

**FAO No. 5447 of 2005 (O&M) and
FAO No. 3627 of 2006 (O&M)**

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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**FAO No. 5447 of 2005 (O&M)
DECIDED ON: JANUARY 29, 2019**

NATIONAL INSURANCE COMPANY LTD.

.....APPELLANTS

VERSUS

GIAN KAUR & OTHERS

.....RESPONDENTS

AND

FAO No. 3627 of 2006 (O&M)

GIAN KAUR AND ANOTHER

.....APPELLANTS

VERSUS

MALOOKA RAM AND OTHERS

.....RESPONDENTS

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

**Present: Mr. V. Ramswarup, Advocate
for the appellant-Insurance Company**

**Mr. Neeraj Khanna, Advocate
for the appellants in FAO No. 3627 of 2006 and
for respondents No.1 and 2 in FAO No. 5447 of 2005.**

AVNEESH JHINGAN J. (ORAL)

The award dated 16.11.2005 passed by the Motor Accident Claims Tribunal, Amritsar [for brevity 'the Tribunal'] under Section 163-A of the Motor Vehicles Act, 1988 [for brevity '1988 Act'] has been assailed in two appeals, one by the Insurer of truck bearing registration No. RJ-19G-3481 [hereinafter referred to as 'offending vehicle'] and other by the claimants.

The grievance raised by the Insurer is that claimants have already availed compensation under Workmen's Compensation Act, 1923 (hereinafter referred to as '1923 Act') and Section 167 of 1988 Act debars the claiming of compensation under both the Acts i.e. 1923 Act and 1988 Act. The appeal filed by the claimants is for enhancement of compensation.

The facts emanating from the record are that on 26.08.2002, truck bearing registration No. CG-04ZC-3043 [hereinafter referred to as 'truck'] and Gujarat State Transport Bus bearing registration No. GJ/18V/8060 met with an accident at Jambva Crossing on National Highway-8 in the area of Police Station Makarpura, Vadodra City. After the accident, the Truck was standing on side of the road, at that time offending vehicle dashed into the truck from back side and thereafter vehicle bearing registration No. RJ-19-G-3481 struck into the truck from back side. Thereafter another truck bearing registration No. AP-11W-5497 struck against the truck. As a result, Jagtar Singh sustained injuries and lost his life.

A claim petition under Section 163-A of the 1988 Act was filed by the parents of Jagtar Singh, it was pleaded in the claim petition that the deceased was 21 years old at the time of accident and his income was ₹3,000/- per month.

The insurer raised an objection that since the parents of the claimants have claimed compensation under 1923 Act, the petition under Section 163-A of the 1988 Act is barred in view of Section 167 of the Act.

The Tribunal rejected the objection of the insurer stating that since the compensation is being claimed from the insurer of the vehicle not owned by employer of deceased, the claim petition is maintainable under the 1988 Act. The Tribunal awarded a sum of ₹96,400/- alongwith interest @ 6% per anum.

Learned counsel for the insurer contends that the Tribunal erred in entertaining the claim petition under Section 163-A of the 1988 Act as the claimants had already got compensation of ₹4,45,420/- alongwith interest @ 12% per annum, under Section 10 of 1923 Act.

Learned counsel for the claimants was not able to dispute the fact that an application under Section 10 of 1923 Act was moved and the compensation was duly awarded. He argues that the compensation under Section 163-A of the 1988 Act was being asked from owner, driver and insurer of the offending vehicle, whereas the compensation under 1923 Act was given by the employer or his insurer. He further argues that compensation awarded is on the lower side.

Learned counsel for the insurer submits that quantum of compensation has been awarded as per the Second Schedule of the 1988 Act and no enhancement can be made.

The issue to be decided is whether after claiming compensation under Section 10 of 1923 Act claim petition under the 1988 Act would be maintainable.

The issue raised by the Insurer in appeal is with regard to the scope of Section 167 of the 1988 Act. Section 167 is quoted below.

