Philip Vs. Surendran

Philip Vs. Surendran

SooperKanoon Citation : sooperkanoon.com/726178

Court : Kerala

Decided On : Aug-07-1992

Reported in : 1994ACJ279

Judge : T.L. Viswanatha Iyer and; L. Manoharan, JJ.

Appeal No. : M.F.A. No. 1031 of 1991

Appellant : Philip

Respondent : Surendran

Advocate for Def. : T.M.M. Youseff,; P.C. Chacko,; Roy Chacko,;

Advocate for Pet/Ap. : K.T. Sankaran and; Mathew John, Advs.

Disposition : Appeal allowed

Judgement :

T.L. Viswanatha Iyer, J.

1. Appellant is the first respondent in O.P. (M.v.) No. 87 of 1986 on the file of the Motor Accidents Claims Tribunal, Kottayam, filed by the first respondent under Section 110-A of the Motor Vehicles Act, 1939 ('the 1939 Act'). The facts leading to that petition are as follows: The first respondent, Surendran, was travelling in a bus No. KLO 3581 proceeding along the Kottayam-Kumily Road to the east. When

it was halted at the Vadavathoor Junction for disembarking some passengers, lorry No. KRE 1893 belonging to the second respondent and driven by the appellant came from the opposite direction and dashed against the bus resulting in very serious injuries to the first respondent. He was treated in the Medical College Hospital and his right hand had to be amputated. He filed the original petition claiming a compensation of Rs. 1,37,000/- for the injury caused to him under various heads. He impleaded the third respondent herein, namely, the United India Insurance Co. Ltd. with the allegation that the lorry No. KRE 1893 had been insured; with it. He also impleaded the owner of the bus, its driver and the National Insurance Co. Ltd., with whom the bus was insured, as respondent Nos. 4 to 6 in the petition.

2. The appellant denied rashness or negligence on his part in driving the lorry No. KRE 1893. The owner of the lorry remained ex pane. The third respondent, insurance company, appeared and disclaimed liability for the whole or any portion of the claim with the contention that the lorry had not been insured with it in the name of the second respondent. We are not setting forth the contentions of respondent Nos. 4 to 6 as they have been exonerated and there is no claim surviving against them.

3. The Claims Tribunal held that the first respondent had sustained injuries in the accident as contended by him and that the accident occurred because of the rash and negligent driving of the lorry by the appellant. He held the appellant and respondent Nos. 2 and 3, (the owner of the lorry and the insurer), liable for payment of the amount of compensation which he fixed at Rs. 1,32,400/-. An award was, therefore, passed for payment of the said amount with interest at 12 per cent per annum from 25.2.1987 till the date of realisation and proportionate costs from the appellant and respondent Nos. 2 and 3. Having done this the Tribunal proceeded to 'order and direct' the third respondent, as the insurer of the offending vehicle, to deposit the amount, interest and costs awarded, within one month. The 'other respondents' (whatever that meant) were exonerated. But in passing the award, the Tribunal did not specifically advert to the plea of the third respondent that the vehicle in question had not been insured with it in the name of the second respondent owner. The Tribunal observed merely that the third

respondent was 'also liable to pay the compensation', without any discussion whatsoever.

4. The third respondent insurer felt aggrieved by the non-consideration of its plea of denial of liability. It filed petition LA. No. 1143 of 1990 for review of the award, on 16.3.1990, together with a petition to condone the delay in filing the said application. In the application for review, all that the Tribunal did was to direct it to be posted along with the records. The matter underwent adjournment in this fashion on five occasions between 5.4.1990 and 27.7.1990 and it was allowed on the last of these dates. The application for condonation of delay was also allowed on that day. The liability cast on the third respondent to pay the amount awarded was set aside; consequently, the appellant and the second respondent were directed to deposit the amount of compensation within one month.

