. 15,000/- to Rs. 85000/-. It was alleged in the cross-objection petition that it having been found by the Tribunal that the deceased was aged only 35 years and that his monthly income was Rs. 200/- the compensation determined at Rs. 15,000/- falls far short of what the claimant is entitled to in law.

6. During the course of arguments it turned out that the real debate between the parties centred around the right of Probodh Chandra Ghosh to file cross objection in the background of the fact that the appeal had been lodged not by Ramgopal Sarma the owner of the vehicle but by the insurer. Almost the whole of the time of the Court in two hearings was devoted to the maintainability of the cross-objection which avowedly had been filed under Rule 22, Order 41, Code of Civil Procedure. It is consequently appropriate to firstly determine whether the stand of the Appellant that the cross-objection is not maintainable is justified in law.

7. Sub-rule 1 Rule 22 provides that any Respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of

the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the date fixed for hearing the appeal, or within such further time as the appellate Court may seem fit to allow. It was urged by Mr. K.P. Sen, on behalf of the Company, that Rule 22 has no applicability to the case in hand inasmuch as the appeal has been filed not in terms of the provisions of the Code, but on the authority of special provision enacted in Section 110-D of the Motor Vehicles Act, hereinafter called the Act. Section 110-D states that any person aggrieved by award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to High Court, and that no appeal shall lie against any award of Claims Tribunal if the amount in dispute in appeal is less than two thousand rupees. The point for decision is whether the provisions of Rule 22 can be availed of by a Respondent when the appeal is filed not under the Code but under some special statute. Another cognate question that crops up is whether the cross-objection can be maintained against a Co-Respondent in an appeal filed by some party to the original dispute.

8. The question last mentioned may first be dealt with on the assumption that cross-objection is maintainable in the present case. The latest judgment available on the subject, luckily of the Supreme Court, is reported in Pannalal Vs. State Bombay and Others, It is observed in paragraph 16 of the report that the question whether a Respondent could by way of cross objection seek relief against another Respondent under the provision of Rule 22 was first raised before the Courts almost a century ago, and in that paragraph and in paragraph 17 notice was taken of the fact that there had at one time been a divergence of judicial opinion in reply to that question. However, by the year 1944 that divergence melted away and the uniform view expressed was that ordinarily it was not open to a Respondent to seek relief as against a Co-Respondent by way of objection, though in exceptional cases this could be done. The Patna and Allahabad High Courts had expressed the opinion that as a general rule the right of a Respondent to urge cross-objection should be limited to asking the relief against the Appellant only and that when the appeal opens up questions which cannot be disposed of properly except by opening up matters as between Co-Respondent that cross-objection against the latter may be entertained and decided. The view enunciated by the Supreme Court was that Order 41, Rule 22, permits, as a general rule, a Respondent to prefer an objection directed only against the Appellant and it is only in exceptional cases, such as where the relief sought against the Appellant in such an objection is intermixed with the relief granted to the other Respondents, so that the relief against the Appellant cannot be granted without the question being re-opened between the objecting Respondent and other Respondents, that an objection under Rule 22 can be directed against the other Respondents, the Supreme Court observed further that the use of the word "cross-objection" in Rule 22 expresses unmistakably the intention of the legislature that the objection has to be directed against the Appellant. The

Supreme Court cited with approval the observations of Rajamannar C.J., of Madras High Court in *Venkateswarlu v. Ramamna* ILR 1950 Mad. 874 (F.B.), that "One cannot treat an objection by a Respondent in which the Appellant has no interest as a cross-objection", and that "The appeal is by the Appellant against a Respondent. The cross-objection must be an objection by a Respondent against the Appellant." It follows that generally speaking the relief by means of cross-objection can be claimed only against the Appellant, and that a special case has to be made out if it is sought against a Co-Respondent in the appeal. One such special case is mentioned in the decisions of Patna and Allahabad High Courts, and another in the decision of the Supreme Court, as reproduced above. This set of two special cases is illustrative and not exhaustive.

