

(2016) 08 KL CK 0067

In the High Court Of Kerala

Case No : I.A. No.1738 of 2016 and M.A.C.A. No. 1674 of 2006 and CMA No.1920 of 2016 and MACA 1643 of 2016

Suraja

APPELLANT

Vs

Dr. K.C. Prakashan

RESPONDENT

Date of Decision : 08-08-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 173(1)

Citation : (2017) 1 KLT 16

Hon'ble Judges : Mr. C.T. Ravikumar and Mr. K.P. Jyothindranath, JJ.

Bench : Division Bench

Advocate : Sri. P.V. Chandra Mohan, Advocate, for the Petitioner; Sri. K.A. Sreejith, Advocate, for the Respondent No. 1; Sri. P.V. Jyothi Prasad, Advocate, for the Respondent No. 2

Final Decision : Dismissed

Judgement

Mr. C.T. Ravikumar, J. - These appeals arise from the judgment and award dated 6.2.2006 in O.P.(M.V.)No. 1743/2001 passed by the Motor Accidents Claims Tribunal, Thrissur. The said claim petition was filed by the appellant in the former appeal. She preferred this appeal seeking enhancement of the compensation upon feeling dissatisfied with the quantum of compensation granted by the Tribunal as per the award thereon. The latter appeal has been preferred against the very same award by the first respondent who is the owner-cum-driver of the vehicle involved in the accident, along with a petition to condone an inordinate delay of 3593 days in filing the appeal viz. CMA 1920/2016. The said appeal has been filed with such an inordinate delay, seeking the prayers to set aside the said award and to remand the case to the Tribunal and to afford him an opportunity to adduce evidence. In such circumstances, we are of the view that it is only appropriate firstly to take up CMA 1920/2016 in MACA 1643/2016 at first and then subject to the decision thereon MACA 1643/2016. For convenient sake the parties are referred to hereafter, in accordance with their original status before the Tribunal unless otherwise specifically mentioned.

CMA No. 1920 of 2016 in MACA No. 1643 of 2016 and MACA No. 1643 of 2016:

2. This appeal has been preferred against the judgment dated 6.2.2006 in O.P. (M.V.)No. 1743/2001 on the file of the Motor Accidents Claims Tribunal, Thrissur with an inordinate delay of 3593 days in filing the appeal and in other words, about a decade since the said judgment. Virtually, the first respondent seeks the prayers to set aside the award dated 6.2.2006 in O.P.(M.V.)No. 1743/2001 on the file of the Motor Accidents Claims Tribunal, Thrissur and to remand the case to the Tribunal for fresh consideration after affording an opportunity to adduce evidence. When an inordinate delay of 3593 days occurred in filing an appeal carrying such prayers the appellant is bound to satisfy this court that the delay occasioned is not due to his gross negligence and there was sufficient cause for not filing the appeal in time and also till such time this appeal has been filed along with the aforesaid application to condone the delay. In this context it is relevant to refer to the second proviso to Section 173(1) of the M.V. Act. Going by the said proviso the High Court is clothed with the power and jurisdiction to condone the delay if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. The award is dated 6.2.2006. As per the award sought to be challenged the 2nd respondent Insurance Company was directed to deposit the awarded amount of Rs.86,100/- along with interest at the rate of 7% per annum from the date of petition till the date of payment and costs. The 2nd respondent was given the right to recover the amount thus deposited to satisfy the award from the first respondent viz., the petitioner in the above Miscellaneous Application, the appellant in the latter appeal. Still, the first respondent, has chosen to file an appeal against the judgment and award dated 6.2.2006 only on 10.6.2016. In fact, the certified copy of the judgment produced by the first respondent-appellant would reveal that he filed the copy application only on 3.6.2016 and it was delivered to him on 4.6.2016 itself. In such circumstances, it is evident that if the delay is properly calculated it would be more than ten years. Taking note of the delay shown in the application viz., 3593 days in filing the appeal and that it is sought to be preferred by the owner-cum-rider of the offending vehicle involved in the accident with the prayer to set aside a judgment and award in favour of the claimant passed as far back on 6.2.2006 we have no hesitation to hold that it cannot be condoned in a casual manner for the mere asking and that the petitioner has to be put under onerous duty to explain the delay and to satisfy us regarding the existence of sufficient cause. While considering an application for condonation of delay, in such circumstances, it is only just and proper, for this court to foresee the heartburn of a claimant, who must either be an injured or a legal heir or legal representative of a deceased person, in a motor vehicle accident and an awardee of compensation, on setting aside the said award, at the instance of a party who had not chosen to avail the opportunity to participate in the preceded the passing of the said award. In such circumstances and also in terms of second proviso to Section 173(1) of the M.V. Act if the explanation reveals gross negligence from the part of the petitioner who is seeking condonation or if he fails to satisfy the court that he