5. The appellant was served with notice of an execution petition for realisation of the amount on 9.4.1991. He states that he became aware of the review petition and of the order thereon only on receipt of the notice on the execution petition. He arranged immediately for obtaining certified copies of the award and of the order on the review petition. He asserts that he was not served with notice of the petition for review with the result the order in the review petition exonerating the third respondent insurer from liability and casting the entire burden on him and the second respondent was one passed behind his back, in violation of the principles of natural justice. This appeal was accordingly filed challenging the reviewed award passed by the Tribunal.

6. At the hearing, counsel for the first respondent, the claimant before the Tribunal, raised a preliminary objection that this appeal filed on 7.11.1991 is not maintainable for the reason that the appellant has not complied with the provisions of the first proviso to Section 173 of the Motor Vehicles Act, 1988 ('the 1988 Act') by making deposit of Rs. 25,000/- as required therein, the 1988 Act having come into force on July 1, 1989. The contention is that after the coming into force of the said Act, any appeal against the award of compensation by a Tribunal functioning under it or under the predecessor Act of 1939 has to comply with the requirements of the first proviso to Section 173 and it will not lie unless the condition precedent

for its maintainability, namely, the deposit of Rs. 25,000/- is complied with.

7. Counsel for the appellant, as also counsel for the second respondent, the owner of the vehicle, demurred to this proposition, pointing out that the right of appeal is a substantive right and not a mere matter of procedure and, therefore, no clog can be imposed on the right of appeal available under the 1939 Act except by express enactment or by necessary implication. But there is no such express provision or necessary implication evident anywhere in the repealing section, namely, Section 217 of the 1988 Act.

8. It is now beyond dispute, having regard to the leading case of the Supreme Court in Garikapati v. Subbiah Choudhry, AIR 1957 SC 540, that the right of appeal is a substantive right and not a mere matter of procedure. The legal pursuit of a remedy, suit or appeal, are really but steps in a series of proceedings, all connected by an intrinsic unity to be regarded as one legal proceeding. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the Us commences, and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of the decision or at the date of the filing of the appeal. Of course, this vested right of appeal can be taken away, but that should be by either express enactment or by necessary intendment and not otherwise. These propositions were laid down by the Supreme Court applying the dicta of the Privy Council in the well-known case of Colonial Sugar Refining Company Ltd, v. Irving 1905 AC 369.

9. The case before the Supreme Court arose under Article 133 of the Constitution of India. A suit had been instituted on 22.4.1949, when the provisions of Sections 109 and 110 of the Code of Civil Procedure, as they then stood, provided for an appeal as of right against a judgment of reversal of the decree of the trial court in a suit where the value of the subject-matter exceeded Rs. 10,000/-. Article 133 of the Constitution confined such appeals to suits where the value of the subject-

matter exceeded Rs. 20,000/-. The valuation of the suit before the Supreme Court was Rs. 11,400/- and the question arose whether the party aggrieved by the judgment of the High Court reversing the decree of the trial court could appeal as of right as under the law as it stood when the suit was filed, and whether this right was deprived of by the change brought about by Article 133 of the Constitution. It was in that context that the Supreme Court laid down the law as aforesaid after an elaborate discussion of the cases on the point and held that the appellant before it could exercise the right of appeal upon the terms and conditions which were in force at the time the suit was instituted, namely, as of right.

10. The effect of the decision of the Supreme Court is that the right of appeal (which includes the conditions subject to which it could be exercised) vests in a party on the date of institution of the suit or proceeding and continues to vest in, and be available to, him despite any subsequent amendment to the law unless the amendment has either expressly or by necessary intendment taken away the right of appeal altogether or imposed limitations or conditions therein either regarding its maintainability or regarding the quality or the content of the appeal or the power of the appellate court. In the absence of any such express enactment or necessary intendment, the suitor continues to have the right which vested in him on the date of institution of the suit, namely, to prosecute the further remedies of appeal or revision of the nature and quality which were open to him on the date of institution of the suit, uninhibited by any conditions imposed on the right of appeal, and unhindered by any limitations placed on it by subsequent legislation. It was thus held in Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh, AIR 1953 SC 221, that a right of appeal, which inhered in an assessee to sales tax, stood unimpaired by subsequent amendment requiring payment of the entire assessed amount as a condition precedent to the admission of the appeal. After observing that a vested right of appeal cannot be taken away except by express enactment or necessary intendment, the Supreme Court held that an intention to interfere with, or to impair or imperil, such a vested right cannot be presumed unless such intention be clearly manifested by express words or by necessary implication. The court proceeded to observe that the imposition of a restriction to pay the entire assessed amount as a condition precedent for the maintainability of the appeal cannot affect the assessee's right of appeal from a decision in proceedings which

