

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No. 1167 of 2014**

1. Smt. Savitri Widow of Suraj Yadav, aged about 22 years,
2. Amit Yadav S/o Late Suraj Yadav, aged about two years,
3. Samit Yadav S/o Late Suraj Yadav, aged about 6 months

The appellant No. 2 and 3 being minor through their natural guardian mother Samit. Savitri Devi (Appellant No. 1)

4. Mathura Prasad Yadav S/o Late Baljeet Yadav, aged about 55 years,

All are resident of near Pani Tanki Takiya, Post Parsa, Police Station Ambikapur, District- Surguja (C.G.).

----Appellants**Versus**

1. Jaimuniya Devi W/o Mathura Prasad Yadav, aged about 50 years, R/o Village Bajarpara Bhatgaon, Police Station Bhatgaon, District- Surajpur C.G. (Owner of Vehicle)
2. Branch Manager the Oriental Insurance Company Ltd. Branch Office The Oriental Insurance Company Ltd. Near Ambedkar Chowk, Manendragarh Road Ambikapur C.G. (Insurer).

---- Respondents

For Appellants	: Shri Rakesh Pandey, Advocate.
For Respondent No. 1	: None, though served
For Respondent No. 2	: Shri Pankaj Agrawal, Advocate

Hon'ble Shri Justice Gautam Chourdiya J.**14/02/2019**

- (1) Heard on I.A. No. 1, application for withdrawal of the appeal.
- (2) This appeal has been filed by the claimants, who are

unfortunate wife, father and children through natural guardian mother of deceased – Suraj Yadav, under Section 166 of the Motor Vehicles Act, 1988 (henceforth “Act, 1988”) against the award passed by third Additional Motor Accident Claims Tribunal, Ambikapur, Sarguja in claim case No. 202/2012 on 16.09.2014 dismissing the claim petition.

(3) Facts of the case leading to filing of the claim petition is that on 09.12.2011 at about 11.30 pm, while deceased Suraj Yadav was driving the vehicle Tavera CG07/5667, the front tire of Tavera got punctured and vehicle was uncontrolled and dashed with the tree, as a result thereof Suraj Yadav died on the spot itself. The claim petition filed by the claimants under Section 166 of the Act, 1988 was dismissed by the Claims Tribunal on the ground that the accident had occurred due to own negligence of deceased.

(4) Learned counsel for the appellants/claimants submits that as per advise of the counsel engaged by them, they filed claim petition under Section 166 of the Act, 1988 before the Claims Tribunal whereas actual legally permissible remedy available to the claimants is to file appeal under Section 163-A of the Motor Vehicle Act, therefore, the claimants seeks permission of this Court to withdraw the instant appeal with liberty to file claim petition under Section 163-A of the Act, 1988 before the Claims Tribunal. To which, counsel for the respondent No. 2/ Insurance Company has no objection.

(5) I have heard learned counsel appearing for the parties and perused the impugned award including record of the Claims Tribunal.

(6) In ***K.S. Bhoopathy and others Vs. Kokila and others, AIR 2000 SC 2132***, the Hon'ble Supreme Court in para-9 has interpreted Order XXIII, Rule 1 CPC which makes provisions for withdrawal of suit or abandonment of part of claim. Relevant portions of the provisions are extracted hereunder:

“Order XXIII

Withdrawal and Adjustment of Suits

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim;

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 or Order XXIII extend, neither the suit nor any part of the claim shall be abandoned without the leave of this Court.

(3) Where the Court is satisfied.-

(a) that a suit must fall by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1); or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3) he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

(Emphasis supplied)

(7) Further, in ***Narain s/o Chokh Ram Vs. Rewati s/o Chokh Ram and Others, AIR 2004 Punjab and Haryana 275***, the Hon'ble Supreme Court has observed in para-5 as under:-

5. After hearing learned counsel for the parties and perusing the impugned order as well as the other material on record, I am of the considered opinion that this petition deserves to be allowed because the name of the father of the plaintiff-petitioner as well defendant-respondents is the same, namely, Chokh Ram and on account of either some error or deliberate attempt on the part of defendant-respondents, the dispute has arisen with regard to the suit property. In the suit filed by the plaintiff-petitioner such a plea could not be set up and the Civil Judge has failed to exercise jurisdiction vested in him by considering the plea under Cl. (b) of sub-rule (3) of R.1 of O.23 of the Code. This aspect has been considered by the Supreme Court in K.S. Bhoopathy's case (AIR 2000 SC 2132) (supra) where two alternatives as contemplated by sub-rule (3) of R.1 or O. 23 of the Code have been discussed. It has been emphasized that the Court must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. Their Lordships have interpreted O. 23, R. 1 of the Code by observing as under:-

“The provisions in O. 23, R. 1, C.P.C. is an exception to the common law principle of non-suit. Therefore, on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of R. 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; one where the Court is satisfied that a suit must fall by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject -matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under O. 23, R. 1 is filed by the plaintiff at the

stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendants losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested to the defendant or even a third party. The appellate/second appellate Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in O. 23, R. 1 (3), C.P.C. for exercise of the discretionary power in permitting withdrawal of suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of the cases.”

(8) It is not disputed that death of Suraj Yadav arises in the motor vehicular accident. Looking to the age of minor children ie. 2 years and 6 months and widow of deceased – Suraj Yadav and the technicalities in this case, the Appellants/Claimants have a right to file afresh application under Section 163A of the Motor Vehicles Act before the appropriate forum under the Motor Vehicles Act.

(9) In view of the above cited judgments and the provisions under Order XXIII Rule 1 of the Code of Civil Procedure, the present appeal is disposed of. The claim petition filed under Section 166 of the Motor Vehicles Act, 1988 before the Tribunal by the Claimants/Appellants are permitted to be withdrawn with liberty to file fresh application under Section 163A of the Motor Vehicles Act on the same cause of action.

(10) Accordingly, the appeal is dismissed as withdrawn reserving liberty in favour of the appellants/claimant to file fresh claim

petition under Section 163-A of the Act, 1988 before the Claims Tribunal.

(11) In view of above, I.A. No. 1, stands disposed of.

Sd/-

(Gautam Chourdiya)
Judge

amita