Umesh Goswami And Another ... ... vs The New India Assurance Co. Ltd. And ... on 31 March, 2022

Author: Sharad Kumar Sharma

Bench: Sharad Kumar Sharma

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          HIGH COURT OF UTTARAKHAND
                  AT NAINITAL
              Appeal from Order No. 62 of 2018
Umesh Goswami and Another                                  ...       Appellants
                              Vs.
The New India Assurance Co. Ltd. and others                ...      Respondents
Advocates :   Mr. Tarun Pande, Advocate, for the appellants
              Mr. V.K. Kohli, Senior Advocate, assisted by Mr. Kanti Ram Sharma,
              Advocate, for respondent No. 1.
              Mr. Girish Chandra Lakhchaura, Advocate, respondent No. 2

Hon'ble Sharad Kumar Sharma, J.
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Facts, apparent from the records are:

> (i) That on 9th February, 2015, a claim petition was filed by the claimants, invoking the provisions contained under Section 166 to be read with Section 140 of the Motor Vehicles Act,
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> (ii) The claim petition, thus filed under the aforesaid provisions for grant of the compensation, was on account of the death of Km. Shagun, who met with an Accident with the bus bearing registration No. PB08AP-9080, and as a consequence of the allegation of negligence, which has been contended by the claimants factually that while Km. Shagun was boarding the bus, it was being negligently driven by the driver of the offending vehicle, resulting into her death and at the time of her death, she was of 5 years of age.

2. The fact of accident and the death are not the disputed facts. For the purpose of determining an adequacy of the compensation, to be made payable in relation to these peculiar facts and circumstances of the present case where the deceased was of 5 years of age, which is a fact, not disputed by any of the parties, which would be the parameters that has to be adopted for the purposes of determining the compensation.

3. The accident had chanced on 9th February 2015. At that point of time, the provisions of Schedule 2, of the Motor Vehicles Act, was applicable, as it is then existed under the statute and as per the schedule given therein, as per its Entry 1, in case of the death of a person upto 15 years of age, the multiplier of '15' was contemplated to be made applicable, in relation to those cases, which were falling within the ambit of Section 163A of the Motor Vehicles Act.

4. To controvert the arguments extended by the learned counsel for the appellant, firstly, the learned counsel for the respondent submits that the implications of the Schedule 2 will not be applicable for the reason being that the case itself would not fall within the ambit of Section163A of the Act and the issue as to whether it will fall under Section163 or 163A, has never been an issue, which was ever argued or attempted to be argued before the learned Motor Accidents Claims Tribunal.

5. Secondly, it is argued by the learned counsel for the appellant, that the aspects of determination of notional income as per schedule 2, as provided in its clause 6, where in the cases of fatal accident or in the case of disability in a non fatal accident, there are two clauses, which have been defined therein, i.e. "in relation to the non earning person", and "spouses".

6. The present case would fall under sub Clause (a) of clause 6 of Schedule 2, i.e. non earning, where the notional income has been observed, as to be made payable as Rs. 15000/- per annum.

7. In the case at hand, when the matter was being considered by the learned Motor Accidents claims Tribunal, while determining the compensation under Section 166A, in fact, it has been argued by the learned counsel for the respondent Insurance Company, as well as the learned counsel for the owner of the vehicle, that the determination of compensation as prayed for under Section 166, its determination cannot be extended to be brought within the determination of compensation, as under Section 166A.

8. The learned Motor Accidents Claims Tribunal, on exchange of the pleadings, particularly, the proceedings, when it was objected by the Insurance Company, by way of filing a written statement i.e. paper number 25(ka/1) and the owner of the vehicle, by filing a written statement i.e paper number 28 (kha), the learned Motor Accidents claim Tribunal, had framed certain issues, but none of the issues relate to consideration of as to whether the applicability of Section 163A and Section 163 of the Act, would be attracted in the facts and circumstances of the instant case, nor the aspects pertaining to the quantification of the damages claimed under the petition under Section 166 was attempted to be argued by any of the parties to be falling within or outside the ambit of Section 163A of the Act, in order to attract schedule 2 of the Motor Vehicles Act.

9. Even the learned Motor Accidents claim Tribunal, while recording its finding on issue No. 4, pertaining to the quantification of the compensation, which has to be made payable by the learned Motor Accidents claims Tribunal, in fact, on its own wisdom and the logic, which has been assigned in para 34 of the judgement, though without any secured foundation, had determined the compensation as to be Rs. 2.00 lakh.

