
(2015) 04 AHC CK 0032

In the Allahabad High Court

Case No : First Appeal From Order No. 2406 of 2004

Oriental Insurance Company Ltd.

APPELLANT

Vs

Sunita Singh and Others

RESPONDENT

Date of Decision : 13-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2, 21
Motor Vehicles Act, 1988 — Section 140, 149 (2), 163A, 163-B

Citation : (2016) 1 ACC 282 : (2015) 5 ADJ 208 : (2015) 110 ALR 843 : (2015) 3 AWC 2867

Hon'ble Judges : Krishna Murari, J; Pratyush Kumar, J

Bench : Division Bench

Advocate : S.C. Srivastava, for the Appellant; M.K. Gupta, A.K. Singh and Kuwar Ritesh Kumar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Pratyush Kumar, J.—Heard Sri S.C. Srivastava, learned Counsel appearing for the appellant and Sri Kunwar Ritesh Kumar, learned Counsel appearing for the respondents Nos. 1 to 4. This is an insurer's appeal against the judgment and award dated 15.5.2004 passed by Motor Accident Claims Tribunal/Special Judge (N.D.P.S. Act), Court No. 2, Ghazipur in Smt. Sunita Singh and others v. Hajimiyani Goremiyani and another, MACP No. 111 of 2002, whereby claim petition of contesting respondents has been allowed and they have been found entitled to payment of compensation of Rs. 6,87,000/- from opposite party No. 1/respondent No. 5 (hereinafter referred as non-contesting respondent). Opposite party No. 2/appellant (hereinafter referred as appellant) has been directed to pay the awarded amount as insurer,

2. Briefly stated respondent Nos. 1 to 4/claimants (hereinafter referred as contesting respondents) had filed claim petition under section 163A of Motor Vehicles Act, 1988 (hereinafter referred as 1988 Act) against non-contesting respondent (owner of Truck No. M.H.04 A.L./6249 and appellant (insurer) stating

therein that Rajesh Kumar Singh @ Rana Pratap Singh was employed as driver by non-contesting respondent. On 2nd August, 2002, deceased Rajesh Kumar Singh was carrying coal on the said truck. On his way near village Chandrapur, Police Station Mahegaon, District Parvatmala (Maharashtra) at about 10.30 p.m. due to mechanical failure, the said truck had fallen in a pit adjacent to the road resulting in the death of the deceased. First Information Report was lodged at police station Mahegaon. Post-mortem was conducted on the body of the deceased. The deceased was aged about 32 years. He was contributing Rs. 5,000/- towards his family. Contesting respondents are his legal representatives. A request has been made that Rs. 7,22,000/- alongwith 10% per annum simple interest be awarded in their favour.

3. Non-contesting respondent admitted the averments made in paras 9 to 12 of the claim petition. In the additional pleas, inter-alia he has stated that the said truck was comprehensively insured by the appellant. All papers of the truck were complete and valid. Being insurer, the appellant is liable to pay the compensation.

4. The appellant had filed a written statement and in the additional pleas, it has been stated that, in case, papers of the truck were not valid or driver had no valid driving license, Insurance Company will not be liable to pay compensation. According to the appellant, accident had occurred due to negligence and maintenance of the vehicle and rash and negligent driving by the driver. Claimed compensation was excessive. Insurance Company was entitled to get benefit of section 149 (2) Motor Vehicles Act, 1988.

5. On the basis of the pleadings of the parties, the learned Tribunal had framed two issues and on behalf of the contesting respondents in addition to the documentary evidence, two witnesses were examined. On behalf of the appellant and non-contesting respondent, no evidence was adduced.

6. After hearing the arguments of the parties, the learned Tribunal has held that in the alleged incident, driver Rajesh Kumar Singh had died. The Tribunal has held income of the deceased Rs. 5,000/- per month. After deducting one third income, loss of dependency Rs. 60,000- Rs. 20,000= Rs. 40,000/-, has been held and in accordance with the provisions mentioned in II Schedule of 1988 Act, Rs. 40,000/- multiplied by 17= Rs. 6,87,000/- have been determined as compensation for loss of dependency. On account of death of the deceased Rs. 5,000/- were awarded for loss of consortium and Rs. 2,000/- for funeral expenses. Thus, total Rs. 6,87,000/- alongwith interest were awarded in favour of contesting respondents. Thereafter the amount was apportioned among the contesting respondents in accordance with their need.

7. Aggrieved with this award, the present FAFO has been filed. In the memo of appeal, inter-alia grounds have been taken that the deceased was workman. His compensation ought to have been calculated according to the schedule of the Workmen's Compensation Act, 1923, the accident occurred due to rash and negligent driving of the deceased, mechanical defect and lastly income was not

duly proved. Thus, impugned judgment and award are illegal.

