IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH: NAGPUR

FIRST APPEAL NO. 260 OF 2008

1. Sou. Kunda Wd/o. Diwakar Pawade,
   Aged about 34 years, Occ. Household,

2. Chetan S/o. Diwakar Pawade,
   Aged about 16 years, Occ. Education,

3. Ku. Shrutika D/o. Diwakar Pawade,
   Aged about 11 years, Occ. Education,

   All are Residents of Maharana Pratap Ward,
   Ballarpur, Tah. Ballarpur, Dist. Chandrapur.

4. Janardhan S/o. Krushnaji Pawade,
   Aged about 69 years, Occ. Agriculturist,
   R/o. Kavthi, Tah. Pombhurna,
   Dist. Chandrapur. . . . **APPELLANTS**

..V E R S U S..

1. National Insurance Company Ltd.
   Through its Manager,
   National Insurance Company Ltd.,
   Chandrapur Branch, Chandrapur.

2. Santosh S/o. Prabhudayal Bajpayee,
   Aged about 31 years, Occ. Business,
   R/o. Subhash Nagar, Ballarpur,
   Tah. Ballarpur, Dist. Chandrapur. . . . **RESPONDENTS**

Shri Apurv De, Advocate for appellants.
Shri B. P. Bhatt, Advocate for respondent no. 1.

CORAM:- M. S. SONAK, J.

DATED:- 06.12.2021

JUDGMENT:-

1. Heard Shri Apurv De, learned counsel for the appellant, and Shri B. P. Bhatt learned counsel for respondent no. 1.

2. The appellants (claimants) challenged the judgment and award dated 15.09.2005 made by Motor Accident Claims Tribunal, Chandrapur (Tribunal) disposing of the Claim Petition No. 165/2002 and awarding the claimants compensation of Rs. 4,37,700/- with interest @ 8% p.a. *inter alia* on the ground that Tribunal, in the peculiar fact and circumstances of the present case ought to have treated the claim as one under Section 166 of the Motor Vehicle Act (un-amended) instead of a claim under Section 163A of the said Act.

3. The claimant no. 1 is widow of late Diwakar Pawade (Diwakar). The claimant nos. 2 and 3 were Diwakar's minor children then aged about 12 years and 7 years respectively. Claimant no. 4 was Diwakar's father, who was then aged 65 years. The Claim Petition was lodged on account of the unfortunate demise of Diwakar in an accident that took place on 29.04.2002.

4. In the Claim Petition, it was pleaded that on 29.04.2002, Diwakar had gone to village Kawathi to attend a marriage ceremony. He was standing by side of Gondpipari Khedi Road near Kawathi Bus Stop talking to another person. At that time, a jeep bearing

registration no. MH31/AG 6468 that came from Gondpipari side driven in a rash and negligent manner by its driver and owner, lost control, turned turtle, and thereafter dashed Diwakar. Diwakar sustained injuries due to this accident, was shifted to hospital, and was declared dead.

5. In the Claim Petition, the claimants had pleaded that Diwakar was an E.P. Fitter in W.C.L. at Ballarpur Open Cast Mine, where he was drawing a salary of Rs. 10,705=60 per month and the salary slip was also produced in support of this contention.

6. The Claim Petition, in this case, has been curiously drafted. The claimants claimed compensation of Rs. 19,14,105/- together with interest @ 18% p.a. based on premise that Diwakar was drawing a salary of Rs. 10,700/- p.m. This was clearly a claim in terms of Section 166 of the said Act to be found in para no. 13 of the Claim Petition.

7. The claimants in para no. 13(B) of the very same Claim Petition, however, proceeded to refer to the calculations in terms of the IInd Schedule of the said Act and based upon the same pleaded that the compensation of Rs. 64 lakhs becomes payable but, they were restricting their claim to Rs. 13 lakhs due to their weak financial position and inability to pay Court fees commensurate to Rs. 64 lakhs.

This claim of para no. 13(B) of the Claim Petition relates to the provision of Section 163A of the said Act.

