

(2012) 04 GUJ CK 0029
In the Gujarat High Court

Case No : First Appeal No. 1995 of 2011 with Civil Application No. 8355 of 2011

The New India Assurance Co. Ltd.

APPELLANT

Vs

Ravindra Purshottam Senghani and Others

RESPONDENT

Date of Decision : 17-04-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 163A, 163A, 166, 168

Citation : (2013) ACJ 1779 : (2012) 2 GLH 325

Hon'ble Judges : C.L. Soni, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Salil Thakor and Ms. Megha jani, for the Appellant; Sandeep N. Bhatt For Defendant: 1, for the Respondent

Final Decision : Allowed

Judgement

Mr. Akil Kureshi, J.—Appellant, New India Assurance Co. Ltd., has in this appeal, challenged judgment and award dated 09.02.2011 passed by the Motor Accident Claims Tribunal (Assistant), Kachchh-Bhuj in M.A.C.P. No. 897 of 1999. By the said judgment and award, the Claims Tribunal disposed of Motor Accident Claims Petition filed by opponent No. 1 herein u/s 166 of the Motor Vehicles Act, 1988. Said opponent No. 1 had received serious bodily injuries in a vehicular accident which took place on 05.03.1999. He was a pillion rider on a scooter. A Jeep insured by the appellant-Insurance Company knocked down the scooterist. He had, therefore, filed claim petition seeking compensation of Rs. 20 lacs from the driver, owner and the insurer of the vehicle involved in the accident. The Claims Tribunal awarded compensation of Rs. 11,08,810/- with interest at the rate of 9% per annum from the date of application till actual payment. It is this award, which the Insurance Company has challenged in the present appeal.

2. Since the appellant-Insurance Company has raised only one single legal contention in support of the appeal and since learned Advocates appearing for the parties requested us to take up the appeal for final hearing at this stage, we heard learned Counsel for the parties at length. The Counsel for the Insurance

Company had submitted relevant documents in form of paper-book. Record and Proceedings were also called from the trial Court and perused by us.

3. Short contention of the appellant-Insurance Company was that the claimant had, during the pendency of the claim petition filed u/s 166 of the Act, also filed application u/s 163A of the Act. Such application was allowed by the Claims Tribunal by an order dated 13.12.2000 awarding Rs. 7,40,000/- to the claimant. It was thereafter not open to the Claims Tribunal to decide application u/s 166 of the Act on merits. We may record that the Counsel for the Insurance Company made it clear that he is pressing the appeal only on this ground. In other words, the Insurance Company raised no dispute with respect to involvement of the vehicle insured by the Company in the accident resulting into injuries to the claimant, the negligence of the driver of such vehicle as also the computation of compensation made by the Tribunal while disposing of Claim Petition u/s 166 of the Act by impugned award dated 09.02.2011.

4. Learned Counsel for the appellant-Insurance Company contended that the Claims Tribunal having entertained the claimant's application u/s 163A of the Act, it was thereafter not open to the Tribunal to entertain application u/s 166 of the Act. Counsel contended that the petition u/s 163A of the Act being in the nature of final adjudication of the compensation payable to the claimant, it was thereafter not open to the claimant to maintain application u/s 166 of the Act.

5. In support of his contention, Counsel relied on decision of the Apex Court in case of *The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc.*, wherein, the Apex Court had held that the compensation payable on structured formula provided u/s 163A of the Act is in the alternative and not in addition to the compensation payable u/s 168 of the Act on the principle of fault based liability.

6. Counsel also relied on the decision in case of *Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda*, wherein, three Judge Bench of the Apex Court confirmed the view in case of *Hansraj Kodala (supra)*.

7. Counsel drew our attention to a decision of learned Single Judge of this Court dated 15.01.2010 passed in Special Civil Application No. 9400 of 2006, rejecting the objection of the Insurance Company to the Claims Tribunal proceeding with the Claim Petition u/s 166 of the Act after having previously disposed of application u/s 163A of the Act. The learned Single Judge in the said judgment opined that proceedings under Sections 163A and 166 of the Act both were permissible. The claimant can file both proceedings and opt for either of the proceedings. The only requirement is that application u/s 166 of the Act should be filed before the award is passed.