8. Learned Counsel for the appellant at the time of hearing only canvassed one point i.e., the impugned judgment and award, have been rendered in a claim petition filed under section 163A of 1988 Act, whereas income of the deceased has been shown to be Rs. 60,000/- per annum. According to the II Schedule of 1988 Act, such petition can be filed only in case where income of the deceased is up to Rs. 40,000/-. Thus, according to him, the present petition is not maintainable and deserves to be rejected.

9. In support of the arguments, he has referred following cases :

"(1) Smt. Manjula Devi, Master Ankur minor through Smt. Manjula Devi (Natural Guardian as real Mother) and Smt. Kamla Devi Vs. Commercial Motors, Chhedi Lal Tripathi and National Insurance Co. Ltd., (2008) ACJ 1624 : (2007) 3 ADJ 255 : AIR 2007 All 122 : (2007) 2 AWC 2050 of the said judgment, following observation has been made:

....."Therefore, in our opinion, in cases where the allegations are made that the income of the victim is more than Rs. 40,000 per annum it is not open for the Tribunal to entertain the claim petition under section 163-A of the Act, such claim petition can be maintainable under section 166 of the Motor Vehicles Act....."

(2) Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda, (2004) 1 ACC 728 : AIR 2004 SC 2107 : (2004) 120 CompCas 292 : (2004) 4 JT 83 : (2004) 137 PLR 271 : (2004) 3 SCALE 546 : (2004) 5 SCC 385 : (2004) 3 SCR 213 : (2004) 2 UJ 1100 : (2004) AIRSCW 1864 : (2004) 3 Supreme 602 Learned Counsel for the appellant has placed reliance on the observations made by the Hon"ble Apex Court. Para 67 of the judgment quoted herein below:

....."67. We, therefore, are of the opinion that Kodala (supra) has correctly been decided. However, we do not agree with the findings in Kodala (supra) that if a person invokes provisions of section 163-A, the annual income of Rs. 40,000/- per annum shall be treated as a cap. In our opinion, the proceeding under section 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....."

10. On behalf of the contesting respondents, in reply to the arguments submitted by the learned Counsel for the appellant, it has been argued, that, the learned Tribunal had no jurisdiction to hear the claim petition filed under section 163-A of 1988 Act, are misconceived because by not raising the plea in its written statement and memorandum of appeal, the appellant has acquiesced about the jurisdiction of the learned Tribunal to hear the claim petition in question. In this reference, learned Counsel for the contesting respondents has further submitted

that they are poor persons, non-raising of this plea upto now puts the contesting respondents in a very difficult situation because due to acquiescence of the appellant, contesting respondents could not avail their remedy under Workmen's Compensation Act, 1923 and further the non-contesting respondent on the belief of the maintainability of the claim petition in question, claimed compensation, from the appellant on the strength of the comprehensive insurance policy, for damages caused to the truck in Claim No. 31/2003/067. According to the learned Counsel for the contesting respondents, after passage of more than a decade, during the hearing of FAFO, the appellant wants to raise a technical plea, which deprives all the respondents who had acted upon on the fact of the maintainability of the claim petition under section 163-A of 1988 Act and thereby acted to their detriment, should not allow to suffer on account of appellant's laches and further, if the learned Tribunal treated to have acted beyond its jurisdiction amounts to error on the part of the Tribunal, on the well settled dictum *actus curiae neminem gravabit* an act of the Court shall prejudice no man.

11. Learned Counsel for the contesting respondents has further contended that since objection against maintainability of the claim petition under section 163-A of 1988 Act has not been raised either in the written statement or in the memo of appeal under Order XLI, Rule 2, this Court should not allow this plea to be raised for the first time.

12. The second part of the argument advanced by the learned Counsel for the respondents is that in the case of *Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another*, (2009) ACJ 1298 : AIR 2009 SC 3104 : (2009) CLT 1055 : (2009) 6 JT 495 : (2009) 6 SCALE 129 : (2009) 6 SCC 121 : (2009) 5 SCR 1098 : (2009) 5 UJ 2280 : (2009) AIRSCW 4992 : (2009) 3 Supreme 487 Hon'ble The Apex Court in para-17 has observed:

".....Where annual income of the deceased is more than Rs. 40,000 and the claim petition was filed under section 163-A of 1988 Act, the compensation may be determined by the formula provided in the II Schedule of 1988 Act....."

