

(2009) 09 CAL CK 0040

In the Calcutta High Court

Case No : F.M.A.T. No. 940 of 2008 and C.O.T. 58 of 2009

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Smt. Rusi Mudi and Others

RESPONDENT

Date of Decision : 16-09-2009

Acts Referred:

Civil Procedure Code Amendment Act, 1999 — Section 32(2)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 149(2), 163A, 170

Citation : (2010) ACJ 1721

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Sanjoy Pal, for the Appellant; Rabindra Nath Mahato, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—Both the appeal and the cross-objection were taken up together for hearing.

2. First we propose to take up the appeal for consideration.

3. This appeal is at the instance of Insurance Company in a proceeding u/s 163A of the Motor Vehicles Act and is directed against an award dated 25th April, 2008 passed by the learned Judge, Motor Accident Claims Tribunal, First Court, Purulia, in M.A.C. Case No. 24 of 2007, thereby disposing of the said proceeding by awarding a sum of Rs. 4,12,500/- as compensation with a direction upon the Insurance Company to pay the said amount with interest @ 6% per annum from the date of filing of the application till final realisation within three months of the said award.

4. Being dissatisfied, the Insurance Company has come up with the present appeal.

5. Mr. Mahato, the learned advocate appearing on behalf of the claimant-respondent, at the very outset, has taken a preliminary objection as regards the

maintainability of the present appeal on the ground that the same is not maintainable at the instance of the Insurance Company as the Insurance Company has sought to impugn the quantum of amount awarded by the Tribunal although it had not taken any leave u/s 170 of the Motor Vehicles Act.

6. Mr. Pal, the learned advocate for the appellant fairly conceded that his client did not take any leave in terms of Section 170 of the Act and the points sought to be urged in this appeal do not come within the purview of Section 149(2) of the Act.

7. In view of such submission, we find substance in the contention of Mr. Mahato, the learned advocate for the claimant-respondent that the present appeal is not maintainable at the instance of the Insurance Company. (See (1) R. Mannakatti and Anr. v. M. Subramanian and Anr. reported in 2006(2) T.A.C. 515 and (2) National Insurance Co. Ltd. v. Nicolletta Rohtagi and Ors. reported in (2003) 1 WBLR (SC) 1).

8. The appeal is, thus, dismissed as not maintainable.

9. We now propose to take up the cross-objection filed by the claimant for consideration.

10. Mr. Pal, the learned advocate for the appellant, has, in his turn, taken a similar preliminary objection as regards the maintainability of the cross-objection at the instance of the claimant-respondent by contending that once the appeal filed by his client is found to be not maintainable in the eye of law, no cross-objection is also maintainable in such an incompetent appeal. Mr. Pal submits that this Court by the above order having already found that the Insurance Company had no locus standi to prefer the present appeal, it should be presumed that the appeal filed by his client was non est in the eye of law and such being the position, no cross-objection is maintainable in such an incompetent appeal.

11. Mr. Mahato, the learned advocate appearing on behalf of cross-objector, however, opposed the aforesaid contention by relying upon the decision of the Supreme Court in the case of Mahant Dhangir and Another Vs. Madan Mohan and Others, and contended that even if the appeal is found to be not maintainable, as a respondent, his client has right to file cross-objection and this Court being an appellate Court can in exercise of its power conferred under Order 41 Rule 33 of the Code grant relief to his client notwithstanding the fact that his client had not preferred any separate appeal against the order of the learned Tribunal.

12. Therefore, the only question that falls for determination in this cross-objection is whether the cross-objection is maintainable when the appeal has been found to be not maintainable in the eye of law.

13. In order to appreciate the question involved herein the provision contained in Order 41 Rule 22 of the Code which is applicable to the present proceeding is quoted below:

22. Upon hearing respondent may object to decree as if he had preferred separate appeal.-(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may seem fit to allow.

[Explanation.-A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree insofar as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

(2) Form of objection and provisions applicable thereto.-Such cross-objection shall be in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto. (3) 3[* * *]

Note.-For provisions as to commencement and application of the above amendments made by Act 46 of 1999, Repeal and Savings provision, see Section 32(2)(v) of the CPC (Amendment) Act, 1999 (Act 46 of 1999), given in the Appendices.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.

14. On a plain reading of the aforesaid provision it is clear that a respondent who has not preferred any appeal against any part of the decree which has gone against him may, in an appeal preferred by the appellant against other part of the decree, file cross-objection within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may seem fit to allow notwithstanding the fact that he did not prefer any appeal against the refusal of that part of relief.

15. The aforesaid provision makes it clear that in order to maintain a cross-objection there must be a competent appeal according to law against any part of the decree passed by the learned Trial Judge. In the proceedings arising out of the Motor Vehicles Act of this nature, as pointed out by the Supreme Court in the case of R. Mannakatti and Anr. v. M. Subramanian and Anr. (supra), an Insurance

Company cannot prefer an appeal against an award questioning any other point than those referred to in Section 149(2) of the Act unless it has taken a leave in terms of Section 170 of the Act.