Counsel pointed out that such decision was carried in appeal by the Insurance Company before the Apex Court. The Apex Court in case of *Oriental Insurance Co. Ltd. Vs. Dhanbai Kanji Gadhvi and Others*, , reversed the decision of the learned Single Judge and held that it was not permissible for the claimant to

proceed further with the petition filed u/s 166 of the Act.

8. Counsel also relied on the decision of the Division Bench of this Court in case of New India Assurance Co. Ltd. Vs. Bhavani Nanji Pachanbhai Patel and Others, wherein, the Bench referring to the decision of the Apex Court in the case of Deepal Girishbhai (supra) observed that remedy u/s 163A of the Act is not in addition to the remedy available u/s 166 of the Act and, therefore, it is for the claimant to elect or opt for either of them.

9. On the other hand, learned Counsel Shri Sandeep Bhatt appearing for the claimant opposed the appeal contending that at the time when the Claims Tribunal decided application of the claimant u/s 163A of the Act, law was not clear. The claimant, Insurance Company as well as the Claims Tribunal, therefore, proceeded on the basis that at the stage of deciding application u/s 163A of the Act, the Tribunal was only making a provisional order for compensation pending final adjudication of the Claim Petition u/s 166 of the Act. It was in this context that the Tribunal required that the claimant should not withdraw the Claim Petition u/s 166 of the Act or allow it to go by default. The Insurance Company also accepted that the compensation being paid under application u/s 163A of the Act was of interim nature, subject to adjustment while deciding claim petition u/s 166 of the Act. In short, Counsel submitted that Insurance Company cannot take contrary stand at this stage.

10. Before advertng to rival contentions, we may take a closer look at the facts on record.

11. Claimant filed a Claim Petition u/s 166 of the Act on 25.10.1999 claiming compensation of Rs. 5 lacs from the driver, owner and the Insurance Company of a jeep bearing registration No. G-J-12-V-6703 on the ground that such jeep being driven rashly had dashed against the scooter on which the claimant was travelling. Such accident resulted into serious injuries to the claimant for which he had to be hospitalised and was bedridden for nearly 12 months. He sustained permanent disablement. He, therefore, also prayed for compensation under the head of future loss of income. Such Claim petition was later on amended with the leave of the Court. Claim was enhanced to Rs. 20 lacs.

12. Along with this Claim Petition, the claimant also filed an application Exh.6 u/s 140 of the Act and claimed an amount of Rs. 25,000/- by way of interim compensation.

13. While these petitions were pending, the claimant filed application Exh.19 u/s 163A of the Act on 14.03.2000. He prayed that the opponents be directed to pay compensation of Rs. 19,33,000/- with interest. In the application, he made a declaration that he was filing the application keeping his right to receive full compensation in the Claim Petition filed u/s 166 of the Act intact. He also declared that he had not filed any application u/s 140 of the Act. Though this declaration was an obvious error, his intention was not to press both the applications i.e. application filed u/s 140 of the Act and the other which he later

on filed u/s 163A of the Act. This becomes clear from the fact that on 15.07.2000, his Counsel made an endorsement on the application u/s 140 of the Act that since application u/s 163A of the Act was filed, the application u/s 140 of the Act was not pressed. On "such endorsement, the Tribunal passed an order on the same day, disposing of the application u/s 140 of the Act as not pressed.