commenced prior to such amendment, and which right of appeal was free from restriction under the section as it stood at the time of the commencement of the proceedings. The fact that the pre-existing right of appeal continued to exist must in its turn necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. In State of Bombay v. Supreme General Films Exchange Ltd., AIR 1960 SC 980, the impairment of the right of appeal came in the form of levy of enhanced court fee under the Court Fees (Bombay Amendment) Act, 1954. The Supreme Court reiterated what it had held earlier in Garikapati's case, AIR 1957 SC 540, observing that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right, and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment. Accordingly, it held that court fee was payable only under the pre-existing law in force on the date of filing of the suit in the absence of any indication in the Amending Act that it was retrospective in operation, and that it was not payable in accordance with the law in force at the date of filing of the appeal. In Kasibai v. Mahadu, AIR 1965 SC 703, question arose whether the unfettered plenary right of second appeal on facts and on law which existed in the State of Hyderabad at the time the suit was instituted, under the Code of Civil Procedure in force in that State, got curtailed to interfere on questions of law only on the introduction of the Civil Procedure Code, 1908, to Hyderabad with effect from April 1,1951. The Supreme Court held that the restrictions could apply only to cases instituted in the court of first instance on or after April 1, 1951 and the jurisdiction of the High Court would, in cases instituted before the date, continue to be governed by the provisions of the Hyderabad Code of Civil Procedure.

11. In Collector of Customs v. A.S. Bava, AIR 1968 SC 13, the question arose whether an appeal under the Central Excises and Salt Act, 1944, could be maintained without deposit of the duty demanded. Section 35 of the Act provided an unfettered right of appeal, but by a notification issued under Section 12, the Central Government made the provisions of Section 129 of the Customs Act, 1962, applicable to duties imposed under the Central Excises and Salt Act. Section 129 required deposit of the duty pending an appeal. The question was

whether this obligation for deposit was a matter of procedure relating to appeal within Section 12 of the Central Excises and Salt Act. The Supreme Court held that the notification was not authorised by Section 12, as it touched a substantive right and not a mere matter of procedure and, therefore, the fetter imposed by Section 129 of the Customs Act was not applicable to the appeal. Section 110-D of the 1939 Act provided for an unfettered unrestricted right of appeal to this court against any award passed by the Motor Accidents Claims Tribunal. This right in all its amplitude will continue unless there is anything in the 1988 Act which repealed the 1939 Act evincing a contrary intention. The question, therefore, is whether there is anything in the 1988 Act which takes away this right and substitutes a restricted right of appeal in its place, where the appeal is filed after July 1, 1989, though the proceedings had been initiated earlier. We must mention here that there can be no doubt that an appeal will have to comply with the provisions of Section 173 of the 1988 Act if the proceedings which led to it had been initiated after July 1, 1989, even though the accident might have taken place earlier. The answer to the question posed above will depend on whether there is anything in the repealing enactment, namely, the 1988 Act, taking away the vested right of appeal expressly or by necessary intendment. The repealing section, namely, Section 217 runs thus:

217. Repeal and savings.-(1) The Motor Vehicles Act, 1939 (4 of 1939) and any law corresponding to that Act in force in any State immediately before the commencement of this Act in that State (hereinafter in this section referred to as 'the repealed enactments') are hereby repealed.

