(2006) 08 GAU CK 0036

Gauhati High Court (Agartala Bench)

Case No: None

Nirmala Debnath and Another		APPELLANT
	Vs	
New India Assurance Company Ltd. and Others		RESPONDENT

Date of Decision: Aug. 24, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115
- Constitution of India, 1950 - Article 14, 16, 19, 226, 227
- Motor Vehicles Act, 1988 - Section 149, 173

Citation: (2007) 1 GLR 741 : (2006) 3 GLT 660

Hon'ble Judges: R.B. Misra, J; A.B. Pal, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

R.B. Misra, J.

The present writ appeal has been preferred by Bishnu Debnath (after his death, his legal heirs were substituted in the light of this court''s order dated 9.6.2004 in CM. Application No. 41 of 2003) against the judgment dated 18.12,2000 passed by this High Court (Single Bench) in Writ Petition (Civil) No. 121 of 2000, preferred under Article 227 of the Constitution of India by New India Assurance Company Ltd. (''the Assurance Company'') challenging the validity of the judgment and award dated 4.12.1999 passed by the learned Member, Motor Accident Claims Tribunal (Court No. 2), West Tripura, Agartala (''the learned Tribunal'') in Title Suit (MAC) No. 188 of 1995, whereby a compensation of Rs. 5,25,000 along with interest at the rate of 12 per cent per annum was awarded by the learned Tribunal with effect from 1.6.1995 and the ''Assurance Company'' was directed to pay the said compensation within a period of 3 (three) months from 4.12.1999 failing which interest was liable to be paid at the rate of 16 per cent per annum. Out of the said awarded compensation, Rs. 1,00,000 was to be kept deposited in a Fixed Deposit Account in any Nationalized

Bank in the name of the claimant late Bishnu Debnath.

2. Learned Tribunal while awarding such compensation took the age of the claimant Late Bishnu Debnath as 20 years at the time of accident and had applied multiplier 20 which was controverted by the ''Assurance Company'' in reference to the decisions in Lilaben Udesing Gohel, Shyamala Shashidharan Nayyar and Others, Pramilaben Narendra Bhai Patel and Others, Ramabhai Shankarbhai Chavda, Lilaben and Others, Kantaben Anil Kumar Patel and Others, Motor Vahan Durghatna Sanghthan, Nadiad and Others and Shardaben Chandubhai Patel and Others Vs. Oriental Insurance Company Ltd. and Others, Hemraj Loduram Rajpur and Another, Nandubhai Ambalal Thakkar and Others, Ganibhai Ambabhai Vora and Another, Kaji Gulam Nabi Sheikh and Others, Gujarat State Road Transport Corpn. and Others, State of Gujarat and Others and Bachusha Dadusha and Others, . as well as in Ashwani Kumar Mishra Vs. P. Muniam Babu and Others, asserting that the multiplier prescribed in the 2nd Schedule of the Motor Vehicles Act, 1988 can be used as a guiding principle having no strict application.

3. The High Court (learned Singe Judge) in its operative part of order dated 18.12.2000 passed in W.P.(C) 121/2000 has observed as "Having regard to the age of the claimant and the profession he undertaken, I am of the opinion that using of multiplier 20 learned Tribunal committed no error. The jurisdiction of this court under Article 227 of the Constitution is very much circumscribed, as the court is not sitting on appeal over the impugned judgment and award passed by the Tribunal. Only the apparent illegality and perversity available on the face of the records can be cured by interference in exercising the power under Article 227 of the Constitution. In case the learned Tribunal went contrary to any mandatory provision and/or ignored any lawful admissible evidence and/or entertain non-admissible evidence in consideration, this court can interfere. So having regard to the limited power of appreciation confined to the aforesaid aspect, I am of the opinion that the learned Tribunal should have assessed the compensation to be awarded in the following line :"

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Loss of monthly income of the injured should have been assessed at Rs. 1,500 (75 per cent of the loss of earning capacity due to the disablement) and using of multiplier appears to be correct. So the amount would come to (1500 x 12 x 2) : Rs. 3,60,000 and out of that amount, the petitioner-Insurance Company is liable to pay 50 per cent as the accident admittedly occurred due to the rash and negligent driving of both the vehicles of whom one was not insured with the petitioner. Hence, this petition is allowed partly as indicated above the petitioner-Insurance Company is liable to pay 50 per cent of the total compensation worked out above, i.e., Rs. 1,80,000 (50 per cent of Rs. 3,60,000) with 12 per cent interest from the date of filing

of the petition till realization. Payment shall be made within a period of 45 (forty-five) days. The remaining Rs. 1,80,000 with 12 per cent interest is recoverable by the claimant-respondent No. 1 from the owner of vehicle No. TRT-1539 (Respondent No. S). No costs.