14. Opponent-Insurance Company filed reply to the claimant's application u/s 163A of the Act at Exh.22. In such reply, Insurance Company took a stand that the claimant has option either - to file application u/s 140 of the Act or u/s 163A of the Act, but not both. Significantly, the Insurance Company also contended that whatever the compensation that the Claims Tribunal may award u/s 163A of the Act, the same should be subject to final outcome of the Claim Petition u/s 166 of the Act. In the reply Exh.22, the Insurance Company averred as under :--

That in case if the direction is issued by the Hon"ble Tribunal to deposit the amount u/s 163-A of the Motor Vehicles Act and in that event it is submitted that the Tribunal should make further direction that the disbursement and investment of the award amount should be made according to Hon"ble the Gujarat High Court direction made in various appeals i.e. to release 30% amount to the applicant and rest of the amount will be adjusted after final disposal of the application u/S 166. It is submitted that the Tribunal should make further direction that in case the final finding is in favour of the Insurance Company then the amount deposited and paid under this application should be reimbursed to the Insurance Company.

15. The claimant as well as the Insurance Company both filed their written arguments to the application u/s 163A of the Act. In such written arguments also, the Insurance Company did not contend that decision on the application u/s 163A of the Act should be in the nature of final adjudication of the claimant's rights.

16. The Claims Tribunal thereupon proceeded to dispose of the claimant's application u/s 163A of the Act by the order dated 13.12.2000: The Tribunal awarded a sum of Rs. 7,40,000/- to be paid by opponent Nos. 2 and 3 jointly and severally with interest at the rate of 12% per annum from the date of the main claim petition till deposit. Significantly, the Claims Tribunal while allowing such application provided that "the petitioner shall file an undertaking before this Tribunal within 4(four) weeks from today stating that he will pursue the main claim petition and obtain a judgment and award on merits and he neither permit the same to be dismissed for default of appearance nor withdraw the same. In terms of the order passed by the Claims Tribunal, the Insurance Company deposited a sum of Rs. 9,10,776/-. Before investment and disbursement of such amount, the claimant filed an undertaking dated 29.08.2001 before the Tribunal, at Exh.32. that he undertakes not to withdraw the claim petition or allow it to go by default and that he will press the petition on merits.

17. Thus despite the disposal of application u/s 163A of the Act by the Tribunal,

the claimant's main petition u/s 166 of the Act remained pending. The Insurance Company for a considerable period of time, filed no reply to such claim petition. The stage for filing the reply was also closed by the Tribunal. Insurance Company however, filed such reply with the permission of the Court which was granted on 19.10.2010. In such reply dated 13.10.2010 Exh.46, Insurance Company, for the first time, took a stand that the Claims Tribunal had partly allowed the claimant's application u/s 163A of the Act and awarded a sum of Rs. 7,40,000/- which the Insurance Company had deposited. By virtue of decision of the Apex Court in case of Hansraj Kodala (supra), the claimant was not entitled to any further compensation u/s 166 of the Act. The Insurance Company also opposed the Claim Petition on merits including on the ground of negligence and the quantum of compensation that may be awarded.

18. On 19.10.2010, the Insurance Company also moved application Exh.47 seeking permission to oppose the petition on all grounds. Such prayer was granted by the Claims Tribunal by an order dated 19.10.2010.

19. After recording of evidence, both sides filed their written arguments. In written arguments of the Insurance Company also, question of maintainability of Claim Petition u/s 166 of the Act was raised.

20. The Claims Tribunal disposed of the petition u/s 166 of the Act by impugned judgment and award allowing enhanced compensation of Rs. 11,08,810/-. Amount already awarded on petition u/s 163A of the Act was to be adjusted towards such compensation.

21. We notice that before the Claims Tribunal, the Insurance Company had placed reliance on the decisions of the Apex Court in the cases of Hansraj Kodala (supra) and Deepal Girishbhai (supra). The Claims Tribunal however, placing reliance on the decision of this Court in case of Dhanbhai Kanji (supra) overruled the Insurance Company's objection as to maintainability of the petition u/s 166 of the Act. Only question therefore arises is whether the Tribunal was correct in doing so.

22. Having noticed the facts in detail, let us trace the development of law on the point.

23. After Section 163A of the Act was added to the statute, the question of nature of compensation payable under such provision came up for consideration before the Apex Court in case of Hansraj Kodala (supra). The Apex Court opined that the compensation payable u/s 163A of the Act was not as an alternative or in addition to the compensation payable u/s 168 of the Act. Section 168 of the Act pertains to award of the Claims Tribunal on application for compensation made u/s 166 of the Act. The Apex Court was of the opinion that for claiming compensation, it was open for the claimant to file petition u/s 163A of the Act and seek speedy remedy for compensation on the structured formula but the claimant could not thereafter maintain further claim u/s 166 of the Act.