(2) Notwithstanding the repeal by Sub-section (1) of the repealed enactments,-

(a) any notification, rule, regulation, order or notice issued, or any appointment or declaration made or exemption granted, or any confiscation made, or any penalty or fine imposed, any forfeiture, cancellation or any other thing done, or any other action taken under the repealed enactments, and in force immediately before such commencement shall, so far as it is not inconsistent with the provisions of this Act, be deemed to have been issued, made, granted, done or taken under the corresponding provision of this Act;

(b) any certificate of fitness or registration or licence or permit issued or granted under the repealed enactments shall continue to have effect after such commencement under the same conditions and for the same period as if this Act had not been passed;

(c) any document referring to any of the repealed enactments or the provisions thereof, shall be construed as referring to this Act or to the corresponding provision of this Act;

(d) the assignment of a distinguishing mark by the registering authority and the manner of display on motor vehicles in accordance with the provisions of the repealed enactments shall, after the commencement of this Act, continue to remain in force until a notification under Sub-section (6) of Section 41 of this Act is issued;

(e) any scheme made under Section 68-C of the Motor Vehicles Act, 1939 (4 of 1939) or under the corresponding law, if any, in force in any State and pending immediately before the commencement of this Act shall be disposed of in accordance with the provisions of Section 100 of this Act;

(f) the permits issued under Sub-section (1-A) of Section 68-F of the Motor Vehicles Act, 1939 (4 of 1939), or under the corresponding provisions, if any, in force in any State immediately before the commencement of this Act shall continue to remain in force until the approved scheme under Chapter VI of this Act is published.

(3) Any penalty payable under any of the repealed enactments may be recovered in the manner provided by or under this Act, but without prejudice to any action already taken for the recovery of such penalty under the repealed enactments.

(4) The mention of particular matters in this section shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals.

We do not find anything in this section which expressly takes away the right of appeal which a party had under the 1939 Act nor anything which requires us

necessarily to imply that such an appeal has to comply with the provisions of Section 173 of the 1988 Act. Counsel was not able to point out any express provision, or any other, which leads to an inference of necessary implication. In the absence of any such provision, it has to be held in line with the catena of decisions of the Supreme Court that the vested right of appeal under the 1939 Act has not been taken away or limited or made subject to the conditions as contended by counsel for the first respondent.

12. The question as to whether Section 217 has the effect of divesting the vested right has to be decided in the light of Section 6 of the General Clauses Act, 1897. In cases of repeal and re-enactment, the line of enquiry to ascertain whether the vested right continues to subsist is not to see whether the repealing enactment expressly keeps alive the old rights and liabilities, but to see whether it manifests an intention to destroy it. This is what the Supreme Court stated in State of Punjab v. Motor Singh, AIR 1955 SC 84, which was reiterated in Indira Sohanlal v. Custodian of Evacuee Property, AIR 1956 SC 77:

Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appeals. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot, therefore, subscribe to the broad proposition that Section 6, General Clauses Act, is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law....

The question, therefore, is not whether the new enactment keeps alive the old rights and liabilities but whether it evinces an intention to destroy them. A perusal of Section 217 does not disclose that there was any intention to destroy the right of appeal which the parties had under the 1939 enactment.

13. A Division Bench of the Allahabad High Court in Oriental Insurance Co. Ltd. v. Dhanram Singh 1990 ACJ 41 (Allahabad), took a contrary view of the matter; but the judgment was modified in the subsequent judgment in the same case which is reported at page 321 of the same volume. The Bench had in its first judgment applied the wrong principle to decide whether the vested right continued to subsist and proceeded to consider whether the right had been preserved, while the line of enquiry should have been whether the right had been destroyed. We need not, however, dwell on this decision as it has already been modified in the subsequent judgment reported at page 321.

14. According to us, appeals arising out of proceedings initiated before July 1, 1989, when the 1988 Act came into force, are not subject to the limitations prescribed by Section 173 of the latter Act, irrespective of the date on which the award was passed, or the appeal was instituted whether before or after July 1, 1989. The appellant before us was not, therefore, bound to comply with the requirement of deposit under Section 173 of the 1988 Act. The appeal is maintainable without such deposit. The preliminary objection raised by the counsel for the first respondent is overruled.