13. In order to deal with the argument of the appellant and repelled on behalf of the contesting respondents regarding objection against the maintainability of the MACP No. 111 of 2002 filed under section 163-A of 1988 Act, we would like to place on record that it has been settled by long series of decisions that there can be no estoppel on a point of law in *Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another*, AIR 1979 SC 1725 : (1979) 118 ITR 461 : (1979) 4 SCC 121 : (1979) 3 SCR 1133 It is further to be remembered that rule of estoppel is a rule of evidence. On its strength, a party cannot be stopped from raising a legal plea. However, the matter is not so simple. When question of acquiescence in respect of the jurisdiction of the learned Tribunal is concerned, though this rigour often is applied in the form of estoppel but the rule of estoppel stands on a different footing when waiver of objection against jurisdiction by way of acquiescence is pleaded.

14. We are of the opinion that only where plea of waiver of jurisdiction is raised, it may be accepted when it relates to territorial jurisdiction or pecuniary jurisdiction of a particular forum. However, where the Court lacks inherent jurisdiction, the plea of waiver or acquiescence would not suffice.

15. Thus we are unable to accept the arguments of learned Counsel of the contesting respondents that by acquiescence the appellant is debarred from questioning the maintainability of claim petition in question.

16. Though, the plea raised by the learned Counsel appearing for the appellant is legal, however, it has to be raised in accordance with the procedure prescribed by the law. In this reference we would like to refer Order XLI, Rule 2, quoted herein below :

"2. Grounds which may be taken in appeal.--The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."

17. The quoted rule absolutely provides a bar that on any ground not having raised in the memorandum of appeal, the appellant except by leave of the Court shall not be heard or permitted to urge.

18. In the case of *Rahul Bhargava Vs. Vinod Kohli and Others*, (2008) 1 ShimLC 385 Himachal Pradesh High Court was also confronted with this question whether any substantial question of law should be allowed to be raised which would take the other party by surprise. A download copy of the said judgment has been made available to us. In para-10 of the judgment, the Himachal Pradesh High Court has proceeded to decline such requests on two grounds. First, such power is a discretionary power and exercise of discretionary power can only be made by giving a reasoned order. The reasons can be recorded in writing only, it would be possible where such request is made in writing showing good reasons for not raising such plea earlier. Since in that case, the appellant also had not filed any application in writing seeking leave to urge on any substantial question of law, the Court opine that appellant could not be permitted to be taken by surprise by the other party in the form of oral request at the time of hearing.

19. The second ground mentioned by the Himachal Pradesh High Court is that such oral requests, compelling other party to get the hearing adjourned and make preparation, is not in consonance with the spirit of the law.

20. Now we are required to opine whether such leave should be granted to the appellant or not. The first guideline we can discover, is contained in proviso to Rule 2, Order XLI, C.P.C. which provides that Court shall not rest its decision on

any ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. At this stage, though learned Counsel for the contesting respondents has been able to refer the case of Sarla Verma's case (supra) but in view of the facts and circumstances indicated hereinabove, while were dealing with the question of estoppel, we do not think that sufficient opportunity can be provided to the contesting respondents only by adjourning the hearing of the appeal.

21. Second guiding factor for exercising our discretion in this reference may be found in section 21, C.P.C. where certain bars have been imposed in reference to challenging the competency of the Court either pecuniary or territorial. Though, presently, the maintainability of the claim petition has been assailed on the ground of in excess of permissible limit of income of the deceased but we think that if by permitting the new plea to be orally raised for the first time during the hearing of the appeal is allowed, it would not advance ends of justice but will result in failure of justice. Since both the parties have contested the claim petition before the learned Tribunal with equal opportunity the appellant had ample opportunity to make this objection. The claim petition has been decided in a transparent manner which promotes the object of social welfare legislation, introduced in the form of section 163-A of 1988 Act.

22. For the reasons mentioned herein below and also agreeing with the view expressed by the Himachal Pradesh High Court in the case of Rahul Bhargava (supra), we are of the opinion that in this case such plea without any application seeking leave of the Court under Order XLI, Rule 2 and mentioning therein proper reasons for not raising this plea earlier should not be entertained. Further absence of this plea in the memorandum of appeal or in the written statement makes the matter worse for the appellant.

23. In view of above, we are not inclined to entertain the plea raised by the appellant regarding maintainability of the claim petition filed under section 163-A of 1988 Act.