9. This takes me to the consideration of the all-important question whether the remedy of cross-objection provided in Rule 22 of Order 41 of the Code is available in an appeal filed in the High Court u/s 110-D of the Act. The Code as a whole or any part thereof has not been made applicable to such appeals. Sub-section (2) of Section 110-C only provides that the Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed, and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (V of 1898). The Central and the State Governments have been given the powers by Section 111 and Section 111A of the Act to frame Rules respectively for the purpose of carrying into effect the provisions of Chapter VIII and of Sections 110 to 110-E of that Chapter. The Rules, if any, framed by the Central Government were not cited by Mr. A.S. Bhattacharjee representing the cross-objector. A copy of the Rules framed by the Assam Government was however shown by him to this Court. According to Rule 20 of the latter Rules some Rules of Orders V, IX, XIII, XVI, XVII and XXIII of the Code" shall in so far as may be applied to proceedings before the Claims Tribunal." It is therefore manifest that the provisions of Order 41 of the Code have not been made applicable to the appeals filed u/s 110-D of the Act. That appears to be natural consequence if we keep in view the true character of the proceedings launched before the Claims Tribunal whose findings following the enquiry respecting the compensation prayed for have been designated as "award" in Section 110-C. and Section 110-F, which bears the heading "Bar of jurisdiction of Civil Courts", provides that "Where any Claims Tribunal has been constituted for any area, no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claims for compensation shall be granted by the Civil Court." Then Section 110 shows that Claims Tribunals constituted by the State Government are ad hoc tribunals which are quite distinct from the normal Civil Courts working in the State. This distinct feature of the constitution of the

Tribunals, the limited nature of the applicability of a few provisions of the Code to the proceedings before the Tribunals, the exclusion of the jurisdiction of Civil Courts in the matter of determining the compensation in the area where a Claims Tribunal has been constituted, and the branding of the findings of the Tribunal as an award are factors which have to be kept in mind while adjudicating whether an aggrieved Respondent in an appeal filed u/s 110-D can take recourse to Rule 22 and file cross-objection.

10. Mr. A.S. Bhattacharjee cited *Delhi Transport Undertaking v. Raj Kumari* 1972 A.C.J. 403 , to support his submission that Rule 22 can be availed of by a Respondent in such an appeal, while *Bokaro and Ramgur Ltd. and Others Vs. Kathara Coal Co. Ltd. and Others*, to buttress the rival contention in the latter case it was held that the right to file cross-objection, like that of appeal, is a creature of the statute, and that unless the statute under which the appeal is filed or some other legal provision grants the right of cross-objection, it is not open to a Respondent in an appeal to avail himself of the remedy of cross-objection. A Single Judge of Delhi High Court held, on the other hand, in the case of *Delhi Transport Undertaking* 1972 A.C.J. 403 that "as soon as the Court becomes seized of an appeal, even where an appellate jurisdiction is conferred under special statute, the rules of practice and procedure of the Code applicable to a civil appeal will in the absence of any specific rule to the contrary, govern such appeal." This view was rested on a decision of the M.P. High Court in *Manjula Devi v. Manjuari Raha* 1968 A.C.J. 1, which in turn had followed the decision of the Privy Council in *Secretary of State for India v. Chelikani Ramarao* AIR 1916 P.C. 21 , The Delhi High Court rejected the submission that since Rule 22 of Order 41 comes into operation only when the appeal is filed against a decree and that since the decision of the Claims Tribunal is not a decree but an award, Rule 22 has no application. The argument employed against that contention was that Order 41 prescribes the procedure for the disposal of an appeal and when no special procedure is prescribed by the Act under which the judgment or order appealed against is passed then the appellate Court has to follow the procedure prescribed by Order 41 for the disposal of the appeal. In this respect reliance was placed on the Supreme Court decision in *National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee)*, The point for decision in this latter case was whether a decision given by a Single Judge of a High Court in an appeal preferred u/s 76, Trade Marks Act, 1940, constitutes a judgment within the meaning of Clause 15 of the Letters Patent and/or whether the provisions of Order 41 appeal filed u/s 76 of that Act. The Supreme Court observed, while deciding the point at issue, that ordinarily after an appeal reaches the High Court, it has be determined according to the rules of practice and procedure of that Court and in accordance, with the provisions of the Charter under which the Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. Section 76, Trade Mark Act, the Supreme Court observed, confers a right of appeal to the High Court and says nothing more about it, and that being so the