was prevented by sufficient cause from preferring the appeal in time such an application deserves to be rejected. In fact, gross negligence would also reveal lack of sufficient cause. Bearing in mind the aforesaid position we will consider the above application. With a view to find out the real reason for the said inordinate delay, we have gone through the affidavit accompanying the application. Evidently, the petitioner assigned some reasons and they read thus: "This petitioner was not aware of the fact that Tribunal entered into a finding to the effect that he was not possessing valid driving licence. This appellant was under the impression that copy of his licence was produced before the Tribunal and he is still in ambiguity why it was not produced. This appellant came to know about this only on 20th May 2016 only when his counsel whom he entrusted to appear in MACA 1674/2006, which is filed by first respondent herein for enhancement of compensation in which this appellant is arrayed 1st respondent, informed him. There is no intentional delay, laches or negligence caused from the part of this petitioner in filing this appeal. The appeal ought to have been filed on or before 7.5.2006." Obviously, the appellant filed this appeal against an award dated 6.2.2006 after more than ten years viz., only 10.6.2016. The delay is shown as 3593 days in the application. It is this inordinate delay that was explained so casually by the petitioner in the above mentioned manner. The impugned judgment and award itself would reveal that the petitioner in the above CMA was the first respondent in O.P.(M.V.)No. 1743/2001 and he was represented by a counsel in the said proceedings before the Tribunal. It is to be noted that the petitioner was the owner-cum-driver of the offending vehicle at the relevant point of time. In fact, a perusal of the impugned judgment, solely for the purpose of considering whether there is any basis for the contentions taken up for condoning the delay, would make it clear that before the Tribunal the second respondent-Insurance Company had filed I.A. No. 5885/2004 for a direction to the first respondent to produce the driving licence. In paragraph No.12 of the impugned judgment the Tribunal observed thus: "the counsel for the first respondent undertook to produce the same but he could not produce it. So that the I.A. was closed. There is no explanation for non-production of driving licence". When the petitioner was represented through counsel before the Tribunal and filed written statement and participated in the proceedings he cannot be heard to contend that he was not aware of the finding of the Tribunal that he was not possessing valid driving licence. When a case is decided on merits after hearing the counsel engaged by a party the said party cannot feign ignorance about the findings in the order/judgment passed after such hearing as in the eye of law it is an order/judgment passed after hearing the party. Therefore, the petitioner cannot be heard to contend that he was prevented by sufficient cause from preferring the appeal in time. Needless to say that remaining ex parte before the Tribunal also could not be assigned as a sufficient cause for condoning the delay in the absence of convincing and cogent explanation therefor. According to the petitioner he received notice in this proceedings only on 20.5.2016. Even then, it is evident that he has not cared to file a cross objection in the appeal, within the permissible period or even

thereafter. How could the petitioner now seeks to bring in an appeal with prayers to set aside the judgment and award dated 6.2.2006 whereby the claimant was granted an award of compensation for Rs.86,100/- and with the further prayers to permit him to adduce evidence. The petitioner had ample opportunities to raise his contentions. Having chosen not to avail such opportunities the petitioner is not justified in lamenting that in the event of refusing to condone the delay he had to suffer inextinguishable loss and injury. In the said circumstances, having perused the affidavit accompanying the petition and considering the reasons assigned as mentioned above for the inordinate delay of 3593 days, we are of the considered view that it reveals nothing but the gross negligence from the part of the petitioner. At any rate, allowing this application at this belated stage would not advance course of justice whereas it would only result in miscarriage of justice. In short, this application cannot be allowed and the delay of 3593 days in filing the appeal cannot be condoned. In the result, the application to condone the delay is to be dismissed. Consequently, the appeal is also liable to be dismissed going by the principle and procedure under Order 41, Rule 3A of the Code of Civil Procedure.

