

S.S.Kilaje

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 354 OF 2013

1. Vitthal Shankar Nanaware
Age : 70 years, Occ:Nil,
2. Smt. Kamalabi Vithal Nanaware,
Age: 68 years, Occ: Househod,
3. Vaishali Kailas Nanaware,
Age:25 years, Occ : Household,
4. Vishal Kailas Nanaware,
Age:12 years, Occ: Education,
5. Shubham Kailas Nanaware,
Age : 6 years, Occ : Education,
Applicant No.4 Vishal Minor Hence
his Guardian
Applicant No.5 i.e. Shubham is minor hence
his guardian his mother, Applicant No.3
Vaishali
All R/at:Taradgaon, Tal – Indapur, Dist-Pune. .. (Ori. Applicants)

Appellants

Versus

1. Jitendra Shivaji Ambekar
Age:29 years, Occ : Agriculturist,
R/at : Vadaki Gaon,
Tal – Haveli, Dist – Pune.
2. Mr. Malti Jagalkishor Patadia,
Age : Adult, Occ : Business,
R/at : Sr.No.15/1A, alok Height,
Manorama Bangalow, Ganeshnagar,
Near Kamble Vasti Dhyari, Pune 411 041.
3. The New India Assurance Company Ltd.,
Branch Office Bhigwan Chowk,
Baramati, Tal – Baramati, Dist – Pune .. (Ori. Opponents)

Respondents

- Mr. Rahul S. Kadam for Appellants
- Mr. Shubham Misar i/by H.G.Misar for Respondent No.3

CORAM : MILIND N. JADHAV, J.

DATE : JULY 21st, 2022

ORAL JUDGMENT:

1. By consent of both parties, First Appeal is taken up for final hearing at the stage of admission.

2. This appeal has been filed to challenge the legality and validity of the judgment and order dated 05.05.2012 passed by the Motor Accident Claims Tribunal, Baramati under Section 163A of the Motor Vehicle Act, 1988 (for short “**the said Act**”) dismissing Claim Application No.117 of 2009 filed by the appellants. The appellants have filed the original application under Section 163A of the said Act for grant of compensation of Rs.4,68,500/-. By the impugned judgment, the learned trial court held that the application was not tenable under Section 163A of the said Act.

3. Appellants (original- applicants) are legal heirs of deceased Kailas Vithal Nanaware who met with an unfortunate accident while driving Indica Car bearing registration No. MH-12-DG-3426 on 10.03.2009, while he was on his way from Pune to Solapur at Pune Solapur highway. Deceased was 30 years old on the date of the accident. It has been brought on record before the trial court that deceased was receiving salary of Rs.6,000/- per month as he was working as driver with City Trupati Travels, Pune and in addition thereto had an annual agricultural income of Rs.1,00,000/-, hence his salary was computed as Rs.1,72,000/- per annum. Claim of appellant was for total compensation of Rs.4,68,500/- before the trial court. Before the trial court original applicants did not file any other claim. Mr.Kadam, learned counsel for appellants submits that appellants had lodged

their claim under Section 163A of the said Act before the trial court.

Issue framed by the trial court relating to compensation was as under :

“Whether applicants are entitled for compensation if yes, from whom and to what extent?”

3.1. Other issues as framed by trial court are not relevant.

4. Trial court in so far as the issue of compensation is concerned, in the impugned judgment held as under :-

“9] It may be stated that applicant filed instant application under section 163-A of M.V.Act. Needless to say that applicants themselves have specifically averred in their application in para no.C that deceased was earning Rs.6,000/- per month as a salary and Rs.1,00,000/- per annum. However, they have not restricted their claim to the extent of Rs.40,000/- annual income of the deceased. Though, applicant No.3 has filed her affidavit at Ex.23, wherein she has also reiterated the same income of the deceased. Thus, it is crystal clear that applicants are claiming that deceased was earning Rs.1,72,000/- per annum, but they have not restricted their claim to the extent of Rs.40,000/- being annual income of the deceased. Ld. Adv. For the applicant has relied upon the authority in the matter of Haseena Sulthana and others Vs. National Thermal Power Corporation Ltd. and another, reported in 2007 ACJ 1832. I have carefully gone through the said authority. The Hon’ble Andhra Pradesh High Court observed in para no. 14 and 16 as under -

“14. The other important differences between sections 163-A and 140 of the Act is that under the latter only a fixed amount is payable and in respect of former the amount is payable under a structured formula basis which prescribed the upper income limit of Rs.40,000 per annum. Therefore, if the income of the deceased or the victim exceeds Rs.40,000 per annum, he will not be in a position to file claim petition under section 163-A of the Act. Hence, the issue no.3 framed above is answered in the negative.”

“16. Therefore it is clear that even if the person with high income notionally brings down his income to Rs.40,000, his claim petition under section 163-A can be entertained.”

10] In the case in hand, applicants have specifically come with

a case that deceased was earning Rs.1,72,000/-. However, they have not restricted their claim to the extent of Rs.40,000/- being annual income of the deceased. Therefore, the ratio laid down in the said authority is applicable to the present case. Therefore, their application is not maintainable under section 163-A of M.V.Act.