16. Appeal is a creature of statute and unless statute provides for right of an appeal, no right is conferred upon a litigant to prefer appeal. The legislature having curtailed the right of appeal of an Insurance Company on the question of quantum of amount awarded by the Tribunal in the absence of any leave u/s 170 of the Act, the appeal preferred by the Insurance Company should not be treated to be "an appeal" in the eye of law and thus, there was no scope of filing any cross-objection in such an appeal.

17. We, thus, find that in the absence of a properly constituted appeal permissible under law of the land, no valid cross-objection can be filed by the respondent. We, accordingly, dismiss the cross-objection as not maintainable by accepting the preliminary objections raised by Mr. Pal.

18. At this stage, we may advantageously refer to consistent judicial opinions of various Courts of this country as to non-maintainability of cross-objections when the original appeals are found to be not maintainable. In *Malhati Tea Syndicate Limited Vs. Revenue Officer, Jalpaiguri and Others*, , a Division Bench of this High Court presided over by P.B. Mukherji, CJ held that the cross-objection was liable to fail in view of the fact that the original appeal itself was not maintainable having been filed in the name of a company which was no longer in existence. In *Dhani Ram Vs. Smt. Sushila Devi*, , R.S. Pathak, CJ (as his Lordship then was) held that though Order 41 Rule 22 speaks of an appeal, it contemplates a valid appeal which ordinarily calls for consideration on its merits and it is such an appeal the pendency of which would entitle the respondent to file a cross-objection. According to the said decision, an appeal which is barred by time is not a valid appeal and the cross-objections too shall have to be rejected. In *Chanchalgauri Ramanlal and Others Vs. Narendrakumar Chandulal and Others*, , a Division Bench presided over by Hon'ble the Chief Justice of that Court (P.S. Poti, CJ) held that a cross-objection filed in a validly instituted appeal against a decree is as good as an appeal and shall have to be disposed of on merits but if an appeal does not lie, any cross-objection in such an appeal would not call for adjudication on merits. In *Charity Commissioner Vs. Padmavati and Others*, , the CJ speaking for the Division Bench held that in a time-barred appeal where the delay was refused to be condoned the appeal itself was rendered not maintainable and the cross-objection would not survive for consideration. In *A.L.A. Alagappa Chettiar v. Chockalingam Chetty and Ors.* reported in AIR 1919 Mad 784, Wallis, C.J. opined that the right of respondent to proceed by way of memorandum of objections is strictly incidental to the filing of the original appeal in time and it is open to a party against whom a memorandum of objections has been filed to set up the bar that the original appeal was filed out of time. We are in respectful agreement with the view of the law taken in the abovementioned decisions and hold that the cross-objection is maintainable if the original appeal

is competent for hearing on merits. A view contrary to the one taken by us has been taken by a Division Bench of Allahabad High Court in *Shankar Lal and Anr. v. Sarup Lal and Anr.* ILR (1912) All 140 and *Nanak Bakhsh and Ors. v. Wazir Singh and Ors.* (1909) 4 IC 625 (Punjab Chief Court). Both the decisions are not supported by any convincing reasoning or logic and to say the least, do not lay down the correct law, as observed by the Supreme Court in a recent case of *Municipal Corporation of Delhi and Others Vs. Intl. Security and Intelligence Agency Ltd.,* . (See the last sentence of paragraph 23 of the judgement).

19. In the case of *Mahant Dhangir and Another Vs. Madan Mohan and Others,* , the decision relied upon by Mr. Mahato, the question was whether a cross-objection is maintainable at the instance of a respondent not against the appellant but against other non-appealing respondent. In that context, the Supreme Court made the following observations:

If the cross-objection filed under Rule 22 of Order 41, C.P.C. was not maintainable against the co-respondent, the Court could consider it under Rule 33 of Order 41, C.P.C. Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If objection cannot be urged under Rule 22 against co-respondent, Rule 33 could take over and come to the rescue of the objector. The appellate court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower court. The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and correspondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraints that we could see may be these: That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities.

20. The sum and substance of the aforesaid decision is that even if strictly speaking, the provision of Order 41 Rule 22 enable a respondent to file cross-objection only against the appellant, by virtue of the power conferred under

Order 41 Rule 33, the appellate Court can grant appropriate relief to a non-appealing respondent against a co-respondent if the circumstances of the case so demand. The aforesaid proposition of law, however, in our view, does not enable the cross-objector to get the appropriate relief if the appeal itself is found to be not maintainable being barred by some law for the time being in force. In such circumstances, the appellate Court cannot exercise even the power under Rule 33 of the Code because of the fact that it has no right to entertain the appeal itself. Moreover, the power under Rule 33 is exercised only when the appellate Court decides to interfere with the order impugned in the appeal in favour of the appellant and it does not exercise such power if the appeal is dismissed on merit. In this connection, we may profitably refer to the following observations of the Supreme Court in the case of *Nirmala Bala Ghose and Another Vs. Balai Chand Ghose and Others*, :

The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41, Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.

21. Thus, by taking aid of the decision referred to by Mr. Mahato, where the question was whether a cross-objection is maintainable against a co-respondent and not the one involved herein, Mr. Mahato's clients cannot get any relief. We, therefore, find that the said decision does not support the cross-objector in anyway.

22. Both the appeal and cross-objection are, thus, dismissed as not maintainable.

23. In the facts and circumstances, there will be, however, no order as to costs.

24. I agree.