24. Since learned Counsel for the contesting respondents has also replied the legal argument, though permission to raise that argument has been declined by us, we would like to place on record that relevant para 17 of Sarla Verma's case (supra), as also noticed by the Hon'ble Apex Court recently in the case of Resham Kumari v. Madan Mohan, decided on 2nd April, 2003 by the Division Bench comprising Hon'ble Mr. Justice R.N. Lodha. Chelameswar, Madan B. Lokur in Civil Appeal No. 4646 of 2009, the Hon'ble Apex Court in para 23 of the judgment has quoted para 17 as below:

"this Court had an occasion to consider the peculiarities of section 163-A of the 1988 Act vis-?-vis section 166. The Court reiterated what was stated in earlier decisions that the principles relating to determination of liability and quantum of compensation were different for claims made under section 163-A and claims made under section 166. It was stated that section 163-A and the Second

Schedule in terms did not apply to determination of compensation in applications under section 166. While stating that section 163-A contains a special provision, this Court said :

"34.....Section 163-A of the MV Act contains a special provision as to payment of compensation on structured formula basis, as indicated in the Second Schedule to the Act. The Second Schedule contains a table prescribing the compensation to be awarded with reference to the age and income of the deceased. It specifies the amount of compensation to be awarded with reference to the annual income range of Rs. 3000 to Rs. 40,000. It does not specify the quantum of compensation in case the annual income of the deceased is more than Rs. 40,000. But it provides the multiplier to be applied with reference to the age of the deceased. The table starts with a multiplier of 15, goes upto 18, and then steadily comes down to 5. It also provides the standard deduction as one-third on account of personal living expenses of the deceased. Therefore, where the application is under section 163-A of the Act, it is possible to calculate the compensation on the structured formula basis, even where the compensation is not specified with reference to the annual income of the deceased, or is more than Rs. 40,000, by applying the formula: $(2/3 \text{ AI } M)$, that is two-thirds of the annual income multiplied by the multiplier applicable to the age of the deceased would be the compensation. Several principles of tortious liability are excluded when the claim is under section 163-A of the MV Act."

25. We have carefully gone through the recent judgment but we could not anywhere find disapproval of the same. In this judgment in para 19, Hon^{ble} the Apex Court has also referred Deepal Girish Bhai Soni's case, (supra), in another reference. Para 19 of this judgment is quoted below :

"the question that arose for consideration before a three-Judge Bench was, whether a proceeding under section 163-A of the 1988 Act was a final proceeding and the claimant, who has been granted compensation under section 163-A, was debarred from proceeding with any further claims on the basis of the fault liability in terms of section 166. This Court considered the statutory provisions contained in the 1988 Act, including sections 163-A and 166. With regard to section 163-A, the Court stated as follows :

"42. Section 163-A was, thus, enacted for grant of immediate relief to a section of the people whose annual income is not more than Rs. 40,000 having regard to the fact that in terms of section 163-A of the Act read with the Second Schedule appended thereto, compensation is to be paid on a structured formula not only having regard to the age of the victim and his income but also the other factors relevant therefor. An award made thereunder, therefore, shall be in full and final settlement of the claim as would appear from the different columns contained in the Second Schedule appended to the Act. The same is not interim in nature...This together with the other heads of compensation as contained in columns 2 to 6 thereof leaves no manner of doubt that Parliament intended to lay a comprehensive scheme for the purpose of grant of adequate compensation

to a section of victims who would require the amount of compensation without fighting any protracted litigation for proving that the accident occurred owing to negligence on the part of the driver of the motor vehicle or any other fault arising out of use of a motor vehicle."

"46. Section 163-A which has an overriding effect provides for special provisions as to payment of compensation on structured- formula basis. Sub-section (1) of section 163-A contains non obstante clause in terms whereof the owner of the motor vehicle or the authorised insurer is liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.....".

"51. The scheme envisaged under section 163-A, in our opinion, leaves no manner of doubt that by reason thereof the rights and obligations of the parties are to be determined finally. The amount of compensation payable under the aforementioned provisions is not to be altered or varied in any other proceedings. It does not contain any provision providing for set- off against a higher compensation unlike section 140. In terms of the said provision, a distinct and specified class of citizens, namely, persons whose income per annum is Rs. 40,000 or less is covered thereunder whereas sections 140 and 166 cater to all sections of society."

"52. It may be true that section 163-B provides for an option to a claimant to either go for a claim under section 140 or section 163-A of the Act, as the case may be, but the same was inserted ex abundanti cautela so as to remove any misconception in the minds of the parties to the lis having regard to the fact that both relate to the claim on the basis of no-fault liability. Having regard to the fact that section 166 of the Act provides for a complete machinery for laying a claim on fault liability, the question of giving an option to the claimant to pursue their claims both under section 163-A and section 166 does not arise. If the submission of the learned Counsel is accepted the same would lead to an incongruity."

26. On behalf of the appellant, no other argument have been submitted in support of the appeal. Since the only argument submitted for reconsideration, cannot be entertained by us, we are not further required to express any opinion on the plea raised by the learned Counsel for the appellant. Thus, the FAFO is without substance. The impugned judgment and award do not warrant any interference. Resultantly FAFO is, accordingly, dismissed.