11] Ld. Adv. for applicant has also relied upon authority reported in 2007 (1) All M.R.(Journal) 51, 2008 DGLS (Soft) 398 and Accidents Claim Journal 2012 (Volume I). I have gone through these authorities, however, applicants have not restricted their claim contending that annual income of the deceased was Rs.40,000/-. The second schedule of M.V.Act shows the structured formula for determination of the compensation. The provisions of section 163-A of M.V.Act is applicable when the income of the deceased was to the extent of Rs.40,000/- per annum, but in the case in hand, earning of deceased was exceeding Rs.40,000/- per annum and the applicants have not restricted their claim to the extent of Rs.40,000/- being annual income of the deceased. Therefore, the present application is not tenable under section 163-A of M.V.Act. Hence, question does not arise to give findings on issue no.1 and 2. In view of the above reasons, I answer issue no.1 to 3 under consideration accordingly.

In view of above findings, present application deserves to be dismissed. In the result, I proceed to pass following order -

ORDER

- 1. The application is dismissed with costs.*
- 2. Award be drawn accordingly.”*

5. It is seen that appellants' application was dismissed on the ground that appellants had specifically come to court with a case that the deceased was earning Rs.1,72,000/- per annum but filed their claim under the provisions of Section 163A of the said Act.

6. Section 163A of the said Act reads thus:

“163A. Special provisions as to payment of compensation on structured formula basis.

1. Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent

disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation.—For the purposes of this sub-section, “permanent disability” shall have the same meaning and extent as in the Workmen’s Compensation Act, 1923 (8 of 1923).

2. In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

3. The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.”

7. Trial court reasoned that since the appellants had not restricted their claim to the extent of Rs.40,000/- being the annual income of the deceased, it relied upon the authority reported in 2007 (1) All M.R. (Journal) 51, 2008 DGLS (Soft) 398 and contended that the application was not maintainable under Section 163A of the said Act.

8. Hence, appellants’ claim came to be dismissed by judgment dated 05.05.2012.

9. I have heard Mr. Kadam and Mr. Misar, learned counsel for the respective parties. Submissions made by counsel has received due consideration.

10. Mr. Misar, learned counsel for respondent No. 3 – Insurance Company has placed before me a judgment in the case of **Deepal**

Girishbhai Soni and Ors.V/s. United India Insurance Co. Ltd. Baroda¹

and contended that if a person invokes the provisions of Section 163A then in that case the annual income of Rs.40,000/- ought to be treated as a cap and the said provision is a social security provision providing for a distinct scheme; hence only those whose annual income is upto Rs.40,000/- can take the benefit thereof. He submitted that in the present case appellant's application to the Court was under Section 163A, however, in view of the computation of annual income of Rs.1,72,000/- of the deceased by the appellants they were dis-entitled for any benefit or compensation under Section 163A. Mr. Kadam has also persuaded me to read the last line of paragraph No. 67 of the aforesaid judgment. Paragraph No.67 of the said judgment reads as under :

“67. We, therefore, are of the opinion that Kodala (supra) has correctly been decided. However, we do not agree with the findings in Kodala (supra) that if a person invokes provisions of [Section 163-A](#), the annual income of Rs. 40,000/- per annual shall be treated as a cap. In our opinion, the proceeding under [Section 163-A](#) being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs. 40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act.”

11. Mr. Misar has been fair in his submissions and has referred to and relied upon the decision of this Court (Coram : M.S. Sonak, J.) reported in 2021 SCC Bom 5020, which *inter-alia*, has referred to the judgment in the case of *Deepal Girishbhai Soni and Ors. (supra)* to

¹ (2004) 5 SCC 385

draw the distinction in the case if an application made by claimants is under Section 163A or Section 166 of the said Act with reference to the income of the deceased at the time of death.

12. On reading of the aforesaid judgment, the narrow issue before me for decision in this First Appeal is whether to permit appellants to convert their original application under Section 163A as an application under Section 166 of the said Act.

13. The decision of the Apex court in the case of ***Kunda and Others V/s. National Insurance Company Ltd. Through its Manager, National Insurance Company Ltd. And Anr.***² covers this issue. Findings in the said case are etched out succinctly in paragraph No. 29 of the judgment and read thus:-

“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.”

14. Both learned counsel are *ad-idem* with respect to the above settled legal position deciphered the Apex Court in Paragraph No. 29

above. There cannot be any objection to permit the claimants / appellants to amend their original claim petition / application clarifying that the same is instituted under Section 166 of the said Act and including any further or such particulars as may be necessary for the purpose.

15. In view of the aforesaid settled legal position, First Appeal stands disposed of with following directions:

(i) Impugned judgment and award dated 05.05.2012 in Claim Application No. 117/2009 filed before the Tribunal at Baramati is hereby quashed and set aside and Claim Application No. 117/2009 is remanded to the file of the Tribunal at Baramati for fresh consideration by treating the Claim Application as one filed under Section 166 of the said Act;

(ii) Appellants are granted liberty to amend their Claim Application 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 appellants to carry out such amendments within such time as it may fix for the purpose;

(iii) Tribunal will permit the parties to lead further evidence if they so request and shall decide the remanded Claim Application afresh by treating the same as having being instituted under Section 166 of the said Act;

(iv) 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;

(v) Tribunal shall endeavor to dispose of the Claim Application on remand, as expeditiously as possible, and preferably within six months from the date the parties file an authenticated copy of this judgment and order;

(vi) All contentions of the parties on merits are expressly kept open for determination by the Tribunal;

(vii) Parties are directed to appear before the Tribunal and file an authenticated copy of this judgment and order within one week from the date of uploading of this order. Tribunal shall act based on an authenticated copy and if necessary, issue notices to such parties, who do not appear before it on the said date.

16. First Appeal disposed.

[MILIND N. JADHAV, J.]

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