

23.11. 2023

item No.4

n.b.

ct. no. 551

FMA 2848 of 2015

with

IA CAN 1 of 2017(Old NO. CAN 5462 of 2017)

+

CAN 2 of 2017(Old No. CAN 5464of 2017)

+

CAN 3 of 2023

Mamtaj Bewa & Ors.

Vs.

United India Insurance Co. Ltd. & Anr.

Mr. Krishanu Banik,

.....for the appellants.

Mr. Rajesh Singh,

..... the respondent.

In Re. CAN 3 of 2023

This is an application for amendment of the name and address of the appellant nos. 2 and 3 and for recording the attainment of majority in respect of appellant no.2.

Heard the learned advocate and perused the application. Considering the submission of the learned advocate, the CAN 3 of 2023 is disposed of with a direction that the department shall carry out the correction in the Memo of the Cause Tittle of the appeal by virtue of paragraph 2 of the said application. The necessary amendment may be made within a fortnight.

Accordingly, the CAN 3 of 2023 is deposed of.

In Re. FMA 2848 of 2015

The instant appeal has been preferred against the award dated December 23, 2014 passed by the learned Judge, Motor Accident Claims Tribunal in M.A.C case No.32 of 2011 under Section 166 of the M.V. Act.

The present appellant being the claimant preferred an application under Section 166 of the M.V. Act before the learned Tribunal for getting compensation on the ground that their predecessor was died in a road traffic accident due to rash and negligent driving of the offending vehicle duly insured under the policy of the Insurance Company. The insurance company contested the matter before the learned Tribunal by filing written statement. After perusing the pleading of the parties, the learned advocate has framed seven issues to determine the matter. But ultimately, the learned Tribunal has decided only the issue no.5 i.e. whether the claim application is barred by res judicata. Leaned Tribunal has heard the parties and after hearing the matter, the learned Tribunal is of opinion that the claim application filed before me is barred by res judicata and accordingly he dismissed the claim application.

Being aggrieved and dis-satisfied with the impugned order, the present appeal has been preferred.

Learned advocate for the appellant submits that the learned Tribunal has committed an error in dismissing the claim application on the principle of res judicata. He argued that the learned Tribunal has proceeded

erroneously by deciding the fact that the claimants had preferred one previous application before the learned Tribunal under Section 163A of the M.V. Act vide MACC No. 108 of 2007. He argued that previous MACC No. 108 of 2007 was dismissed as is not maintainable, so, the observation of the learned Tribunal regarding the contention of earlier case is erroneous. He further submits that the claimant filed the application before the learned Tribunal for getting compensation on the ground that their predecessor was died in a road traffic accident. The way by which the Tribunal has dismissed the claim application is not legally correct. He cited the decision of Hon'ble Supreme Court in ***New India Assurance Co. Ltd. Vs. Bidyut Kumar Mukherjee & Ors.*** wherein the Division Bench of this Court had held that if the application under Section 163A or Section 140 was dismissed the application under Section 166 of the M.V. Act is maintainable. He also cited another decision of ***Oriental Insurance Co. Ltd. Vs. Bimla Devi & ors.*** reported in ***2008 ACJ 1181*** wherein it has been held by the Himachal Pradesh High Court that when the income exceeding Rs.40,000/- per annum. The application under Section 163A is not maintainable but the Tribunal may convert the application under Section 166 of the M. V. Act. The Division Bench of this High Court in ***Kanai Manna Vs. United India Insurance Co. Ltd. & Ors.*** reported in ***2009 ACJ 544*** also adopted the same view

that the claim application filed under Section 163A may be converted to Section 166 of the Act.

He further argued that strict principle applicable in the Civil Procedure Code is not applicable in a case under the M. V. Act [***Vimla Devi & Ors. Vs. National Insurance Co. Ltd. & Ors.*** reported in ***1(2019) ACC 305(SC)***].

Learned advocate for the insurance Company submits that the learned Tribunal has correctly dismissed the claim application on the ground that the application under Section 166 of the M.V. Act is not maintainable the earlier application filed under Section 163A of the M.V. Act has been dismissed on merits. The learned Tribunal has discussed the merit in the judgment itself. He further argued that by virtue of decision of Hon'ble Supreme Court passed in ***Deepal Girishbhai Soni Vs. United India Insurance Co. Ltd.*** reported in ***(2004) 5 SCC 385***, the application under Section 163A or Section 166 both are final. One claimant cannot file an application under Section 163A and thereafter an application under Section 166 of M.V. Act. He submits that the impugned judgment passed by the learned Tribunal suffers no illegality. So, the instant appeal had got no merit and liable to be dismissed.

