

(2000) 12 CAL CK 0035
In the Calcutta High Court
Case No : F.M.A. No. 1594 of 2000

The New India Assurance Co. Ltd.

APPELLANT

Vs

Bidyut Kumar Mukherjee and Others

RESPONDENT

Date of Decision : 21-12-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Motor Vehicles Act, 1988 — Section 113B, 140, 149(2), 158, 158(6)

Citation : (2001) ACJ 1891 : (2001) 2 CALLT 281

Hon'ble Judges : Samaresh Banerjea, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Mr. Kamal Krishna Das, Mr. Krishanu Banik and Ms. Purabi Saha, for M.D., Duragapur Steel Plant, for the Appellant;

Final Decision : Dismissed

Judgement

A.K. Banerjee, J.—This appeal has been preferred by the New India Assurance Co. Limited mainly on the two grounds which are as follows :--

(i) Since the application u/s 140 of the Motor Vehicles Act, 1988 has been dismissed, the application u/s 166 of the Motor Vehicles Act, 1988 should have been dismissed on the grounds that it is barred by the principle of res judicata.

(ii) The compensation awarded to the claimant was on the higher side and the Insurance Company is entitled to challenge the same in this appeal although there was no application made before the Court below for permission u/s 170 of the said Act of 1988.

2. For disposal of the present appeal the relevant section of the said Act of 1988 which would come up for consideration are set out for ready reference.

Section 140. Liability to pay compensation in certain cases on the principle of no fault:--(1) Where death of permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicles shall, jointly and severally, be liable to pay compensation in

respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of (fifty thousand rupees) and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of (twenty-five thousand rupees).

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1), shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made or shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force.

Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or u/s 163A.

Section 163A. Special provisions as to the payment of compensation on structured formula basis.--Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument, having the force of law, the owner of the motor vehicle or the authorised insurer shall be 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.

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

Section 166. Application for compensation.--(1) An application for compensation arising out of an accident of the nature specified in subsection (1) of section 165

may be made-

- (a) by the person who has sustained the injury; or
- (b) by the owner of the property; or
- (c) where death has resulted from the accident by all or any of the legal representatives of the deceased; or
- (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be;

Provided that they were all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or the benefit of all the legal representatives of the deceased and the legal representatives who have not so injured, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed.

Provided that where no claim for compensation u/s 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(3) *****

(4) The claims Tribunal shall treat any report or accident forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act.

Section 170. Impleading insurer in certain cases.--Where in the course on any injury, the Claims Tribunal is satisfied that-

- (a) there is collusion between the person making the claim and the person against whom the claim is made, or
- (b) the person against whom the claim is made has failed to contest the claim.

It may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in subsection (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

3. u/s 140 of the said Act, the claimant is entitled to have compensation for a fixed amount irrespective of the fact whether there has been any fault on the

part of the owner or there was any other reason for rejecting the claim on factual basis.

4. u/s 166 a claimant is entitled to apply for higher compensation and in case such compensation is given, compensation u/s 140 is liable to be adjusted.

5. u/s 163A the statute has provided a summary procedure which is commonly known as ready reconer for awarding compensation u/s 166 i.e. an applicant has a choice either to apply u/s 166 or to apply u/s 163A, but in both cases the appellant is entitled to the statutory compensation u/s 140.

6. In the instant case, the appellant availed of the remedy u/s 140 as well as 163A. The application u/s 163A has been dismissed by the Court below on the ground that it is not maintainable since the deceased had income more than Rs. 40,000/- at the time of the occurrence of the accident. The learned Judge of the Court below while dismissing the said application did not go into the merits of the matter.

7. The application u/s 140 came up for disposal before the Court below, the same was dismissed on the ground that it was hit by the principles of resjudicata since the application u/s 163A had been already dismissed.

8. Being aggrieved by the said order the claimant preferred an appeal. During the pendency of the said appeal, the application made subsequently by the claimant u/s 166 was disposed of in favour of the claimant holding that the claimant was entitled to compensation. The contention of the insurance Company that the said application u/s 166 was also barred by the principle of res judicata has however, been rejected by the Court below.

9. Since the claimant already got the award in his favour, he withdrew the appeal preferred by the claimant being aggrieved by the order passed u/s MO.

10. The present appeal is against the order made u/s 166 preferred by the Insurance Company.

11. Section 11 of the CPC bars a party to reagitate an issue which has reached its finality in another proceeding between the same parties. The application u/s 163A was dismissed on the ground that it was not maintainable since the deceased was having an income for more than Rs. 40,000/- and there was no adjudication on merits. Hence, the applicant was entitled to avail of the other remedy available under the Act namely section 140 and 166. We have no hesitation to say that the order passed by the Court below u/s 140 was erroneous as the Court below while dismissing the application u/s 140 misconstrued the provision of section 11 of the Code of Civil Procedure. Although the appeal preferred from the said order was withdrawn by the claimant, the claimant is entitled to challenge the said order in a collateral proceeding since the said order is a nullity as has been held in the Supreme Court in the case of Kiran Singh & Ors. v. Chaman Paswan reported in AIR1954 SC 354 wherein the Supreme Court was of the view that if an order is a nullity in the eye of law the

same can be challenged in any other collateral proceeding.

