

In the High Court of Punjab and Haryana at Chandigarh

FAO-426 of 2013(O&M)
Date of Decision:11.3.2019

Khazan Chand

---Appellant

vs.

New India Insurance Company and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. M.S.Sachdev, Advocate
for the appellant

Ms. Anamika Mehra, Advocate
for respondent No. 1

Mr. Krishan Sehajpal, Advocate
for respondents No. 2 to 5

Rekha Mittal, J.

Challenge in the present appeal has been directed against order dated 26.10.2012 passed by the Motor Accidents Claims Tribunal, Fast Track Court, Jalandhar (in short “the Tribunal”) whereby application for setting aside ex parte award dated 16.4.2009 filed by Khazan Chand (respondent No. 2 therein) by invoking Order 9 Rule 13 of the Code of Civil Procedure (in short “the Code”), was dismissed.

Counsel for the appellant would argue that Khazan Chand being registered owner of alleged offending vehicle Tata 709 bearing No.

PB-07-E-2217 was impleaded as respondent in claim application under Section 166 of the Motor Vehicles Act, 1988 (in short "the Act") filed by Bimla Rani and others in regard to death of Paramjit Singh in a motor vehicular accident. The Tribunal passed award on 16.4.2009 whereby the claimants were allowed compensation of Rs. 4,65,000/-, payable with interest but the insurance company was held entitle to recover the amount of compensation from the driver and owner of offending vehicle after payment of compensation to the claimants as the driver did not possess a valid licence. It is argued that the appellant did not receive any summons either through ordinary process or registered cover, therefore, ex parte proceedings initiated against the appellant and ex parte award dated 16.4.2009 cannot be allowed to sustain. It is further argued that no sooner the appellant got knowledge of passing of ex parte award when some official from office of Naib Tehsildar came to him and revealed that order has been passed by the Court for attachment of his property, he immediately filed application for setting aside the ex parte award. Counsel would inform that claim of victim family has already been satisfied by the insurance company and even the appellant has already paid the amount to the insurance company, in terms of recovery right given by the Tribunal but the Tribunal without providing an opportunity of hearing to the appellant has fastened recovery right against the appellant as well as driver of the offending vehicle even in absence of any privity of contract between the insurer and the driver.

Counsel for the insurance company has supported the impugned order with the submission that the Tribunal has rightly passed

order dated 28.3.2008 whereby the driver and owner of offending vehicle were proceeded against ex parte.

Counsel representing the appellant, in reply, would argue that even if it is assumed that the Tribunal has sent notice through registered cover, as the appellant is residing outside the jurisdiction of the Court at Jalandhar, no such presumption with regard to service of appellant through registered cover on expiry of period of 30 days is otherwise available. In support of his contention, he has relied upon judgment of the Himachal Pradesh High Court **M/s Aar Kay Traders vs. M/s Satish Electronics 2009 (4) Civil Court Cases 157.**

Counsel for the insurance company, while refuting contention of the appellant would argue that as the appellant is residing in Hoshiarpur and claim proceedings were pending in the Court at Jalandhar, since Hoshiarpur and Jalandhar fall in the same state i.e. State of Punjab, the appellant cannot derive any advantage to his contention from the provisions of Order 5 Rule 9 (4) nor can seek aid of what has been held by the Himachal Pradesh High Court in **M/s Aar Kay Traders's case (supra).**

I have heard counsel for the parties, perused the paper book and records of MACT case No. 7 of 2008 in which ex parte award was passed.

The claim application was registered on 22.1.2008 and notice to the respondent was issued on registered cover within three days for 25.2.2008. There is a report in the margin with regard to non-receipt of notice and the same is dated 23.2.2008. On 25.2.2008, appearance was caused on behalf of the insurance company and summons of respondents

No. 1 and 2 therein were ordered to be issued for 28.3.2008 on registered cover within three days. Again there is an endorsement dated 26.2.2008 with initials of an official and a report that summons not received back from Hoshiarpur. On the next date fixed i.e. 28.3.2008, the order passed by the Tribunal, reads thus:-

“RC sent to respondent No. 1 and 2 not received back, which was sent on 20.2.2008. The period of 30 days has been lapsed. It presumed that the respondent No. 1 and 2 has been received the registered cover. Case called since morning, but none has appeared on their behalf. Accordingly, respondents No. 1 and 2 are proceeded against ex parte. Written reply on behalf of respondent No. 3 filed. Rejoinder be filed on 22.4.2008.”