10. It has been argued by the learned counsel for the Insurance Company, whose argument has been supported by the learned counsel for the owner of the vehicle, that the argument of the learned counsel for the appellant, to bring the case within the ambit of scheduled 2, will not apply in the instant case, because of non applicability of Section 163A of the Motor Vehicles Act.

11. This argument or the logic, as argued by the learned Senior Counsel for the Insurance Company and also by the learned counsel for the owner of the vehicle, could have had been an issue of debate

before this Court, provided if at all, it was agitated before the learned Motor Accidents Claims Tribunal or if the learned Motor Accidents Claims Tribunal itself, while recording its finding on issue number 4, had dealt with the aspect of applicability or non applicability of issue number 2, under the Motor Vehicles Act.

12. In that eventuality, at this stage, this Court is restricting itself to record any findings about the implications of Section 163 and 163A, which may have a bearing on the applicability of the Schedule, which has been sought to be attracted and applied by the learned counsel for the appellant for the multiplier of '15' and for determining purposes of the notional income under clause (6) of schedule 2, as to be Rs. 15000/- for a non earning persons, which, as per the opinion of this Court, since the findings on issue number 1, is not based upon a sound reason, as to in what manner, the Court has arrived at a conclusion of the payment of compensation as to be to the tune of Rs. 2.00 lakh. This Court is not in league with the observations, as made by the learned Motor Accidents Claims Tribunal, in its findings as recorded in para 34 of its judgement.

13. To meet out the arguments as extended by the learned counsel for the respondent, pertaining to the non applicability of Schedule 2, because Section 163A is not attracted, the learned counsel for the appellant has made reference to a judgement reported as in 2009 (14) SCC 1, R.K. Malik and Another Vs. Kiran Pal and others, and particularly, the reference has been made before this Court to para 14 of the said judgement, which is extracted hereunder:-

> "Under the Second Schedule of the Act in case of a non earning person, his income is notionally estimated at Rs. 15,000/- per annum. The Second Schedule is applicable to claim petitions filed under Section 163 A of the Act. The Second Schedule provides for the multiplier to be applied in cases where the age of the victim was less than 15 years and between 15 years but not exceeding 20 years. Even when compensation is payable under Section 166 read with 168 of the Act, deviation from the structured formula as provided in the Second Schedule is not ordinarily permissible, except in exceptional cases. [see Abati Bezbaruah v. Dy. Director General, Geological Survey of India, (2003) 3 SCC 148); United India Insurance Company Ltd. v. Patricia Jean Mahajan, (2002) 6 SCC 281 and UP State Road Transport Corp. v.

Trilok Chandra, (1996) 4 SCC 362]".

14. In fact, if the said paragraph, while considering the implications of notional income determined by Schedule 2 as to be Rs. 15000/- for non earning member under Section 163A of the Act, and with regards to the applicability of multiplier to be applied, where the age of the victim happens to be less than 15 years, in fact, the Court of Motor Accidents Claims Tribunal has observed that even when the compensation is payable under Section 166 to be read with Section 168 of the Act, the deviation from the structured formula provided under Schedule 2, could be adopted in exceptional cases depending upon the facts of the each case.

15. This very finding recorded in para 14 of the said judgement, will not oust the applicability of Schedule 2, in the instant case, which would still be a subject matter to be considered by the learned

Motor Accidents Claims Tribunal, as to whether, at all if the principles of multiplier or the principles of notional income as envisaged in Schedule 2, could be made applicable in the instant case, where the deceased is below 5 years of age.

16. The learned counsel for the respondents had submitted that this exception carved out by the judgement of R.K Malik's case (supra), cannot be liberalised in its interpretation for applying the principles of Schedule 2, in the proceedings under Section 166 of the Act, this Court is of the view that this aspect has had to be considered only when the learned Motor Accidents Claims Tribunal was called upon to answer the said query and once it was not sought for, before the learned Motor Accidents Claims Tribunal and issue number 4 has been cursorily decided even without any reason as to what is the foundation of determining the compensation of Rs. 2.00 lakh, the judgement itself would be deemed to be a non logical judgement, without considering the implications either of Section 163 or Section 163A of the Motor Vehicles Act, or what would be the ambit of consideration of compensation under Section 166 of the Act.

17. The learned counsel for the owner of the vehicle had filed an application invoking the provisions contained under Order 41 Rule 33 of the Code of Civil Procedure, wherein the learned counsel for the owner of the vehicle, apprehending that there is an order of remand to the Motor Accidents Claims Tribunal, to reconsider the claim of compensation, in the light of the principles of R.K Malik's case (supra), in the light of the fact, as to what would be the appropriate multiplier, which the claimant would be entitled to be awarded! What would be the basis of applicability of the notional income! And, in what manner it has to be determined to be made applicable, the owner of the vehicle apprehends that the recovery rights, which has been given to the Insurance Company, by the impugned award and which has been affirmed in AO No. 158 of 2019, by dismissal of the Appeal from Order, by the judgement of the learned Single Judge of this Court on 16th December 2021, may create an unprecedented liability on the owner of the vehicle if at all based on the principles as dealt with above, the competition is re-determined to be made payable.