8. The claimants examined some witnesses in support of their case. The Tribunal vide the impugned judgment and award dated 15.05.2005 awarded the claimants compensation of Rs. 4,37,700/- with future interest @ 8% p.a. and the proportionate costs. In doing so, the Tribunal only considered the claim under Section 163A of the said Act. Further, the Tribunal recorded a finding that the monthly salary of Diwakar was Rs. 6448/- and therefore, his annual salary was Rs. 77,376/-. The Tribunal however held that since the claim was under Section 163A of the said Act, the annual salary of Diwakar had to be capped at Rs. 40,000/- p.a. and on this basis proceeded to make an award of Rs. 4,37,000/-. The claim under Section 166 of the said Act was not at all considered by the Tribunal.

9. Shri Apurv De, learned counsel for the appellants submitted that the provisions of Section 163A of the said Act apply only to a case where the deceased was drawing an income of less than Rs. 40,000/- p.a. He submits that once this finding was reached, the Tribunal was not justified in treating the Claim Petition as one filed under Section 163A of the said Act but was obliged to treat it as filed under Section 166 of the said Act. He submitted that there were alternate pleadings

in the Claim Petition and therefore, such treatment should have posed no difficulty. He submitted that since this was not done, the impugned award warrants interference. He submitted that after setting aside the impugned award, the matter can be remanded to the Tribunal for consideration of the Claim Petition as one filed under Section 166 of the said Act, so that fair opportunity is available to all the parties. He submitted that in the peculiar facts of the present case, no order be made requiring the claimants to refund the compensation amount already received but, appropriate order can always be made to put the claimants to terms that in the unlikely event of they having to return such amount to Insurance Company. He relies on the following judgments in support of his contentions:-

i) Deepal Girishbahi Soni Vs. United Indian Insurance Co. Ltd. [(2004) 5 SCC 385]

ii) Oriental Insurance Co. Ltd. Vs. Hansrajbhai V. Kondala [(2001) 5 SCC 175]

iii) National Insurance Co. Ltd. Vs. Bruno Baltazar Saldanha [I (2012) ACC 30]

iv) New India Assurance Co. Ltd. Vs. Ashabai [I (2009) ACC 800]

v) Bajaj Allianz General Insurance Co. Ltd. Vs. Shobha Banarao Khose [2020 (6) Mh.L.J. 371].

10. Shri B. P. Bhatt, learned counsel for Insurance Company submits that the claimants had themselves invoked the provisions of Section 163A of the said Act and therefore, are now estopped from contending that the impugned award made under Section 163A of the said Act is without jurisdiction or otherwise vitiated. He submits that the claimants took a calculated risk knowing full well that in the petition under Section 163A of the said Act, they are exempted from the requirement of proving negligence. He submits that the claimants cannot be allowed to approbate or reprobate. He submits that serious prejudice will be caused to the Insurance Company and the owner because if the matter is now required to be determined as one under Section 166 of the said Act, the Insurance Company and the owner may be called upon to pay the interest on the determined amount for a period between 18.09.2002 i.e. the date of filing of the Claim Petition and the date of realization of the amount that may be determined. He submits that for no fault of the Insurance Company and the owner, liability of payment of such interest can never be foisted on them. He submits that full liberty will also have to be given to the parties because the predicates of a petition under Section 163A and Section 166 of the said Act are quite different. He submits that even otherwise, there is no error in the impugned award because the Tribunal had quite correctly taken the income of Diwakar at Rs.

40,000/- p.a. in terms of Section 163A of the said Act read with IInd Schedule of the said Act. For all these reasons, he submitted that the present appeal may be dismissed.

11. The rival contentions now fall for determination.

12. In this case, as noted earlier, the claimants, in all probabilities, based on legal advice adopted quite a strange and unfortunate method for claiming compensation in respect of Diwakar's death in an accident arising out of the use of a motor vehicle. In the Claim Petition so lodged, claims were made on an alternate basis by invoking the provisions of Section 163A and 166 of the said Act. This is evident from the holistic reading of the Claim Petition in a meaningful manner. This is quite clear from reading para nos. 13 and 13(B) of the claim petition. The calculations based on Diwakar's monthly income of Rs. 10705/- in terms of Section 166 have been stated in para no. 13 and para no. 13(B), there are pleadings about the claim in terms of Section 163A of the said Act read with IInd Schedule of the said Act.