High Court being seized as such of the appellate jurisdiction conferred by Section 76 it has to exercise that jurisdiction in the same manner as it exercise its other appellate jurisdiction and when such jurisdiction is exercised by a Single Judge, his judgment becomes subject to appeal under Clause 15 of the Letters Patent, there being nothing to the contrary in the Trade Marks Act. It is apparent that the matter for decision before the Supreme Court was altogether different from what the Delhi High Court had to deal with in the aforementioned case.

11. The Supreme Court decision in *Hanskumar Kishanchand Vs. The Union of India (UOI)*, in my opinion, furnishes the answer to the question at anvil. The facts of that case have to be narrated in brief to bring out what questions arose before the Supreme Court and on what basis they were dealt with and decided. The Central Government requisitioned certain properties owned by Hans Kumar in exercise of the power conferred by Section 75(a) of the Defence of India Act, 1939, and the Rules framed thereunder. Since the Government and Hans Kumar could not agree on the amount of compensation payable respecting those properties, the Central Government referred the matter to Mr. Jafry, Additional District Judge, Khandwa, u/s 19(1)(b) of that Act. Mr. Jafry announced his award fixing Rs 13,000/- as annual rent for the occupation of the premises. An appeal taken against that award to the High Court was disposed of by a Division Bench which enhanced the annual rent by a sum of Rs. 3250/-. Hans Kumar and the Central Government both having felt aggrieved with the High Court decision moved applications for filing an appeal to the Federal Court of India. Both the applications were granted and appeals filed in the Federal Court. The two appeals were subsequently taken up by the Supreme Court on the abolition of the Federal Court. At the opening of the hearing the Solicitor-General raised a preliminary objection about the maintainability of the appeal filed by Hans Kumar on the footing that the decision of the High Court made in appeal u/s 19(1)(f) of the Defence of India Act was an award and not a judgment, decree or order within the meaning of Sections 109 and 110 of the Code and so the appeal was incompetent. It is in the context of these facts that the Supreme Court surveyed the entire law on the subject and on accepting the validity of the preliminary objection raised by the Solicitor-General held the appeal to be not maintainable.

12. The first proposition enunciated by the Supreme Court in that case was that there is a sharp distinction between a decision which is pronounced by a Court in a cause which it hears on the merits, and the one which is given by it in a proceeding for the filing of an award. The former is a judgment, decree or order rendered in the exercise of its normal jurisdiction as a civil court and this is appealable under the general law, as, for example, under Sections 96, 100, 104, 109 and 110 of the Code. The latter, on the other hand, is an adjudication of a private tribunal with the imprimatur of the Court stamp on it and to the extent that the award is within the terms of the reference, it is final and not appealable. The position under the law, it was emphasised, is the same when the reference to arbitration is made not under agreement of parties but under provisions of a statute. The result of such statutory provisions of a statute. The result of such

statutory provisions it was added, is to withdraw the dispute from the jurisdiction of the ordinary courts and to refer it for decision by a private tribunal. That decision is an award and stands on the same footing as an award made on reference under agreement of parties. Reference was then invited to Section 46 of the Arbitration Act, 1940, which states that the provisions of that Act except Sub-section (1) of Section 6 and Sections 7, 12, 36 and 37 shall apply to arbitration under any other enactment for the time being in force as if the arbitration were pursuant to arbitration agreement and as if that other enactment were an arbitration agreement except in so far as the Arbitration Act is inconsistent with that other enactment or any rules made thereunder. The Supreme Court went on to observe further: "Nor does it make any difference in the legal position that the reference under the statute is to a Court as arbitrator. In that case, the Court hears the matters not as a civil court but as a *persona designata*, and its decision will be an award not open to appeal under the ordinary law applicable to decisions of courts. A statute, however, might provide for the decision of a dispute by a court as court and not as an arbitrator, in which case its decision will be a decree or order of court in its ordinary civil jurisdiction, and that will attract the normal procedure governing the decision of that Court, and the right of appeal will be comprehended therein." The Supreme Court clinched the issue by stating further: "The position therefore is that if the reference is to a court as *persona designata*, its decision will not be open to appeal except to the extent that that statute so provides: but that if, on the other hand, it is to a court as court, its decision will be appealable under the general law, unless there is something in the statute which abridges or takes away that incident. It may be a question whether the reference to a court under a particular statute is to it as a court or as *persona designata*. But when once it is determined that it is to it as *persona designata*, there can be no question that its decision is not open to appeal under the ordinary law."