MACA 1674 of 2006:

3. Now, we will consider the former appeal preferred by the injured-petitioner seeking enhancement of the compensation granted by the Motor Accidents Claims Tribunal, Thrissur as per award in O.P.(M.V.)No. 1743/2001. The claim petition was under Section 166 of the M.V. Act seeking a total compensation of Rs.5 lakhs for the injuries sustained by the appellant in a motor vehicle accident that occurred on 13.2.2001. On that day the appellant was standing at Lenin Nagar, Punnamm along with her children when the offending vehicle viz. a car bearing registration No. KL 8/M 6336 knocked her down. Consequentially she sustained serious injuries. It is in the said circumstances that alleging rashness and negligence on the part of the first respondent, the owner-cum-driver in driving the said vehicle and taking up averments so as to make the second respondent liable to indemnify the first respondent that the claim petition was filed. Before the Tribunal the first and second respondents filed separate written statements. In the written statement filed on behalf of the first respondent it was contended that the accident had occurred not due to the negligence on the part of the first respondent. It is stated that it occurred due to the negligence of the appellant/petitioner when she attempted to cross the road. Further, it is contended that if at all the claimant is to be compensated, the second respondent is bound to indemnify him as the vehicle in question was insured with the said Insurance Company. The second respondent filed written statement and additional written statement. It is true that the existence of the valid policy at the time of accident was admitted the second respondent. But, at the same time, in the additional written statement it was specifically contended that the first respondent was not having a valid driving licence at the time of the accident. On the side of the claimant-appellant she got herself examined as PW1 and one Dr. K.S. Sunil Kumar was examined as PW2. The claimant has also adduced

documentary evidence consisting of Exts.A1 to A19. No oral evidence was adduced by the respondents. On their side Ext.B1 which is a copy of the policy certificate in respect of the vehicle in question was produced. The Tribunal considered the evidence on record and the rival contentions and passed the impugned award whereby and where under the petition was allowed in part and an amount of Rs.86,100/- was awarded as compensation with interest at the rate of 7% per annum from the date of petition till realisation. As noticed here-in-before it is dissatisfied with the said quantum of compensation that this appeal has been preferred by the claimant.

4. We have heard the learned counsel appearing for the appellant, learned counsel appearing for the first respondent and also the learned counsel appearing for the second respondent Insurance Company.

5. The learned counsel for the second respondent-Insurance Company attempted to canvass the position that in view of the finding of the Tribunal that the first respondent was not having a valid driving licence fastening of the liability on the insurer to pay, initially, the amount awarded to the appellant herein though with the liability to recover the amount paid to satisfy the award from the first respondent, is absolutely unjustifiable and unwarranted and hence, liable to be interfered with. The learned counsel for the first respondent, on the contrary contended that the first respondent was, in fact, having a valid driving licence to drive the class of vehicle to which the offending vehicle belongs, at the time of the accident. It is further submitted that I.A. No. 1738/2016 has been filed in this appeal with a prayer to receive Annexure R1 (A) as an additional document. It is a photocopy of a licence claimed to have been issued in the name of the first respondent viz, Dr. K.C. Prakasan who is the driver-cum-owner of the offending vehicle. While considering the question whether it could be accepted on file and admitted in evidence, we are of the view that certain aspects, borne out from records, have to be looked into. We have already stated that the second respondent had filed an additional written statement before the Tribunal taking up the specific contention that the first respondent was not having a valid driving licence to driver a car, at the time of the accident. Such an additional written statement was filed by the second respondent as early as on 29th September, 2004 and the judgment was passed by the Tribunal only on 6.2.2006. After taking up such a specific contention in the additional written statement the second respondent filed I.A. No. 5885/2004 for a direction to the first respondent to produce the driving licence. Evidently, even after the receipt of copy of I.A. 5885/2004 and making an undertaking before the Tribunal that he would produce the driving licence the first respondent had failed to produce the same before the Tribunal. This fact recorded in the impugned judgment is not disputed by the first respondent. The fact that he had not produced the same before the Tribunal cannot be disputed because if it was already produced, there would be no need to file the above mentioned application to receive the copy of the licence, at this appellate stage. In fact, the fact that what is sought to be produced is only a photocopy and that too, of the duplicate is not at all