*“167. **Option regarding claims for compensation in certain cases.**— Notwithstanding anything contained in the Workmen’s Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen’s Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both”.*

As per Section 167 of the 1988 Act where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act and also 1923 Act, the compensation can be claimed under either of the Acts but not under both. The only exception is to Chapter X of the Act.

Chapter X of the 1988 Act deals with no fault liability in certain cases. Meaning thereby, that in spite of getting compensation under 1923 Act, the claimants shall be entitled to no fault liability. The choice is of the claimant to seek compensation under either of the Acts.

The Supreme Court in case of **National Insurance Co. Ltd. vs. Mastan and another; (2006) 2 SCC 641**, held as under:

“22. Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. Section 167 contains a non-obstante clause providing for such an option notwithstanding anything contained in the 1923 Act.

23. *The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.*

24. *In Nagubai Ammal and Others v. B. Shama Rao and Others [AIR 1956 Supreme Court 593], it was stated :*

"It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."

25. *In C. Beepathuma and others v. Velasari Shankaranarayana Kadambolithaya and others [AIR 1965 Supreme Court 241], it was stated :*

*"The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland -
"That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."*

"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

26. *Thomas, J. in P.R. Deshpande v. Maruti Balaram Haibatti 1998(2) RCR(Rent) 215 (SC) : [(1998)6 SCC 507] stated the law,*

thus :

"The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

27. The First Respondent having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof."

It was held that having claimed compensation from employee under 1923 Act, claim cannot be made under 1988 Act.

The Supreme Court in **Oriental Insurance Company Ltd. vs. Dyamavva and others;** 2013 (9) SCC 406; considering the decision of **Mastan's** case (supra) held as under:-

"12. The issue to be determined by us is, whether the acceptance of the aforesaid compensation would amount to the claimants having exercised their option, to seek compensation under the Workmen's Compensation Act, 1923. The procedure under Section 8 aforesaid (as noticed above) is initiated at the behest of the employer "suo motu", and as such, in our view cannot be considered as an exercise of option by the dependants/claimants to seek compensation under the provisions of the Workmen's Compensation Act, 1923. The position would have been otherwise, if the dependants had raised a claim for compensation under Section 10 of the Workmen's

Compensation Act, 1923. In the said eventuality, certainly compensation would be paid to the dependants at the instance (and option) of the claimants. In other words, if the claimants had moved an application under Section 10 of the Workmen's Compensation Act, 1923, they would have been deemed to have exercised their option to seek compensation under the provisions of the Workmen's compensation Act. Suffice it to state that no such application was ever filed by the respondents-claimants herein under Section 10 aforesaid. In the above view of the matter, it can be stated that the respondents-claimants having never exercised their option to seek compensation under Section 10 of the Workmen's Compensation Act, 1923, could not be deemed to be precluded from seeking compensation under Section 166 of the Motor Vehicles Act, 1988.

13. Even though the aforesaid determination, concludes the issue in hand, ambiguity if at all, can also be resolved in the present case, on the basis of the admitted factual position. The first act at the behest of the respondents-claimants for seeking compensation on account of the death of Yalgurdappa B. Goudar, was by way of filing a claim petition under Section 166 of the Motor Vehicles Act, 1988 on 30.5.2003. The aforesaid claim petition was the first claim for compensation raised at the hands of the respondents-claimants. If the question raised by the appellant has to be determined with reference to Section 167 of the Motor Vehicles Act, 1988, the same is liable to be determined on the basis of the aforesaid claim application filed by the respondents-claimants on 30.5.2003. The compensation deposited by the Port Trust with the Workmen's Compensation Commissioner for payment to the respondents-claimants was much later, on 4.11.2003. The aforesaid deposit, as already noticed above, was not at the behest of the respondents-claimants, but was based on a unilateral "suo motu" determination of the employer (the Port Trust) under Section 8 of the Workmen's Compensation Act, 1923. The first participation of Dayamavva Yalgurdappa, in the proceedings

initiated by the Port Trust under the Workmen's Compensation Act, 1923, was on 20.4.2004. Having been summoned by the Workmen's Commissioner, she got her statement recorded before the Commissioner on 20.4.2004. But well before that date, she (as well as the other claimants) had already filed a claim petition under Section 166 of the Motor Vehicles Act, 1988, on 30.5.2003. Filing of the aforesaid claim application under Section 166 aforesaid, in our view constitutes her (as well as, that of the other dependants of the deceased) option, to seek compensation under the Motor Vehicles Act, 1988. The instant conclusion would yet again answer the question raised by the appellant herein, under Section 167 of the Motor Vehicles Act, 1988, in the same manner, as has already been determined above.