24. The view of the Apex Court in case of Hansraj Kodala (supra) was soon thereafter doubted by another Bench and the issue was, therefore, placed before the larger Bench of three Judges. Such issue was decided in case of Deepal Girishbhai (supra). The Apex Court confirmed the view in the earlier decision in case of Hansraj Kodala (supra) and went on to opine that proceedings u/s 163A of the Act would be available only to those cases where the annual income does not exceed Rs. 40,000/-, and other claims, are required to be determined in terms of Chapter-XII of the Act. The Apex Court concluded as under :--

67. We, therefore, are of the opinion that Kodala has correctly been decided. However, we do not agree with the findings in Kodala 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 u/s 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.

We may however notice that in the said decision, the Apex Court converted the application u/s 163A of the Act into one u/s 140 of the Act. required the claimant to return excess amount after adjustment and thereafter, permitted the claimant to press Claim Petition u/s 166 of the Act on merits.

25. The law on the issue, therefore, is sufficiently clear. As laid-down by the Apex Court in the case of Hansraj Kodala (supra) and also in case of Deepal Girishbhai (supra), the Claim Petition u/s 163A of the Act is not in addition to the petition u/s 166 of the Act. The applicant has a choice either to file application u/s 163A of the Act if such provision is applicable in his case and seek a quicker resolution to his dispute by adoption of structured formula or maintain the claim petition u/s 166 of the Act which does not depend on such fixed parameters provided in the Act. But the claimant cannot maintain both the proceedings. Once application u/s 163A of the Act is heard and decided, it is not open for the claimant to maintain his application u/s 166 of the Act or for the Tribunal to decide and dispose of the same on merits.

26. The learned Single Judge of this Court took a view that as long as application u/s 163A of the Act is filed after petition u/s 166 of the Act; both would be maintainable. The Apex Court reversed such decision in case of Dhanbai Kanji (supra). While doing so, the Apex Court held and observed as under :-

11. The clear proposition of law which emerges from the decision of this Court in Deepal G. Soni is that the remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. As explained by this Court in the said decision, a claimant thus, must opt/elect to go either for a proceeding u/s 163-A or u/s 166 of the Act, but not under both.

12. Applying the principle laid down in Deepal G. Soni to the facts of the case, it will have to be held that the respondents having obtained compensation, finally

determined u/s 163-A of the Act are precluded from proceeding further with the petition filed u/s 166 of the Act. The exception mentioned by the learned Single Judge in the impugned judgment that a petition u/s 166 of the Act can be proceeded further if it is filed before passing of an award passed u/s 163-A of the Act is not supported by the scheme envisaged under Sections 163-A and 166 of the Act and is contrary to the principle of law laid down by this Court in Deepal G. Soni case. Therefore, this Court is of the opinion that the impugned judgment of the High Court upholding the order passed by the Tribunal to permit the respondents to proceed further with the petition filed u/s 166 of the Act cannot be sustained and will have to be set aside.

27. To complete the sequence, we may record that in case of National Insurance Company Ltd. Vs. Sinitha and Others, , the Apex Court considered the decision in case of Hansaraj Kodala (supra) and opined that in said case, the Supreme Court did not decide that the determination of compensation u/s 163A of the Act is based on no fault liability principle.