mentioned in the affidavit accompanying the petition. Why the photocopy is produced and under what circumstances duplicate was obtained, if at all duplicate was obtained, are also conspicuously absent in the affidavit accompanying I.A. No. 1738/2016 filed in this appeal. The first respondent is fully aware of the fact that the Tribunal held that he was not having valid driving licence at the time of the accident and that is why the second respondent was directed to "pay and recover" the awarded amount. Even then, the first respondent has not cared to produce the original of the driving licence or at least to specifically state the reasons why the same could not be produced, in the affidavit. In the contextual situation it is relevant to refer to the decision of the Hon"ble Apex Court in *Sital Das v. Sant Ram* reported in [AIR 1954 SC 606]. The Hon"ble Apex Court held therein that when no foundation is laid for the reception of secondary evidence, such evidences shall be excluded from consideration. True that in terms of Order 41, Rule 27 of the Code of Civil Procedure this Court is having the power to receive additional evidence at the appellate stage. However, the nature of the document sought to be produced and marked viz. Annexure R1(A) as also the manner in which it is sought to be done viz., without specifically mentioning that it is a photocopy and explaining the circumstances for producing the photocopy especially of the duplicate, we are of firm view that it cannot be received as evidence in this appeal. We, therefore, decline to exercise the power under Order 41, Rule 27 of the Code. Consequently, I.A. No. 1738 of 2016 is dismissed. We will now, deal with the contention of the second respondent. Admittedly, the first respondent had not produced the driving licence before the Tribunal. It was in the said circumstances that the Tribunal was constrained to hold that the first respondent was not having a valid driving licence and ultimately granted the second respondent the right to recover the amount paid to satisfy the award from the first respondent after paying the amount in terms of the award to the claimant. Evidently, the Tribunal had not fastened with the liability to indemnify the first respondent. Evidently, the Tribunal as per the impugned award only directed the second respondent, the insurer of the vehicle to satisfy the award at the first instance by paying the amount awarded to the claimant with liberty to recover the amount paid, from the first respondent. Taking into account all these facts and the observations made by the Tribunal specifically in paragraph 12 of the impugned judgment and award we are of the view that the first respondent cannot be heard to say that he was deprived of an opportunity to produce the driving license and it can only be taken that for reasons best known to him and to him alone, he had not produced the driving licence if at all he possessed a valid licence at the time of the accident. At any rate, it is a fact that the first respondent has failed to bring on record evidence to upset the finding of the Tribunal. Being a person who was ultimately to pay Rs.86,100/- along with interest and cost as per the award owing to the fact that the second respondent was given the liberty to realise the amount paid to the claimant/appellant from him, he ought to have been diligent enough at least to prefer a regular appeal or cross objection within the statutorily prescribed period or within a reasonable time showing sufficient cause for the