14. In the aforesaid view of the matter, we hereby affirm the determination rendered by the Motor Accidents Claims Tribunal, Bagalkot, and the High Court in awarding compensation quantified at ₹11,44,440/- to the claimant. The Motor Accidents Claims Tribunal, Bagalkot, as also, the High Court, ordered a deduction therefrom of a sum of ₹3,26,140/- (paid to the claimants under the Workmen's Compensation Act, 1923). The said deduction gives full effect to Section 167 of the Motor Vehicles Act, 1988, inasmuch as, it awards compensation to the respondents-claimants under the enactment based on the option first exercised, and also ensures that, the respondents-claimants are not allowed dual benefit under the two enactments”.

The Division Bench of this Court in case **Yash Pal Sharma vs.**

Girdhari Lal; 2001 (4)RCR (Civil) 249, has held as under:

5. On reading Section 167 of 1988 Act, it is clear that the bar of the Section is only regarding making claim i.e., he is to make claim either under the 1988 Act or the 1923 Act. If without making a claim, the claimant is given any amount under the 1923 Act, there is nothing in

this Section which would disentitle him for getting the claim under the 1988 Act. This being the position, we find that the learned Tribunal was not correct in dismissing the claim of the appellant on the ground that he had already received the amount under the 1923 Act. The award, therefore, deserves to be set aside and the case deserves to be remanded to the learned Tribunal.”

In ***Dyamavva's and Yash Pal Sharma's*** case (supra) a distinction was made in compensation received under Section 8 and 10 of 1923 Act.

It was held that in order to succeed under the Act the claimant will have to establish that the right to seek compensation under 1923 Act was not exercised. As per the procedure under Section 8 of 1923 Act only the employer can deposit the compensation under 1923 Act and it is '*suo motu*' action on part of employer. On the deposit of the amount, the Commissioner is required to distribute the amount amongst the dependants. Whereas in Section 10 of 1923 Act, a limitation of two years is provided from the date of occurrence. In the said period a claim for compensation can be raised under 1923 Act by moving an application. Once an application under Section 10 of 1923 Act is moved the option given as per Section 167 of the 1988 Act is exercised, thereafter, the compensation cannot be claimed under the 1988 Act. But mere receipt of the compensation under Section 8 of 1923 Act would not be considered as exercise of option as that is a *suo motu act* of the employer.

In the present case, an application under Section 10 of 1923 Act was moved and thereafter a compensation of ₹4,45,420/- alongwith interest @12% per annum was awarded.

From the plain language of Section 167 of the 1988 Act and the afore-

said decisions, the claimant cannot avail compensation under both the Acts.

The contention raised by the claimant that the claim petition for compensation under the Act has been filed against the driver, owner and insurer of offending vehicle and not against vehicle owned by the employer has a fallacy. The Section does not provides for any exception with regard to the person against whom the compensation has been claimed. Even if its is claimed against the offending vehicle yet the compensation is being claimed under the 1988 Act. Whereas, Section 167 of the 1988 Act debars the claimant to seek compensation under both the Acts. The argument raised by learned counsel for the claimant is against the plain language of Section 167 of 1988 Act.

As section 167 of the 1988 Act provides no exception that in cases where accident gives rise to claim under both the Acts, the compensation can be claimed separately by invoking one Act against the employer and other against third party. The bar is that compensation under both the Acts cannot be claimed.

The appeal filed by the insurer for the reasons mentioned above is accepted and the appeal filed by the claimants is dismissed.

(AVNEESH JHINGAN)
JUDGE

JANUARY 29, 2019
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Whether speaking/reasoned:
Whether reportable :

Yes / No
Yes / No