12. We feel that the learned Judge of the Court below while disposing of the application u/s 166 has very rightly rejected the contention of the Insurance Company to the said effect and held the said application u/s 166 to be maintainable.

13. Accordingly, we hold that the said application u/s 166 of the Motor Vehicles Act 1986 made by the claimant was maintainable and we are in total agreement with the learned Judge of the Court below on that score.

14. With regard to second issue raised by Mr. Das on behalf of the Insurance Company we feel that issue had already been decided in Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, . Mr. Das appearing for the Insurance Company relied on a Division Bench decision of this Court in the case of United India Insurance Co. Ltd., v. Gita Rani Mondal reported in (2001) 1 Cal LT 85 (HC) : 2000 Vol. II Calcutta High Court Notes page 389 wherein it was held that even if the application u/s 170 is not made by the Insurance Company before the Court below the Insurance Company is entitled to challenge the order impugned on merits. However, there are subsequent Division Bench decision which has followed the Shankaryya's case. Mr. Das has relied on a decision of another Division Bench presided by the Hon''ble Justice V.K. Gupta sitting with Justice Arunava Barua in F.M.A. No. 1472 of 2000 dated September 7, 2000 wherein the said Division Bench referred the identical issue to a larger Bench since there has been confusion raised because of the decision of the Division Bench in Gita Rani Mondal's case. Mr. Das has relied on another order passed by a Division Bench presided over by the Hon''ble Justice V.K. Gupta wherein I was a party, referring the same issue before the larger Bench following the earlier decision in F.M.A. No. 1472 of 2000. Mr. Banik appearing for the claimant has drawn our attention to the subsequent decision of the Division Bench of this Court including the Bench presided over by the Hon''ble Justice Chatterjee sitting with Hon''ble Justice Am it Talukdar wherein the said Division Bench unhesitatingly held that after Shankaryya's case the Insurance Company is not entitled to maintain any appeal on merits without prior permission being obtained u/s 170 of Motor Vehicles Act, 1988, Mr. Das appearing for the Insurance Company after relying on the various Division Bench decisions as above submitted that the subject matter of the case should also be referred to the larger Bench, in the alternative the matter should be adjourned till the decision is given in pending Supreme Court matter on the self-same issue where, according to Mr. Das, stay has been granted to the Insurance Company.

15. I am unable to accept the contention of Mr. Das with regard to the question of adjournment since I feel that so long the Shankaryya's case is not over-ruled by the Supreme Court, the same is binding upon myself.

16. With regard to the other question, i.e., referring the matter to a larger Bench I have no hesitation to confess that after careful examination of the judgment of

the Division Bench presided over by the Hon''ble Justice Chatterjee, I have become wiser and I feel that I should not have referred the subject issue to the larger Bench. Hence, on that score also the contention of Mr. Das is not tenable.

17. Accordingly. I hold that the Insurance Company is not entitled to maintain this appeal on merits since prior permission u/s 170 has not been obtained.

18. In the result, the appeal falls and is accordingly dismissed. Since I feel that the Insurance Company being a public body is unnecessarily burdening this Court with frivolous appeal, I award cost of Rs. 5100/- as against the Insurance Company.

19. The Insurance Company is directed to pay the awarded amount, the interest awarded by the Court below as also the cost by this Court to the claimant by Account Payee Cheque within four weeks from the date of the communication of this order.

20. Mr. Das appearing for the Insurance Company submitted that he has already deposited a sum of Rs. 25,000/- in this Hon''ble Court, since we have directed Mr. Das to pay the entire amount by Account Payee Cheque to the claimant directly, Mr. Das's client will be at liberty to withdraw the amount deposited in this Court upon filing an affidavit of compliance indicating the compliance of this order. Let an urgent certified xerox copy, if applied for be given as expeditiously as possible.

S. Banerjee, J.

21. Although my learned Brother with admirable dexterity has explained the issue which has come up before us and has also resolved the same by giving cogent reasons and dismissing the appeal with which I am in full agreement, I like to add few words in view of the importance of the issue which was raised before us.

22. The question of res judicata, which was raised by the insurer is, no doubt, mis-conceived.

23. As pointed out hereinbefore by my Learned Brother that the application of the claimant u/s 163A of the Motor Vehicles Act was dismissed not on merit but on technical terms. That apart, as it will appear from the said section itself that the legislature in its wisdom has introduced the said section by way of amendment providing for a summary procedure for payment of compensation without determination of the fact whether the death or permanent disablement in respect of which the claim has been made was due to any wrongful action or neglect or default of the owner of the vehicle.