delay. As noticed here-in-before, he had filed an appeal but with an inordinate delay of 3593 days and we have already found that the reason assigned by the 1st respondent for the inordinate delay could not be condoned and that the said application and consequently, the appeal are liable to be dismissed. When he being the owner-cum-driver of the offending vehicle he is supposed to the person holding the original driving licence and withholding of the same is sufficient to draw an adverse inference that he was not having a valid driving licence to drive the same, at the relevant point of time. Now, we will consider whether an interference with the impugned judgment and award is called for at the instance of the second respondent. It is to be noted that even though the second respondent now, raises grievance against the judgment and award on the ground that the Tribunal awarded only "pay and recovery" instead of fully exonerating the second respondent from the liability to pay the compensation, it is a fact that the second respondent has not chosen to prefer a regular appeal in terms of Section 173(1) of the M.V. Act or to file a cross objection in this appeal. Though there is no legal inhibition to consider the contentions of a non-appealing party or a party who failed to file a cross-objection in the light of the provisions under Order 41, Rule 33 CPC the said power need not be exercised in favour of a party who has not filed an appeal or cross objection at his instance as a matter of right as the said vide power has been bestowed upon the court to enable it do complete justice between the parties and therefore it is to be exercised only when the court is satisfied that but for the use of the said power gross injustice would occur. In the light of the decisions of the Hon"ble Supreme Court in *National Insurance Co. Ltd. v. Kusum Rai* [(2006) 4 SCC 250], *Ishwar Chandra v. Oriental Insurance Co. Ltd.* [(2007) 10 SCC 650] and *Ram Babu Tiwari v. United India Insurance Company Limited and Ors.* [(2008) 8 SCC 165] rendered relying on the earlier decision in *National Insurance Co. Ltd. v. Swaran Singh* [2004 (1) KLT 781 (SC)] case ordering "pay and recovery" in case of absence of valid driving licence, for the driver of the offending vehicle cannot be taken as an illegality warranting appellate interference. In such circumstances, we do not find any reason to interfere with the finding of the Tribunal that the first respondent had not produced the driving licence and he had not given any explanation for its non-production. Therefore the consequential order directing the second respondent, the insurer to pay the awarded amount with interest and costs and then, granting liberty to recover the amount paid from the first respondent, is nothing but an inevitable consequence also does not call for any interference. In the result, I.A. No. 1738/2016 filed in this appeal is liable to be dismissed.

6. Now, the question surviving for consideration is whether the appellant is entitled to get enhanced compensation under any of the heads. The accident and the fact that it occurred due to the negligence from the part of the first respondent are not now available to be disputed and in fact, not disputed before us. The appellant has produced Ext.A2 wound certificate and Ext.A6 discharge card to establish that she had sustained grievous injuries in the accident. She has also produced Ext.A8 disability certificate issued by PW2. Going by the

wound certificate and the discharge card the appellant sustained the following injuries:-

"fracture of lateral tibial condyle and tibial spine of left knee, medial ligament tear of left knee, fracture of head of right fibula, fracture of distal end of right radius, subluxation of right temporo mandibular joint and fracture of nasal bone".

Ext.A8 would reveal that PW2 who examined the appellant for the purpose of assessing the permanent disability assessed the whole body disability as 22%. The Tribunal dealt with Ext.A8 the assessment and the evidence of PW2 in paragraph No.11. The Tribunal found that while being examined as PW2 he was asked to give the split up percentage of disability and the break-up given by him made total percentage of disability as 23%. That apart, when being cross examined he deposed that he could not exactly say the formula which he had adopted for assessing the disability. It is in the said circumstances that the Tribunal declined to accept the entire percentage of disability assessed by PW2. It is to be noted that Ext.A8 is not a disability certificate issued by a duly constituted Medical Board. In the light of the nature of the oral evidence of PW2 we see no reason to hold that the disinclination to accept and act upon Ext.A8 by the Tribunal is irregular or illegal warranting interference. But, at the same time, evidently, the Tribunal took note of the fact that the appellant had sustained ligament tear on left knee, fracture of distal end of right radius with subluxation of right temporo mandibular joint and consequently assessed the whole body disability of the petitioner as 10%. On going through the injuries sustained by the appellant as revealed from Exts.A2 and A6 and A8, and the discussion and appreciation of evidence, we are of the considered view that the Tribunal was right in holding that the entire percentage of disability certified under Ext.A8 could not be taken into consideration. At the same time, on going through Ext.A8 and the nature of the injuries sustained by the appellant and the reasoning for assessment disability revealed from Ext.A8, as revealed from the aforesaid evidence on record, we are of the considered view that the whole body disability can be taken as 12%. In the claim petition the appellant stated that she was a Lab Technician and was getting a monthly income of Rs.3,500/-. While being examined she contended that she is a tuition teacher. It is a fact that the appellant had not adduced any evidence to establish her averments in the claim petition or her assertions made during her examination, regarding income and occupation. But at the same time the evidence on record would reveal that she is a house wife. The accident occurred on 13.2.2001. In such circumstances, we are of the view that even in the absence of any evidence regarding the occupation and income monthly income could be fixed by equating her services in terms of money and by relying on the decision of the Hon''ble Apex Court in *Lata Wadhwa v. State of Bihar* [AIR 2001 SC 3218]. The Hon''ble Apex Court held that in respect of a house wife belonging to the age group of 34-59, reckoning the service rendered by them to the family and equating the same in terms of money, it would only be reasonable to take the notional income of persons within the said age group as Rs.3,000/-. The appellant was aged 34 years on the date

