

(1993) 02 OHC CK 0033
In the Orissa High Court
Case No : M.A. No. 138 of 1992

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Parbati Mohanta and Another

RESPONDENT

Date of Decision : 09-02-1993

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (1993) 2 ACC 711 : (1993) ACJ 550 : (1993) 76 CLT 495

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : M. Sinha, S. Sen and B. Singh, for the Appellant; P. Roy, S.S. Basu, A.K. Mohanty and R.N. Mohanty, for the Respondent

Judgement

S.C. Mohapatra, J.—Grievance of insurer appellant is that its vested right of appeal is circumscribed on account of the defect pointed out by the Stamp Reporter which should be ignored.

2. Learned counsel for the appellant submitted that the provision of Section 173(1), first proviso, of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") is not applicable and Section 110-D of the Motor Vehicles Act, 1939, which has been repealed would determine the question.

3. Section 173 of the Act reads as follows:

173. Appeals.—(1) Subject to the provisions of Sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court:

Provided further that the High Court may entertain the appeal after the expiry of

the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees.

4. In view of general importance on the question, I invited willing members of the Bar to render assistance to me *amicus curiae* for deciding the question. M/s. S.S. Basu, P. Roy, A.K. Mohanty and R.N. Mohanty, Advocates, made their submissions. I acknowledge the valuable assistance rendered by them.

5. Submissions of the learned advocates centre round the interpretation of the right of appeal vested u/s 173 extracted earlier. Right of appeal is a creature of the statute. In absence of any such right vested in an aggrieved party, there is no general principle of preferring an appeal. Such right vested normally indicates the pre-conditions for such right, the forum where it would be provided and the order which is subjected to appeal.

6. Mr. Mohitosh Sinha, learned Counsel for appellant, submitted that the day proceeding is initiated, it carries with it the right of appeal vested in a party. Said right would continue until the lis is finalised. Change of law would not take away such right or curtail such right.

7. Submission of Mr. Sinha is supported by the decision reported in Janardan Reddy and Others Vs. The State, , where it has been laid down on principle that right of appeal is not merely a matter of procedure; it is a matter of substantive right. This right of appeal from the decision of an inferior Tribunal to a superior Tribunal becomes vested in a party when the proceedings are first initiated in and before a decision is given by the inferior court. Accepting the said principle, Supreme Court in the decision reported in Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, held that such a right cannot be taken away except by express enactment or necessary intendment of the legislature.

8. In Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, the question for consideration was, whether by amendment to Section 22 of the Central Provinces and Berar Sales Tax Act, 1947, requiring satisfactory proof of payment of tax for entertainment of an appeal would govern an appeal by assessing where the assessment proceeding was initiated prior to the amendment. Supreme Court considered the provision before amendment and after amendment. There was no provision relating to satisfactory proof of payment of tax before amendment. After the amendment, it was provided as follows:

Provided that no appeal against an order of assessment, with or without penalty, shall be admitted by the said authority unless such appeal is accompanied by a satisfactory proof of the payment of the tax, with penalty, if any, in respect of which the appeal has been preferred.

Considering the decision of the Judicial Committee reported in Colonial Sugar

Refining Co. Ltd. v. Irving LR (1905) AC 369 and various other decisions including the decision of the Calcutta High Court in Nagendra Nath Bose v. Man Mohan Singha Roy 34 CWN 1009 (1930) it was held that an intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express word or necessary implication. After considering the various decisions, it was held:

Further, even if the "lis" is to be taken as arising only on the date of assessment, there was a possibility of such a "lis" arising as soon as proceedings started with the filing of the return or, at any rate, when the authority called for evidence and stalled the hearing and the right of appeal must be taken to have been in existence even at those dates. For the purposes of the accrual of the right of appeal the critical and relevant date is the date of initiation of the proceedings and not the decision itself.

9. In view of the clear principle laid down, there can be no doubt that no impediment can be created under the earlier law by a subsequent enactment unless legislature enacting the subsequent law expressly provides for the same or the language by necessary implication leads to the same intendment.

10. Question of the right of appeal to a particular forum prior to the coming into force of the Orissa Civil Courts Act came to be considered by a Division Bench of this Court in the decision in Duryodhan Samal v. Uma Dei ILR (1985) Cut 257. Decision of the Supreme Court in Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, and various other decisions were taken into consideration. It was held that though right of appeal is a vested right, the forum in which it would be preferred is procedural and, accordingly, the forum available on the day the decision of the inferior Tribunal sought to be assessed would be the forum and the forum under the earlier law would not be the forum. Said decision would have no application to this case since, as in the case of enactment, viz., the Central Provinces and Berar Sales Tax Act, 1947, considered in Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, in the Motor Vehicles Act, impediment has been created by requiring the appellant to deposit the amount as envisaged u/s 173, first proviso. Change of law and amendment of the existing provision would have the same effect in this regard.

11. From the discussions made above, the conclusions would be as follows:

(i) Right of appeal against an award in respect of an accident caused by a motor vehicle is vested on the aggrieved party from the very day the application for compensation is made by which a proceeding is initiated.

(ii) Where the application has been made under the repealed Act and the award is also made thereunder, appeal preferred under the provisions of the said Act would not require the deposit and would continue without calling for the statutory deposit in a pending appeal.

(iii) Where application is under the repealed Act and the award is under the repealed Act, but appeal is filed when the Act came into force repealing the earlier enactment, no deposit would be necessary to be made as required u/s 173, first proviso.

(iv) Where application was made under the repealed Act but the award was made at a time when the Act came into force, no deposit would be required to be made as required u/s 173, first proviso, although the appeal would be filed u/s 173 of the Act which reflects the same right as in Section 110-D of the repealed Act.

(v) Where the application is made under the Act and award is also made under the Act, Section 173, first proviso, is to be complied with and deposit is to be made as required thereunder for valid entertainment of the appeal.

12. Aforesaid conclusions are on the finding that deposit of amount is not a procedure for an appeal but is an impediment to the substantive right as has been laid down in Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, .

13. Submission has been made that legislative object is that in cases where liability for money is created on a party by any adjudication while preferring an appeal, the money is to be deposited. There cannot be any doubt about it. As early as 1976 when the CPC was amended by Act 104 of 1976, Order 41, Rule 1(3) provided that the appellant shall, within such time as the appellate court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Order 41, Rule 5(5) provided that order of stay of execution of an appealable decree would not be made by the appellate court where the appellant has failed to make the deposit or furnish the security specified in Sub-rule (3) of Rule 1. These provisions in the CPC are only procedural and, accordingly, they would operate even in respect of appeals filed after the amendment came into force in respect of vested right of appeal created before the amendment. Same is not the position in case of appeals under the Motor Vehicles Act. Accordingly, it cannot be held that the legislature intended unequivocally that deposit is to be made u/s 173, first proviso of the Act.

14. In the present case, however, the question is of academic interest since the date of accident is also after the Act came into force which is the cause of action for the application. Accordingly, the Stamp Reporter is correct on the facts of this case and appellant is required to deposit the amount. One month's time is granted to the appellant to deposit the amount in compliance with Section 173, first proviso of the Act, as pointed out by the Stamp Reporter.

15. With the aforesaid direction, this application is disposed of.