13. The Tribunal in the present case has virtually ignored the claim under Section 166 of the said Act but, treated the Claim Petition as one under Section 163A of the said Act. This is even though the Tribunal, in para no. 19 of the impugned judgment and award

recorded a categorical finding that the net salary of Diwakar can be taken as Rs. 6448/- p.m. and Rs. 77,376/- p.a. The Tribunal, however, held that since the claim is under Section 163A of the said Act, the annual income of Diwakar will have to be restricted to Rs. 40,000/- p.a.. Based on such reasoning, the Tribunal awarded a compensation of Rs. 4,37,700/- with future interest @ 8% p.a. to the claimants.

14. Now, the question, which arises for determination is whether the Tribunal was justified in treating the Claim Petition in the present case as one filed under Section 163A of the said Act when the claimants had pleaded that yearly income of deceased- Diwakar was far more than Rs. 40,000/- p.a. They had pleaded that Diwakar's monthly income was Rs. 10,705/-. Secondly, the further question which arises is whether the Tribunal after recording the categorical finding at para no. 19 of the impugned judgment and award that Diwakar's yearly income was Rs. 77,376/- p.a. was justified in restricting it or capping it to Rs. 40,000/- p.a. and then proceed to make an award under Section 163A of the said Act.

15. From the reading and analysis of the provisions of Section 163A read with IInd Schedule of the said Act, it is quite clear that the Claim Petition under the present case should not have been treated as one under Section 163A of the said Act having regard to the pleadings

that the income of the deceased was in access of Rs. 40,000/- p.a. Therefore, the Tribunal, in this case, should have gone by alternate pleadings and treated this petition as one under Section 166 of the said Act.

16. In ***Bajaj Alliance Vs. Shobha*** (supra), this Court has held where in the Claim Petition itself it was alleged that income of the deceased was more than Rs. 40,000/- p.a., the Tribunal could not have entertained the Claim Petition under Section 163A of the said Act. The Claim Petition was accordingly dismissed but, liberty was granted to the Claimants to file petition under Section 166 of the said Act with directions to Tribunal to consider the same in accord with the law.

17. In ***New India Assurance Vs. Ashabai*** (supra), the learned Single Judge of this Court (Justice A. S. Oka, as is Lordship then was), noted that the Claim Petition was filed through Advocate setting out a specific case that the income of the deceased was Rs. 4000/- p.m. In such circumstances, it was held that the action of invoking Section 163A of the said Act could not be said to be deliberate and the Claim Petition was allowed to be converted to one under Section 166 of the said Act. The learned Judge ruled that conduct of the parties is quite relevant in the matter and discretion for conversion should be exercised based on the conduct of the parties.

18. In the above case also, the contention similar to the one now raised by Shri Bhatt about the Insurance Company and the owner being burdened with interest from the date of filing of the petition under Section 163A of the said Act till the disposal of the petition under Section 166 of the said Act was raised. The learned Judge, however, held that the interest payable under Section 171 of the said Act is always in the discretion of the Tribunal. While passing the final award in the Claim petition under Section 166 of the said Act, the Tribunal would certainly note that the claimants had originally filed the petition, which was not maintainable and it is only subsequently that the petition was converted to that under Section 166 of the said Act. The learned Single Judge reiterated that the Tribunal is free to consider this factual aspect while exercising discretionary powers under Section 171 of the said Act. the said Act

19. In ***National Insurance Company Vs. Bruno Baltazar Saldanha*** (supra) yet another learned Single Judge of this Court permitted the conversion of the petition under Section 163A of the said Act to one under Section 166 of the said Act after it was noted that income of the deceased was more than Rs. 40,000/- p.a. Several consequential orders were made allowing the amendment to the Claim Petition as originally filed and permitting the parties to lead further evidence.