18. The dismissal of AO No. 158 of 2019 dated 16.12.2021, by the co-ordinate Bench of this Court, if the concluding part of the judgment is taken into consideration, which is extracted hereunder, in fact while dismissing the Appeal from Order of the owner of the vehicle, holding it to be not maintainable on the ground of the delay, the Court has not ventured into the merits of the matter.

> "It is settled principle of law that for the fault of counsel, the party should not be allowed to suffer. It is also contended by the learned counsel for the petitioner that he could know about the impugned award only after he received notice in AO No. 62 of 2018 where he has been arrayed as respondent. The record of AO No. 62 of 2018 shows that he has been served with the notice on 13.03.2018. Thereafter, also there is a delay of one year that has not been explained validly in this case.
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> Hence, this Court constrained to dismiss the application for condonation of delay. Accordingly, the delay condonation application is dismissed. Since, the appeal has been filed with delay of 441 days, the appeal is not maintainable. Hence, the appeal is dismissed."

19. Furthermore, in view of the logic assigned in the part of the judgement dated 16.12.2021, which is extracted hereinabove, the judgement dated 16th December 2021, would not create any cloud, as such to decide the AO No. 62 of 2018, independently as it has been observed in the concluding part of the judgement dated 16th December 2021, merely, because the owner apprehends that in case if the matter is remitted back and if at all there is a probability of enhancement of compensation since the principles of recoverable right stand settled against him by dismissal of his Appeal from Order, any spurt in the compensation if at all it is made it has had to be recovered from the owner of the vehicle, because his liability has been affirmed, which will not mitigate the right of the claimants to get an appropriate compensation determined as per the ratio of R.K. Malik's case (supra), and as far the principles to be determined by the Court whether the appellant's claim for the grant of compensation would at all fall to be under Section 163A of the Motor Vehicles Act or not.

20. In fact, the owner of the vehicle is having a premonition as such. The premonition of a probable decision is not a concept which is permissible under law, to restrain the Court to proceed to decide the matter on merits merely because of the fact that a party to the proceedings anticipates an adverse order against him. Anticipation is not a logical basis to not to remit the matter to the learned Motor Accidents Claims Tribunal, to decide the claim petition of the appellant afresh, but quite obviously, it would always be open for the parties to the proceedings to argue and extend their respective cases in the context of applicability or non applicability of Schedule 2, of the Act, and it is thereafter only upon considering the aforesaid arguments the learned Motor Accidents Claims Tribunal will decide the implications of issue number 4.

21. The learned counsel for the respondents, owner of the vehicle, submitted that he had filed an application under Order 41 Rule 33, in order to make the Appellate Court conscious of its exercise of appellate power of exercising of its appellate jurisdiction in considering the case and the scope, this Court is of the view that if the language of Order 41 Rule 33, is taken into consideration, in fact, it is not a substantive provision, which is creating a right for an applicant to file an application under Order 41 Rule 33, but rather it is a directive provisions for the Appellate Court, with regards to the scope of exercising of their appellate powers, when considering an Appeal on its own merits.

22. Hence, filing of an Application under Order 41 Rule 33 of the CPC, within itself will not create any substantive right, to the applicant which has now been left open to be determined by the learned Motor Accidents Claims Tribunal, after proceeding afresh, for deciding the issue number 4, as directed above.

23. In view of the aforesaid observations, the Appeal from Order is allowed. The matter is remitted back to the learned Motor Accidents Claims Tribunal, to decide the claim petition afresh, however, considering the facts that the accident happens to be of 2015, it is hoped and trusted that the learned Motor Accidents Claims Tribunal, will decide the matter afresh within a period of two months from the date of production of the certified copy of this judgement. Obviously, after providing opportunity of hearing to all the parties concerned, detailing with their respective arguments, pertaining to the legal implications of Section 163 and 163A of the Motor Vehicles Act.

24. Consequently, the Appeal from Order is allowed. The matter is remitted back to the learned Motor Accidents Claims Tribunal and the learned Motor Accidents Claims Tribunal is requested to decide the claim petition afresh in view of the observations, already made above and particularly in the light of the principles of R.K. Malik's case (supra), as observed above.

(Sharad Kumar Sharma, J.) 31.03.2022 Mahinder/