15. We shall now deal with the appeal on merits. The basic contention of the appellant is that he or his counsel had had no notice of the application for review and that it had been allowed behind his back. We have already pointed out that all that the Tribunal did after receiving the review petition was to post it on numerous occasions with the endorsement 'with records' and ultimately to pass an order. No notice was ordered to the affected parties and no opportunity was given to them to file any counter or objections. Of course, the docket sheet contains endorsement of the copy of the review petition having been served on the clerk of the fourth respondent and also on a person styled as 'R 1 advocate'. It is not clear as to who this 'R 1 advocate' is. From a comparison of the signature on the docket of the

review petition with the signature of the appellant's advocate in the vakalath, it is clear that it was not he who received the copy of the review petition and he was not the 'R 1 advocate' on whom it was served. Evidently, it was served on someone else. There is nothing on record to show that the appellant or his counsel was served with copy of the review petition or that they had notice thereof. The review petition has, therefore, been allowed without notice to the appellant. The effect of allowing the review was to exonerate the insurer and to cast the entire liability for payment of the compensation on the appellant and the second respondent. In other words, the appellant and the second respondent are the persons affected by the order on the review petition, apart from the claimant himself who lost his recourse against the insurer. The disposal of the review petition adversely to the appellant without notice to him and without affording him opportunity to file objections is clearly illegal as one passed in violation of the principles of natural justice. It has got to be set aside. We do so.

16. We find some disturbing features in this case which we have noted in certain other cases as well arising from orders of Motor Accidents Claims Tribunals. The cause title of the review petition does not disclose as to who are the respondents and how they are arrayed. The array of the respondents simply reads: 'Philip and five others' of which Philip, of course, is the appellant. An interlocutory petition claiming substantive relief as in this review petition should disclose who are the parties figuring as petitioners and respondents. It is not sufficient to array the parties as 'Philip and Ors.'. The cause title does not even disclose the ranks of the parties with reference to their position in the main original petition. It is this irregularity in the cause title that has led to the impasse in this case of the review being allowed without notice to the affected parties. The greater disturbing feature is that the Tribunal overlooked the obvious, that notice had to be given to the affected parties before the review petition could be allowed. This elementary case was not taken with the result the claimant who has suffered heavily as early as on October 26, 1985 and who has to get Rs. 1,32,400/- by way of compensation is left without recourse to any person for recovery of the amount due to him, about which there is no dispute at this stage. But he stands delayed in his attempts for recovery of the amount because of the irregular procedure adopted by the Tribunal. It is imperative that the Tribunals remind themselves of the right rules of

procedure and of the rules of natural justice and remember to issue notice to the affected persons on such review petitions and Ors., unless, of course, they are dismissed in limine.

17. Counsel for the appellant and respondent Nos. 1 and 2 have a contention that the Tribunals functioning under Section 110 of the 1939 Act or Section 165 of the 1988 Act have no power to review their awards. It was pointed out that the power of review which affects the finality of a judgment or award has to be expressly conferred as laid down by the Supreme Court in P.N. Thakershi v. Pradyumansinghji, AIR 1970 SC 1273. We are not, however, dealing with this aspect as we did not have the benefit of considered arguments on the question, parties being rest content to leave the matter for decision by the Tribunal itself after the remit. We are, therefore, leaving open this question to be dealt with by the Tribunal if raised before it.

The appeal is, therefore, allowed. The reviewed judgment of the Tribunal including the order on I.A. No. 1143 of 1990 exonerating the third respondent from liability and casting it on the appellant and the second respondent are set aside. The Tribunal is directed to consider the review petition afresh after affording opportunity to the appellant and respondent Nos. 1 and 2 to file their objections and to be heard. Respondent Nos. 4 to 6 have been exonerated even in the original judgment. They are unnecessary parties in the further proceedings. They will, therefore, stand discharged from the array of parties. Parties will appear before the Tribunal on 22nd September, 1992. The Tribunal will dispose of the review petition I.A. No. 1143 of 1990 on or before 31st December, 1992.