

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: May 24, 2010

Date of Order: June 04, 2010

+CM No. 12742 in MAC APP No. 433/2009

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04.06.2010

RAJESH KUMAR CHOPRA

... Appellant

Through: Mr. R.S. Sharma, Advocate

Versus

NATIONAL INSURANCE CO. LTD. & ORS.

... Respondents

Through: Mr. L.K. Tyagi, Advocate

AND

+CM No. 12747 in MAC APP No. 434/2009

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RAJESH KUMAR CHOPRA

... Appellant

Through: Mr. R.S. Sharma, Advocate

Versus

NATIONAL INSURANCE CO. LTD. & ORS.

... Respondents

Through: Mr. L.K. Tyagi, Advocate

+CM No. 12752 in MAC APP No. 435/2009

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04.06.2010

RAJESH KUMAR CHOPRA

... Appellant

Through: Mr. R.S. Sharma, Advocate

Versus

NATIONAL INSURANCE CO. LTD. & ORS.

... Respondents

Through: Mr. L.K. Tyagi, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. These three appeals have been preferred by the appellant against award dated 2nd January, 2007 with a delay of 885 days. The appeals are accompanied by an application for condonation of delay and also by an application under Order 41 Rule 27 of CPC for permitting the appellant to adduce evidence during appeal.

2. As per the averments made in the appeal, three claim petitions under Motor Vehicle Act were filed after an accident involving vehicle of appellant took place on 12th November, 2005 resulting into death of two persons and injuries to one. Notices of these claim petitions were served upon the appellant who did not put appearance. However, the appellant's contention is that when he went to Court on 5th April, 2006, he came to know that lawyers were on strike. So he went back without getting his presence recorded and thereafter he was advised by some Advocate that since the vehicle was insured, the matter will be dealt with by the

insurance company and he need not worry about the same. He, therefore, did not contest the claim petitions.

3. A notice under Order XII Rule 8 of CPC was got served upon the appellant by insurance company for producing copy of driving license and permit in the court on 16th December, 2006. The appellant's plea is that he sent his employee to the Court along with documents who handed over these documents to the Advocate of insurance company, but did not get his presence recorded in the Court. The insurance company's Advocate did not place these documents on record.

4. It is undisputed that despite being aware of the proceedings the appellant remained ex-parte and ultimately the award was announced on 2nd January, 2007. After the announcement of award on 2nd January, 2007, the appellant moved an application under Order IX Rule 13 of CPC on 15th January, 2007 seeking setting aside of the award. This application of the appellant was dismissed by the Tribunal on 27th February, 2008. Against this dismissal, the appellant preferred an appeal before the High Court on 16th May, 2008 being FAO No. 180 of 2008. The appeal was dismissed by the High Court on 25th May, 2008. Against the order of the High Court, the appellant preferred an SLP before the Supreme Court which was dismissed on 16th December, 2008. After dismissal of SLP the

appellant was called upon to deposit the award amount by the Tribunal, the appellant then preferred a Writ Petition before the High Court being WP(C) No. 11251 of 2009 for setting aside the order. This Writ Petition was dismissed as withdrawn by the appellant on 28th August, 2009. Thereafter the appellant filed these appeals.

5. The fact that the appellant filed an application under Order IX Rule 13 of CPC within two weeks of passing of the award makes it abundantly clear that he was keeping a watch on the proceedings of the Tribunal and was waiting for the Tribunal to pass an award so that he could assail it by making an application under Order IX Rule 13 of CPC. However, it was open to the appellant to avail the remedy of filing an application under Order IX Rule 13 of CPC or to prefer an appeal against the award under section 173 of M.V. Act. These remedies are not mutually exclusive and the appellant could have simultaneously prosecuted both these remedies. But the appellant did not prefer an appeal and continued with the remedy under Order IX Rule 13 of CPC. He went right up to the Supreme Court and even after the SLP was dismissed, he did not prefer an appeal, he filed a Writ Petition that amount be not recovered from him. It is only after the Writ Petition was dismissed as withdrawn that the appellant filed above appeals. I consider that after the remedy under Order IX Rule 13 CPC was exhausted by the appellant, the appellant could not turn around

and prefer appeals and start another round of litigation and carry it on, for depriving the claimants of the benefits of the decree. It must be noted that first round of litigation under Order IX Rule 13 of CPC took around three years and the dependents of the two deceased persons & injured were deprived of the timely compensation because of this litigation.

6. In *Sumera Vs. Madanlal & Ors.*, AIR 1989 M.P. 224, Madhya Pradesh High Court had observed that when remedy under Order IX Rule 13 CPC is exhausted, a regular appeal against ex-parte decree is not maintainable. Even if an appeal is filed against an ex-parte decree, the appellant has to restrict himself only to the submissions on merits and none else.

7. The appellant herein has moved an application under Order 41 Rule 27 asking the appellate court to record his evidence and take documents on record on the ground that by mistake he did not appear before the Tribunal and did not produce evidence in his favour. Order 41 Rule 27 of PC is not meant for those who deliberately do not appear before the Trial Court and do not produce evidence before the Trial Court. I, therefore, consider that application made by the appellant under Order 41 Rule 27 CPC was not maintainable.

8. I also consider that application seeking condonation of 885 days delay in filing appeal on the ground that the appellant was pursuing other remedies is also not maintainable. There is no ground to believe that the appellant was proceeding with other remedies bonafidely, more so, in view of the fact that application under Order 9 Rule 13 CPC was made soon after passing of the ex-parte award and the appellant, despite having remedy of filing the appeal open and concurrent, did not file an appeal.

9. I consider that it is not open to the appellant to get evidence adduced at the appellate stage, when he remained ex-parte before the Trial Court and get the award set aside on the basis of such evidence which he wants to introduce at the appellate stage. In case this evidence is not allowed to be introduced, there is nothing for the appellant to argue. The entire arguments of the appellant for setting aside the award are based on the additional evidence which the appellant wants to introduce under Order 41 Rule 27 of CPC.

10. I, therefore, consider that these appeals are not maintainable and are liable to be dismissed and are hereby dismissed.

June 04, 2010
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SHIV NARAYAN DHINGRA, J.