20. In this case, apart from the pleadings, even the Tribunal recorded categorical findings that the annual income of Diwakar was Rs. 77,376/- p.a. However, Tribunal, proceeded to restrict or caped this amount to Rs. 40,000/- by holding that Claim Petition was under Section 163A of the said Act. In the case of ***Oriental Insurance Company Vs. Hansrajbhai V. Kondala (supra)***, it appears that such capping was resorted to. Now ***Kondala*** (supra) was decided by the Division Bench of the Hon'ble Supreme Court. Another Division Bench doubted the correctness of the two-judge Bench decision in ***Kondala*** (supra) and therefore, reference was made to the three-Judge Bench which was disposed of in the case of ***Deepal Soni*** (supra).

21. The three-Judge Bench of the Hon'ble Supreme Court in ***Deepal Soni*** (supra) concluded that ***Kondala (supra)*** had been correctly decided but, the three-Judge Bench did not agree with the capping principle adopted therein. The three-Judge Bench of the Hon'ble Supreme Court concluded that provision of Section 163A is a social security provision providing a distinct scheme and only those whose annual income is up to Rs. 40,000/- can take benefit thereof. All other claims are required to be determined in terms of Chapter 12 of the said Act. There is no doubt that Chapter 12 of the said Act includes the petition under Section 166 of the said Act.

22. Having regard to the law laid down in the three-Judge Bench of Hon'ble Supreme Court in ***Deepal Soni*** (supra), it is quite clear that exercise of restricting or capping the annual income of Diwakar to Rs. 40,000/- by the Tribunal was not correct. The Tribunal, in the facts of the present case, should have treated the Claim Petition as one under Section 166 of the said Act and proceeded to determine the compensation accordingly.

23. The contention based on estoppel or approbation and reprobation is not quite correct in the peculiar facts of the present case. Here, quite unfortunately, the claimants, no doubt based on legal advice, had filed Claim Petition invoking both Section 163A and Section 166 of the said Act. There were pleadings in respect of both the claims. Therefore, this cannot be said to be the case of approbation and reprobation. Even otherwise, in the matter under the said Act, where the claimants seek compensation, there is no scope for readily inferring any malafides or approbation or reprobation on the part of the claimants unless there is some clear evidence to suggest otherwise or where the claimants seek to obtain some undue advantage based on the same. Here, the claimants have lost due to their curious and confusing pleadings and therefore, it cannot be considered that the claimants took their chance or otherwise tried to take advantage of their confusing pleadings and alternate claims.

24. The contention of Shri Bhatt that the Insurance Company and the owner might be saddled with the interest from the date of filing of the petition without any fault of their part indeed has some merit. However, as was pointed out by the learned Single Judge, who decided the case of ***New India Assurance Co. Ltd. Vs. Ashabai*** (supra), there is discretion vested in the Tribunal under Section 171 of the said Act for the award of interest. At the stage of exercise of such discretion, the Tribunal would be duty-bound to consider all these aspects. Therefore, based on the apprehension now expressed, there is no case made out to deny the appellants the relief as pressed for by Shri Apurv De in this appeal.

25. Shri Bhatt, learned counsel for the Insurance Company is also entirely right in submitting that appropriate opportunity be granted to all the parties if any conversion was being permitted as opposed to mere liberty to file a fresh petition under Section 166 of the said Act. Shri Bhatt submitted that course adopted in ***Bajaj Alliance Vs. Shobha*** (supra) should be adopted in this case also and the Claim Petition should be dismissed with liberty to the claimants to file fresh proceedings under Section 166 of the said Act. He also submitted that the appellants should be directed to return the compensation amount, which they already received in terms of the impugned Award, which they now seek to quash. He submitted that claimants should at least

be called upon to furnish a Bank Guarantee to secure this amount so that, the Insurance Company is not forced to take out lengthy proceedings to recover this amount if the Tribunal ultimately holds that the Insurance Company is not liable to pay any amount to the claimants.