of the accident. In such circumstances, we are of the view that the notional income fixed by the Tribunal viz., Rs.1,500/- requires reI. fixation and accordingly, we fix the monthly income of the appellant as Rs.3,000/-. The Tribunal fixed the multiplier of the appellant with reference to her age on the date of the accident as 16. A perusal of Ext.A19 which is the copy of the S.S.L.C. Book would reveal that the Tribunal correctly fixed the multiplier especially in view of the decision of the Hon'ble Apex Court in Sarla Varma v. Delhi Transport Corporation [2010 (2) KLT 802 (SC)]. In such circumstances, with the modified monthly income and percentage of permanent disability compensation for permanent disability has to be reassessed. Based on such reassessment the appellant would be entitled to get an amount of Rs.69,120/-. However the Tribunal has already granted an amount of Rs.28,800/- under that head. Therefore, the appellant is entitled to get only an amount of Rs.40,320/- additionally under that head. It is granted. The Tribunal took the period of loss of earnings only as four months. Taking note of the nature of the injuries sustained by the appellant the parts of the body on which such injuries were sustained and the disability, we are of the view that the said period ought to have been taken as six months. Taking the period of loss of earning as six months and the monthly income as Rs.3,000/- the appellant would be entitled to get an additional amount of Rs.12,000/- under the head. It is granted. Towards transportation, the Tribunal granted only an amount of Rs.1,000/-. Taking note of the number of reviews which the appellant must have had after the initial hospitalisation and discharge we are of the view that an amount of Rs.3,000/- has to be granted additionally under the head transportation expenses. It is awarded. Towards bystander's expenses, taking note of the period of hospitalisation, we are inclined to grant Rs.1,000/- additionally under that head. Towards pain and suffering, considering the nature of the injuries revealed from Ext.A2 wound certificate as also Ext.A6 discharge card, we have no doubt that she must have endured enormous pain. Hence, we are granting an amount of Rs.10,000/- more under that head. Taking note of the injuries and the disability it is evident that the appellant was deprived and would be deprived of ordinary experiences and enjoyment of life, for the period she lives. Hence, we are inclined to grant an amount of Rs.15,000/- towards loss of amenities. Thus, the appellant is entitled to get an additional compensation of Rs.81,320/- (Rupees eighty one thousand three hundred and twenty only).

7. In the result:

CMA No. 1920 of 2016 in MACA No.1643 of 2016 filed for condoning the delay of 3593 days in filing the appeal is dismissed. Consequently, MACA 1643/2016 is also dismissed. I.A. No. 1920/2016 filed in this appeal is dismissed. MACA No.1674/2006 is allowed. The appellant is awarded an additional compensation of Rs.81,320/- (Rupees eighty one thousand three hundred and twenty only). The said additional compensation will carry interest at the rate of 8% per annum from the date of petition till realisation. The second respondent insurer is directed to pay the said amount along with interest thereon within a period of

two months from the date of receipt of a copy of this judgment. Since we concurred with the grant of liberty to recover the amount paid from the first respondent, the second respondent after paying the amount in terms of the impugned award and this judgment to the appellant-claimant will be at liberty and entitlement to recover the amount paid, from the first respondent.

8. There will be no order as to costs.