4. The main point/question for adjudication in the present writ appeal is as below:

Whether the Division Bench of this High Court in exercise of its appellate jurisdiction or in writ appeal jurisdiction could declare a judgment/order of learned Single Judge of High Court to have been passed in exercise of its jurisdiction under Article 226 of Constitution only and further whether this court (DB) could scrutinize and analyze the said impugned judgment/order appealed against passed in exercise of power of superintendence, under Article 227 of the Constitution in a writ petition preferred exclusively under Article 227 [not under Article 226 or (both under Article 226 and Article 227)] of Constitution before Single Judge against the award of Tribunal/Motor Accident Claims Tribunal and say that the said impugned order could be passed by learned Single Judge in exercise of its power under Article 226 only ?

5. For adjudication the present writ appeal it is necessary to give background and facts briefly as follows:

On 18.9.1994 at about 6.30 P.M. while Bishnu Debnath, a scooter mechanic was coming to Agartala through Assam-Agartala Road travelling in a Jeep TRT-1539 met with an accident with another vehicle TRT-3111 coming from opposite direction with high speed dashing the jeep in which he was travelling and Bishnu Debnath received severe injuries, and was treated in G.B. Hospital Agartala and had become handicapped. A claim petition for compensation in reference to his monthly earning of Rs. 2,200 and for the permanently disabled in right hand was preferred before learned Tribunal where New India Assurance Company Ltd., insurer of vehicle No. TRT-3111 was made party. Both the Insurer and the Owner filed Written Statement claiming that injury was caused due to negligent driving of another vehicle namely, TRT-1539. The owner or the driver of TRT-1539 though received summons but did not appear and contest the case before learned Tribunal. The claimant examined himself and two witnesses in support of his claim but the opposite parties had not produced any evidence.

In claim petition both the vehicle Nos. TRT-3111 and TRT-1539 were made parties, but in evidence it was revealed that only TRT-3111 was made responsible for the said accident accordingly learned Tribunal came to the conclusion that the driver of TRT-3111 was only responsible for the accident.

6. The ''Assurance Company'' preferred a Writ Petition No. 121 of 2000 under Article 227 of the Constitution only (not under Article 226) wherein the validity of the judgment and order dated 4.12.1999 of learned Tribunal in Title Suit (MAC) No. 188 of 1995 was challenged with prayer to pass a fresh award and appropriate orders for a fresh inquiry and determination of the just compensation. The appellants in

their affidavit-in-opposition before this court (Single Bench) has indicated in para 2 that none of the provisions of Article 227 of the Constitution of India is attracted and as such exercise of jurisdiction of superintendence was not to be made as the ''Assurance Company'' without preferring appeal under the Motor Vehicles Act had preferred a petition under Article 227 of the Constitution only to suppress the mis-statement and wrong calculation, etc., which was nothing but abuse of process of law and as such there is no question of any interference and writ petition was liable to be dismissed.

7. It has been argued on behalf of the appellants herein as below:

(i) The Writ Petition 121 of 2000 before High Court (Single Bench) was not at all maintainable and was to be dismissed in limine as learned Tribunal neither committed any mistake on the face of the record nor had made any jurisdictional error.

(ii) Observation of learned Tribunal without any reference or discussion that both the vehicles, e.g., TRT-3111 and TRT-1539 were responsible for the accident should not have been taken to consideration under Article 227 of the Constitution.

(iii) The evidences on record were very clear that the vehicle No. TRT-3111 was only responsible for the accident and as such the ''Assurance Company'' was liable to pay the whole compensation awarded by learned Tribunal and not the owner of TRT-1539.

(iv) This High Court (Single Judge) committed serious mistake by altering the findings of the fact arrived at by the learned Tribunal so far the income of the injured Bishnu Debnath was concerned as such the calculation of compensation made by the learned Single Judge was wrong.

(v) Learned Single Judge of this High Court erroneously held that the loss of earning capacity of appellant as Scooter Mechanic was not 100 per cent but 75 per cent without any basis.

8. Mr. S. Deb, learned senior counsel for the appellants, has very emphatically submitted that this court (Division Bench) may gracious enough to take pains to analysis the impugned order dated 18.12.2000 to arrive at a conclusion irrespective of the fact that W.P.(C) No. 121 of 2000 was preferred under Article 227 of the Constitution before this court (Single Judge) but the verdict and relief given by learned Single Judge in its order dated 18.12.2000 could not have been done in exercise of power of superintendence under Article 227 of the Constitution, as the same could only be granted in exercise of power under Article 226 of the Constitution, therefore, treating the impugned order dated 18.12.2000 to have been passed under Article 226 of the Constitution, by this High Court (Single Judge), the present writ appeal is maintainable before the Division Bench of this High Court.