26. As noted earlier, the contention of a reasonable opportunity to all the parties is correct and such reasonable opportunity deserves to be granted to all the parties if the conversion of the petition to one under Section 166 of the said Act is to be permitted at this stage and the matter is to be remanded for fresh consideration. However, in peculiar facts of the present case, it will be harsh and inequitable to require the claimants to bring back the amount, which they recovered in terms of the impugned award or to offer Bank Guarantee in respect thereof. No doubt, the appellants will have to give a bond or furnish an undertaking concerning the said amount.

27. Shri Apurv De submitted that the appellants will furnish the undertaking that in the unlikely event of they being required to return the amount which they recovered under the impugned award, they will return the same together with interest @ 8% p.a. within 3 months from the directions for such return or such lesser period as the Tribunal may specify.

28. Such undertaking on behalf of the claimants will, according to me, set to rest the apprehension now expressed by Shri Bhatt in the present appeal. Ultimately, it must be remembered that this is a case where the deceased was only standing by the side of the road and the offending vehicle turned turtle and dashed the deceased resulting in his unfortunate demise. At least, *prima facie* therefore, a case of negligence has been made out. Further, even the Tribunal had concluded that the annual income of the deceased at the time of his accident was Rs. 77,376/- p.a. Based on all this, it is unlikely that the claimants will receive compensation which will be less than Rs. 4,37,700/-. The claimants, as noticed earlier, are the widow, minor children, and aged father. At this stage, requiring such claimants to bring back an amount of Rs. 4,37,700/- will be quite harsh and unjust in the peculiar facts of the present case.

29. Having cumulative regard to all the aforesaid facts, circumstances, and position in law, this appeal is disposed of by making the following order:-

(i) The impugned judgment and award dated 15.09.2005 in Claim Petition No. 165/2002 filed before the Tribunal at Chandrapur is hereby set aside and the Claim Petition No. 165/2002 is remanded to the file of the Tribunal at Chandrapur for fresh consideration by treating the Claim Petition as one filed under Section 166 of the said Act.

(ii) Even though the judgment and award dated 15.09.2005 is set aside, the appellants will not be required to refund the amount received by them under the said award to the Insurance Company for the present. However, this will be subject to the appellants filing undertaking before the Tribunal within one month from today that they will refund such amount to the Insurance Company together with interest @ 8% p.a. if they are so directed by the Tribunal and within three months from the direction of the Tribunal or within such shorter period as may be directed by the Tribunal. This undertaking can state that the same is given without prejudice to the right of the appellants to challenge the Award made by the Tribunal directing refund.

(iii) The appellants are granted liberty to amend their Claim Petition clarifying that the same is instituted under Section 166 of the said Act and for including such other and further particulars, as may be necessary for the purpose. The Tribunal to allow the appellants to carry out such amendments within such time as it may fix for the purpose.

(iv) After the appellants amend their claim petition, the respondents in the Claim Petition are also permitted to amend their pleadings and to take such defenses, as are permissible to them. The Tribunal should also allow the respondents to amend their pleadings within such time it may fix for the purpose.

(v) The Tribunal will permit the parties to lead further evidence if they so request and shall decide the remanded Claim Petition afresh by treating the same as instituted under Section 166 of the said Act.

(vi) The Tribunal, while exercising powers under Section 171 of the said Act for the award of interest if and when the occasion arises for the same, shall have due regard to the facts and circumstances of the case, including that the claimants, in this case, had invoked Section 163A of the said Act though in the alternate and had themselves challenged the award made under Section 163A of the said Act.

(vii) The Tribunal should endeavor to dispose of the Claim Petition on remand, as expeditiously as possible, and preferably within eight months from the date the parties file an authenticated copy of this judgment and order.

(viii) All contentions of all the parties on merits are expressly kept open for determination by the Tribunal.

(ix) The parties shall now appear before the Tribunal on 04.01.2022 at 10.30 a.m. and file an authenticated copy of this judgment and order. The Tribunal shall act based on such an authenticated copy and if necessary, issue notices to such parties, who do not appear before it on the said date.

(x) The Appeal is disposed of in the aforementioned terms. There shall be no order as to costs.

(M. S. SONAK, J)

RR Jaiswal