13. After having enunciated these principles the Supreme Court proceeded to examine whether an appeal to the High Court u/s 19(1)(f) of the Defence of India Act had been lodged in the High Court "as a court or as arbitrator", and held: "The provisions for appeal to the High Court u/s 19(1)(f) can only be construed as a reference to it as an authority designated and not as a court." This conclusion was reached on the basis that u/s 19(1)(b) the reference is admittedly to an arbitrator, that an arbitrator need not be a Judge of a Court, that it is sufficient that the arbitrator is qualified to be appointed a Judge of the High Court, and that under the law no appeal would have lain to the High Court against the decision of such an arbitrator except for the provisions made, in Section 19(1)(f). The Supreme Court observed that the fact that the reference in that case had been made to a District Judge would not affect the position. The Supreme Court also took note of the fact that the decision of the arbitrator appointed u/s 19(1)(b) is expressly referred to in Section 19(1)(f) as an award, and proceeded to state: "Now, an appeal is essentially a continuation of the original proceedings, and if the proceedings u/s 19(1)(b) are arbitration

proceedings, it is difficult to see how their character can suffer a change, when they are brought up before an appellate tribunal." It was also mentioned that an appeal against an award continues to be part of and a further stage of the original arbitration proceedings, and that a proceeding, which is at its inception an arbitration proceeding must retain its character as arbitration, even when it is taken up in appeal where such an appeal is provided by the statute.

14. The Privy Council decision in *Rangoon Botatoung Co. v. Collector*, 39 Ind. App. 197 was approvingly cited by the Supreme Court in the case of *Hans Kumar*. I am tempted to reproduce the facts of that Privy Council case to show that they are parallel with the facts of the case in hand. Some properties had been acquired under the Land Acquisition Act of 1894, and the Collector happened to determine the compensation payable to the quondam owners. The latter having objected to the quantum of compensation, the matter was referred for decision to the Chief Court of Burma. That matter was heard by a Bench of Judges who determined the sum of compensation at a particular figure. Since the decision of the Bench also did not satisfy the quondam owners, they preferred an appeal to the Privy Council under the provisions of the Code of Civil Procedure. A preliminary objection taken by the Collector was respecting the maintainability of the appeal on the ground that the decision sought to be appealed against was not a judgment of court but an award and was therefore not appealable. In giving effect to this objection, the Privy Council observed:

Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

Shortly after this judgment of the Privy Council an almost identical question arose for determination before the Bombay High Court. That decision is reported in *Special Officer v. Dossa Bhai* ILR 37 Bom 500. The precise question that was debated before the High Court was whether a decision given by it in appeal u/s 54 of the Land Acquisition Act amounts to a judgment within the meaning of Clause 39 of the Letters Patent so as to enable the party to appeal to the Privy Council under that Clause. The ultimate decision reached by the High Court, after it had cited the above reproduced excerpt from 39 Ind. App. 197 (*supra*), was expressed in the following words:

This passage shows that it is a mistake to suppose that the award made in such a case by the High Court is a decree within the ordinary jurisdiction to which the CPC refers; and it seems to me it would be equally erroneous to regard such an award as a final judgment or order within the meaning of Clause 39 of the Letters Patent.