Heard the learned advocates and perused the principle laid down by the Hon'ble Supreme Court as well as the Hon'ble Division Bench of this Court, it appears

that the learned Tribunal in dealing with an application under Section 166 of the M.V. Act has discussed about the earlier application filed under Section 163A of the M.V. Act which was disposed of. It is true that the claimants have initially preferred the application under Section 163A of the M.V. Act and the said application was dismissed. No appeal has been preferred against the said dismissal of Section 163A application being no MACC 108 of 2007. The said MACC case was dismissed on 21.11.2009. The copy of the said judgment was annexed with the LCR. Learned Tribunal in deciding the present application under Section 166 of the M.V. act is of opinion that the instant claim application is barred by res judicata. Let be considered whether the judgment passed by the learned Tribunal is correct in its proper perspective.

Though the strict applicability of Section 11 of CPC i.e. res judicata is not applicable in the case under Section 166 or 163A of MV. Act. Moreover, it is true that issues are usually framed according to the provisions of Order 14 of CPC in deciding a claim application. In the instant claim application, learned Tribunal has framed as well as the seven issues to decide the matter. However, he decided only the issue no.5. Order 14 Rule 2 permits the court to decide a case by framing a preliminary issue. No such preliminary issue has been framed according to the provisions of Order 14 rule 2 of the Code of Civil Procedure. However, the direction of Order 14 Rule 2 sub

rule 2 of the Code of Civil Procedure is very much clear that when issues are framed and when the issues are both on fact and law, the court has to decide all the issues. In this particular case, such strict direction was not followed by the learned Tribunal. Moreover, it appears to me that the learned Tribunal has decided the issue no.5 only without discussing other issues. In deciding such issue, the learned Tribunal is of opinion that on the earlier proceeding, the matter was disposed of on merit ie. issues submitting between the same parties are finally decided.

I have perused the judgment passed by the learned Tribunal on the earlier occasion, it appears that through the application was filed under Section 163A of M.V. Act. The learned Tribunal has proceeded to decide the matter without framing of any issues. Surprisingly, the claim application under Section 163A was preferred by claiming the monthly income of the deceased to be Rs.4,000/- but the learned Tribunal in deciding the income of the deceased is come to the opinion that the yearly income of the deceased was Rs.36,000/- considering the notional income of Rs.3,000/- per month. Again it is surprising in the judgment that, the learned Tribunal at the last portion is of opinion that while an application under Section 163A of MV. Act was filed exceeding the monthly income of Rs.40,000/- i.e. not maintainable when it was specifically observed that the yearly income of the deceased was Rs.36,000/-, then how he come to the opinion that the

claim case is not maintainable as the income of the deceased is beyond Rs.40,000/-. So, the judgment passed by the learned Tribunal in earlier proceeding(MACC no.108 of 2007) is appears to me contradictory itself. It further appears that the learned Tribunal on the earlier proceeding has discussed the merits of the case and also wanted to look after that whether the offending vehicle was responsible to commit the accident or not. However, it appears to me that the learned Tribunal in the earlier proceeding has committed some error in the judgment; but the present appeal is preferred not against the earlier judgment passed by the Tribunal but against the present judgment on the basis of which the learned Tribunal has dismissed the claim case under the principle of res judicate. It is true that an application under Section 163A of M.V. Act as well as Section 166 of M.V. Act are final. The claimants are entitled to get compensation either under Section 163A of the M.V. Act or Section 166 of the M.V. Act. The claimant is debarred to prefer two separate applications for getting compensation. The principles of law laid down by the Hon'ble Supreme Court is very much clear to the effect that the claimant has to pray for conversion of application under Section 163A to Section 166 of M.V. Act if situation arises. In this case, the claimant has not adopted such procedure and filed another application under Section 166 of the M.V. Act after dismissal of application under Section 163A of the

M.V. Act. The application filing under Section 166 of the M.V. Act is actually barred by law irrespective of merit of this case. So, considering the same, I find no justification to entertain the appeal.

In principle, it appears to me that the earlier judgment passed by the learned Tribunal is not justified and claimants bonafidely proceeded to wrong forum. So, this appellate Court is of opinion to allow the claimant to prefer an appeal against the judgment passed by the learned Tribunal in MACC No.108 of 2007 under Section 163A of the M.V. act, which was deposed of by the learned Tribunal Balurghat on 21.11.2009. The appeal shall not be barred by limitation under the provision of Section 14 of the Limitation Act if it is filed within three months from the date of passing of this order.

Accordingly, I find no merit to entertain the appeal. The appeal is hereby dismissed on the above observation.

Connected applications, if any, are also disposed of.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Subhendu Samanta, J.)