28. We, therefore, agree with the Counsel for the appellant that it was not open for the Claims Tribunal to allow the Claim Petition u/s 166 of the Act in the present case since previously the claim petition u/s 163A of the Act was already decided and partly allowed. In our view, therefore, the Tribunal committed an error. Our case is very similar to one decided by the Supreme Court in case of Dhanbai Kanji (supra). It was a case where the Claims Tribunal had previously allowed application of the claimant u/s 163A. When the petition u/s 166 came up for consideration, the Insurance Company filed application objecting to the Tribunal entertaining such petition. Tribunal rejected the application. The Insurance Company therefore, approached the High Court. Learned Single Judge dismissed the petition holding that since application u/s 163A was filed after filing of petition u/s 166 of the Act, both were maintainable. In further appeal by the Insurance Company, the Apex Court reversed the decision of the High Court relying on the decision in case of Deepal Girishbhai (supra). In our case also, facts are very similar. Only difference is that the Insurance Company did not file separate application before the Tribunal opposing maintainability of the petition but, instead raised such objection during the course of the proceedings in the written statement as well as in the oral arguments before the Tribunal and challenged the final decision of the Tribunal on the claim petition. To our mind this difference is not material.

29. Before closing, however, we would like to record that in the present case, the law has acted rather harshly against the claimant. The claimant filed his petition u/s 166 of the Act which was accompanied by an application u/s 140 of the Act seeking interim compensation. Soon thereafter, the claimant withdrew such application u/s 140 of the Act in view of the fact that he had filed application u/s 163A of the Act. In response to such application u/s 163A of the Act, the Insurance Company contended that even if the compensation is to be granted, the same should be subject to outcome of the Claim Petition u/s 166 of the Act.

On such basis, the Claims Tribunal proceeded to decide application u/s 163A of the Act treating it as interim in nature. It was for this reason that the Tribunal provided that the claimant should not allow his claim petition u/s 166 of the Act to go by default or withdraw it. In other words, the Tribunal provided that compensation being granted u/s 163A of the Act was interim in nature and would be open to adjustment when final order u/s 166 of the Act is passed. In such order, compensation may even be lesser than already awarded and in which case, the Insurance Company would be entitled to recover the difference.

30. Law on the issue was not clear when the Tribunal decided claimant's application u/s 163A of the Act. The Tribunal decided claimant's application u/s 163A on 13.12.2000. The decision in case of Hansraj Kodala (supra) was rendered on 04.04.2001. The claimant, Insurance Company and the Tribunal all, therefore, proceeded on the basis that such adjudication of compensation was interim in nature and not final.

31. The Insurance Company accepted such order by the Claims Tribunal passed in the year 2000 and filed no reply to the claim petition u/s 166 of the Act for long. Such reply was filed only in the year 2010. In such reply, for the first time, the Insurance Company took a stand that the claimant's petition u/s 166 of the Act was not maintainable in view of law laid down by the Apex Court.

32. The Claims Tribunal found that compensation higher than what was awarded previously which the Tribunal understood as interim, was justified on final adjudication of all issues. Such Claim Petition u/s 166 of the Act was decided after recording detailed evidence. With respect to such evidence, or even the computation of compensation, the Insurance Company has raised no serious grievance before us.

33. The sum total of result is that though the Claims Tribunal finds that the claimant should receive compensation of Rs. 11,08,810/- which would be the just compensation payable, the claimant's entitlement is getting reduced to the original sum of Rs. 7,40,000/- granted by the Claims Tribunal u/s 163A of the Act. Perhaps in view of the decision of the Apex Court in case of Deepal Girishbhai (supra), it was not the petition u/s 166 of the Act but the petition u/s 163A of the Act which was not maintainable since the claimant's income exceeded Rs. 40,000/- per annum. Unfortunately however, such law was laid down later on and the claimant and the Claims Tribunal as also the Insurance Company at the relevant time proceeded on the basis that the compensation being awarded u/s 163A of the Act was interim in nature.

34. Be that as it may, our duty is to apply law as it stands and the law allows no ambiguity, no room for any doubt. Inescapable conclusion therefore, we arrive at is that, despite such apparent loss to the claimant, the Tribunal's impugned award dated 09.02.2011 passed in the petition u/s 166 of the act must be set aside.

35. In the result, the appeal is allowed. Impugned award dated 09.02.2011 is set

aside. Record and Proceedings shall be transmitted to the trial Court. In view of disposal of the first appeal, civil application does not survive. Disposed of as infructuous.