The leave to the Privy Council was consequently refused and an application moved before the privy Council for special leave met an identical fate.

15. In the aforementioned case of Hans Kumar the Supreme Court referred to another Privy Council decision in *Secretary of AIR 1931 149 (Privy Council)* This was a case under the Calcutta Improvement Act, 1911. Under that Act a tribunal had been constituted for determining the amount of compensation payable on the acquisition of land, and under the Calcutta Improvement (Appeals) Act, 1911, an appeal is provided in certain cases from the decision of the Tribunal to the Calcutta High Court. The point that arose for determination was whether the decision given by the High Court in appeal was open to further appeal to the Privy Council. In answering that question in the negative the Privy Council observed that in view of the decision in 39 Ind. App. 197, there could be no right of appeal against the decision of the High Court. The decision that no appeal lay to the Privy Council was founded on the postulate that the decision of the High Court was not a judgment, decree or final order passed by the High Court as a Court.

16. I may revert once again to the Supreme Court decision in the case of Hans Kumar. In para 11 of the report the conclusions were summed up as thus:

It is not every decision given by a Court that could be said to be a judgment, decree or order within the provisions of the CPC or the Letters Patent. Whether it is so or not will depend on whether the proceeding in which it was given came before the Court in its normal civil jurisdiction, or de hors it as a *persona designata*. Where the dispute is referred to the Court for determination by way of arbitration as in 39 Ind. App. 197 (P.C.) (A), or where it comes by way of appeal against what is statedly an award as in ILR 37 Bom. 506 then decision is not a judgment, decree or order under either the CPC or the Letters Patent.

The criteria that clearly emerge from the principles enunciated by the Supreme Court in the case of Hans Kumar and from the cases mentioned in that judgment for determining whether the appeal would be governed by the provisions of Order 41 are whether the original proceeding out of which the appeal has arisen had been dealt with by the Presiding Officer of the forum as a Court or as a *persona designata* and whether the decision of the appellate forum would be a judgment or order in its capacity as a Court or as a *persona designata*. A point to remember, as mentioned by the Supreme Court in the case of Hans Kumar, is that an appeal is essentially a continuation of the original proceedings and that if the original proceedings are in the nature of arbitration proceedings, it is difficult to see how they could change their character before an appellate tribunal. It can bear repetition to state that the determination of the Claims Tribunal is described in the Act as award and that such Claims Tribunal cannot be branded as a Court. It is in the nature of ad hoc tribunal which acts within the frame-work of Chapter VIII of the Act. Therefore when an appeal against an award of the Claims Tribunal is taken to the High Court u/s 110-D of the Act, the High Court would decide the matter not as a Court but as an appellate tribunal and the decision given by it would be in the nature of an award. As such, the, appeal to the High Court cannot be taken to be governed by the provisions of the Code with the

consequence that the Respondent cannot avail himself of Rule 22 of Order 41 of the Code, it having not been disputed by Mr. A.S. Bhattacharjee that the relief by way of cross-objection would be available only if the appeal filed by the Company were governed by the provisions of Order 41. It follows that the cross-objection filed by Probodh Chandra Ghosh is not maintainable in law and so the same is hereby rejected.

17. The appeal filed by the Company need not detain us long for Sub-section (2) of Section 96 of the Act categorically provides that the insurer on being made a party can defend the action only on the grounds mentioned therein. None of those grounds entitles the insurer to question the correctness of a finding of the Claims Tribunal as to the manner in which the accident happened or its estimate of the compensation to be awarded. Since in the present appeal the Company has not challenged the validity of the insurance policy nor the fact that in terms of that policy a sum of Rs. 15,000/- is recoverable from it, it cannot be permitted to challenge the findings of the Claims Tribunal regarding who was responsible for the occurrence resulting in the death of Subodh Chandra Ghosh and what should be the quantum of compensation payable to the legal representative of Subodh Chandra Ghosh. Therefore the appeal is clearly without merits and so has to be dismissed.

In the result I dismiss the appeal as also the cross-objection. However I leave the parties to bear their own costs in this Court.