The Tribunal adjourned the case on 25.2.2008 to 28.3.2008 for issuance of summons for service of respondent Nos. 1 and 2 therein and endorsement dated 26/2 indicates issuance of summons but there is no specific endorsement that summons were even sent through registered cover. There is nothing on record suggestive of the fact that claimants furnished any registered cover either on 25.2.2008 or 26.2.2008 for issuance of notice to respondents No. 1 and 2 therein through registered cover. I have gone through entire file of the Tribunal but unable to find any postal receipt on record with regard to issuance of notice to respondents No.1 and 2 by way of registered process. The Tribunal without bothering to ensure if any registered notice was actually issued for service of respondents No. 1 and 2 therein has recorded order that registered cover was sent to respondents No. 1 and 2 on 20.2.2008 and since period of 30 days has

elapsed, respondent Nos. 1 and 2 are presumed to have received the registered cover. This casual approach adopted by the Tribunal led to initiation of ex parte proceedings and culmination of ex parte award against the driver and owner of offending vehicle. The court that decided application under Order 9 Rule 13 of the Code has put a premium on the lapse committed by the Tribunal that passed order dated 28.3.2008. The Presiding Officer did not bother to examine the original records in order to determine if any registered notice was ever issued for service of respondents No. 1 and 2 therein. In this view of the matter, findings of the Court that appellant was duly served in the case are the result of non-application of mind and failure to take into consideration the materials on record.

Counsel for the appellant has made a legal submission by referring to the provisions of Order 5 Rule 9 of the Code particularly sub rules (3) and (4) thereof. He has placed reliance upon judgment of the Himachal Pradesh High Court in **M/s Aar Kay Traders's case (supra)** wherein sub rule (4) of Rule 9 of Order 5 of the Code has been interpreted. A relevant extract from sub rule (4) of Rule 9 of Order 5, reads thus:-

“Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the court in which suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of rule 21 shall not apply.”

Indisputably, the appellant was residing outside jurisdiction of

the court in which the application for compensation was instituted. The contention raised by counsel for the insurance company that both the places i.e. Jalandhar and Hoshiarpur fall within the State of Punjab, therefore, sub rule (4) would not be attracted in the circumstances of the present case is the result of misreading of words 'where a defendant resides outside the jurisdiction of the court in which suit is instituted'. The Himachal Pradesh High Court while interpreting sub rule (4), extracted hereinabove, has held, quoted thus:-

“In cases where the defendant resides outside the territorial jurisdiction of the court in which the suit is instituted, the court cannot issue summons by registered post acknowledgment due. It has been urged that this is a retrograde step and will unnecessary delay the suit. It does not appear to be so. Probably, the reason why registered post service has not been permitted when the defendant resides outside the jurisdiction is that in a large number of cases, the registered letter never comes back and then a declaration of deemed service is made after thirty days. The legislature, probably felt that where the defendant resides far away, outside the jurisdiction of the court, it would be unjust to raise such a presumption.

Be that as it may, this court cannot go into the reasons which may have weighed with the legislature since the language of sub-rule (4) is absolutely clear and the only interpretation which can be given to sub-rule (4) is that when the defendant resides outside the jurisdiction, he can under this

sub rule only be served by speed post, courier service, fax message or e-mail but not by registered post acknowledgment due.”

Taking into consideration the provisions of sub rule (4) when examined in the light of judgment in **M/s Aar Kay Traders's case (supra)**, it was not available to the Tribunal to raise a presumption of service through registered cover in the given circumstances as the appellant was residing outside the territorial jurisdiction of the Court at Jalandhar in which the application for compensation was filed. Analyzed from any angle, there was no due service of the appellant and as such, order passed by the Tribunal initiating ex parte proceedings and passing ex parte award against the appellant cannot be allowed to sustain and accordingly set aside. I would hasten to add that there is nothing on record suggestive of the fact that the appellant had knowledge of pendency of proceedings before the Tribunal prior to the date when he received intimation of passing of award from the official of Naib Tehsildar.

In view of what has been discussed hereinbefore, the appeal is allowed. The impugned order is set aside and application under Order 9 Rule 13 of the Code is allowed. As a consequence, the ex parte award dated 16.4.2009 is set aside only to the limited extent of deciding the issue of driving licence and entitlement of the insurance company to have recovery right against driver and owner of the offending vehicle as claim of the victim family already stands satisfied and the claimants would be put to unnecessary inconvenience if they are again called upon to appear before the Tribunal for deciding the limited dispute between the insurer and

insured. As a consequence, MACT case No. 7 of 2008 is restored to the Board of the Tribunal for deciding the aforesaid limited issue from the stage of filing of the written statement by the appellant.

Disposed of.

(Rekha Mittal)
Judge

11.3.2019
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes/No