24. The subsequent dismissal of the application of the claimant u/s 140 of the Act, as it appears from the said order itself, again was not on merit but on the ground that because of dismissal of the application of the claimant u/s 163A of the Motor Vehicles Act, the application of the claimant u/s 140 of the Motor Vehicles Act is barred by the principle of res judicata.

25. Such order was passed by the Tribunal totally over-looking the fact that principle of res judicata would not apply as there has been no final determination of the issues involved in the application for compensation.

26. We find that the learned Judge of the Tribunal has very ably after discussing this aspect of the matter has rightly rejected the contention raised by the insurance Company which had no merit whatsoever.

27. Mr. Dos learned counsel, appearing for the insurer, tried to contend referring to the provisions of section 113B of the Motor Vehicles Act, 1988 that since the claimant can opt to have the relief under any of the provisions mentioned therein, he was not entitled to pay relief under both and, therefore, could not have invoked section 166 of the Act, after dismissal of the application u/s 163A of the Act.

28. We are, however, unable to accept such contention of Mr. Das, Section 163B of the Act clearly lays down that where a person is entitled, to claim compensation u/s 140 and section 163A he shall file the claim case on either of the said section and not on the both. In the instant case, the Tribunal held, which rejecting the application u/s 163A on a technical ground, that such application is not maintainable as the income of the deceased exceeded Rs. 40,000/-.

29. In view of the aforesaid reason, it was held that on the said application, the applicant is not entitled to compensation. Such being the position it was, therefore, certainly open to the claimant to apply under sections 166 and 140 of the Motor Vehicles Act, 1988. As pointed out hereinbefore the dismissal of the application u/s 140 of the Motor Vehicles Act was made erroneously on a total wrong interpretation of law.

30. It will not be out of place in this connection, to refer to the decision of the Supreme Court in the case of Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, that a question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

31. We are somehow surprised that the Insurance Company which is a public undertaking inspite of such position of law and rejection by the Tribunal of its contention insist upon to continue the proceeding upto the High Court at the cost of the Public Exchequer. We do not find any merit in the appeal whatsoever preferred by the appellant, Insurance Company.

32. An attempt has been made by the Insurance Company to contend that even though the principle of res judicata will not apply, the Insurance Company is

entitled to challenge the order of the Tribunal on the question of quantum of compensation and the interest awarded thereon, notwithstanding the admitted fact that no leave was obtained from the Tribunal u/s 170 of the Motor Vehicles Act, 1988 for contesting the proceeding.

33. As it has been pointed out by learned Brother that the issue is *ex facie res integra* and not only such question has been settled in the case of Shankarayya (*supra*), such position of law has been reiterated by the Supreme Court time and again by subsequent judgment rendered by the Supreme Court including the decision reported in *Chinnama George and Others Vs. N.K. Raju and Another*, (*Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another*,

34. Mr. Das learned counsel appearing for the Insurance Company, however, tried to contend that a number of Special Leave petitions have been filed against the various judgments rendered by the Division Bench of this Hon'ble Court, dismissing the appeal filed by the Insurance Company on the grounds that the same were not maintainable following the decision of the Supreme Court in Shankarayya's case and in number of such cases, the Hon'ble Supreme Court has stayed the operation of the order passed by the High Court with a further direction upon the Insurance Company to deposit 50 per cent of the awarded amount, allowing the claimant to withdraw the same without furnishing any security.

35. It has been further submitted by Mr. Das that in view of such fact as aforesaid, the Court should wait for final disposal of the aforesaid Special Leave Petitions where such order has been passed by the Supreme Court. My learned brother has already dealt with the matter rightly contending that the decision of the Supreme Court being absolutely clear and unambiguous which has been rendered in Shankaryya's case and thereafter was reiterated in the subsequent cases are pronouncement of law u/s 141 of the Constitution and, therefore, are binding on us and unless and until such decisions are deviated from or upset by a larger bench of Supreme Court, such judgment remains law of the land. In fact, similar argument was advanced before a Bench to which myself and Justice G.C. De were parties which rejected similar contentions of the Insurance Company on the self-same reasoning.

36. The last contention of Mr. Das namely that the matter should be referred to a larger bench of this Hon'ble Court in view of contrary decision in the case of *Gita Rani Mondal* (*supra*) cannot also be accepted.

37. After the decision of *Gita Rani Mondal*'s case, again the Supreme Court, as pointed out hereinbefore, has reiterated the principle laid down in Shankaryya's case and the other Division Bench subsequent to the case of *Gita Rani Mondal*, presided over by Chatterjee, J. and S.B. Sinha, J. and as also others declined to refer the matter to a larger bench in view of the clear pronouncement of the law by the Supreme Court, which is binding upon all.

38. I fully agree with my learned brother that as it is indeed harassing for the

claimant that the Insurance Company which is not an ordinary litigant but a Public undertaking should proceed to delay the payment of awarded amount and continue litigation upto the High Court in the manner as aforesaid, it is a fit case where the appeal should be dismissed with the aforesaid cost of 300 Cms. (Rs. 5100/-).

39. Appeal dismissed.