9. In order to strengthen the stand Mr. S. Deb, learned senior counsel for the appellant has referred and relied upon the following decisions:

(A) In Naib Singh Vs. State of Punjab, The Supreme Court in respect of conditions of maintainability of Appeal before Division Bench against judgment of Single Judge (in reference to claim 15 of Latters Pantent of Bombay High Court) has observed that if the judgment appealed against is under Article 226 of Constitution, it is maintainable if it is under Article 227, it is barred and it is both under Article 226s and 227 it is to be treated as one under Article 226 so as not be deprive the appellant of his valuable right of appeal. For reference paragraph 100 of Umaji Keshav Meshram (supra) is being reproduced herein below:

100. According to the Full Bench even were Clause 15 to apply, an appeal would be barred by the express words of Clause 15 because the nature of the jurisdiction under Articles 226 and 227 is the same inasmuch as it consists of granting the same relief, namely, scrutiny of records and control of subordinate courts and tribunals and, therefore, the exercise of jurisdiction under these articles would be covered by the expression "revisional jurisdiction" and "power of superintendence". We are afraid, the Full Bench has misunderstood the scope and effect of the powers conferred by these articles. These two articles stand on an entirely different footing. As made abundantly clear in the earlier part of this judgment, their source and origin are different and the models upon which they are patterned are also different. Under Article 226 the High Courts have power to issue directions, orders and writs to any person or authority including any Government. Under Article 227 every High Court has power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of imagination can a writ in the nature of habeas corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law [see State of Gujarat etc. Vs. Vakhtsinghji Sursinghji Vaghela and Others etc., Ahmedabad Mfg. and Calico Ptg. Co. Ltd. Vs. Ram Tahel Ramnand and Others, . The orders, directions and writs under Article 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Article 227 is in addition to that conferred upon the High Courts by Article 226. Though at the first blush it may seem that a writ of certiorari or a writ of prohibition partakes of the nature of superintendence inasmuch as at times the end result is the same, the nature of the power to issue these writs is different from the supervisory or superintending power under Article 227. The powers conferred by Articles 226 and 227 are separate and distinct and operate in different fields. The fact that the same result can at times be achieved by two different processes does not mean that these two processes are the same.

(B) In Sushilabai Laxminarayan Mudliyar and others Vs. Nihalchand Waghajibhai Shah and others, where the Supreme Court has observed that the appeal before Division Bench lies against order of Single Judge in a petition under Article 226, however, test is not whether in truth and substance the order was passed under Article 226 or under Article 227, where facts justify filing of petition either under Article 226 or under Article 227 but it is filed under both the articles, court should treat the petition as being made under Article 226 so as not to deprive the party of the right of appeal to Division Bench under Clause 15 of the Letters Patent of Bombay High Court when substantial part of the order sought to be appealed against is under Article 226.

Thus, the determining factor is the real nature of the principal order passed by the Single Judge which is appealed against and neither the mentioning in the cause title of the application of both the articles nor the granting of ancillary orders thereupon made by learned Single Judge would be relevant. Thus, in each case, the Division Bench may consider the substance of the judgment under appeal to ascertain whether the Single Judge has mainly or principally exercised in the matter his jurisdiction under Article 226 or under Article 227. In the event in his judgment the learned Single Judge himself had mentioned the particular article of the Constitution under which he was passing his judgment, in an appeal under Clause 15 against such a judgment it may not be necessary for the appellate Bench to elaborately examine the question of its maintainability. When without mentioning the particular article the learned Single Judge decided on merits the application, in order to decide the question of maintainability of an appeal, against such a judgment, the Division Bench might examine the relief granted by the learned Single Judge. When more than one relief are granted by the learned Single Judge, for maintainability of an appeal, the determination would be the main and not the ancillary relief. When a combined application under Articles 226 and 227 of the Constitution is summarily dismissed without reasons, the appeal court may consider whether the facts alleged warranted filing of the application under Article 226 or under Article 227 of the Constitution. (second part of paragraph 1)

(C) In M/s. Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad, also relying upon the verdict of Umaji Keshv Meshram (supra) the Supreme Court has held that Letters Patent Appeal in reference to Clause 15 of Bombay High Court was maintainable if Single Judge exercised jurisdiction under Article 226 but if jurisdiction exercised under Article 227, it would not be maintainable. Where facts justify of petition both under Article 226 and Article 227 and petition so filed was dismissed by the Single Judge on merits, petition should be treated to have been made under Article 226 so as not to deprive the petitioner of his right to prefer LPA before Division Bench. Whether in substance the petition was under Article 226 or under Article 227, the averments made in writ petition that while interpreting relevant statutory provisions, Labour Court and Industrial Court committed serious error of law which resulted in miscarriage of justice and violation of fundamental rights and as such

prayer made to call for the record and proceedings and after perusal thereof to quash and set aside the orders passed by Labour Court and Industrial Court in revision was held in facts and circumstances in substance the petitioner sought writ of certiorari under Article 226 though the Single Judge had not expressly stated that the court was considering the petition under Article 226 but it could not be said that Single Judge dismissed the petition only under Article 227.

The relevant paragraph 16 of Lokmat Newspapers (supra) is extracted below:

In this connection, it is profitable to have a look at the decision of this court in the case of Umaj''i Keshao Meshram v. Radhikabai (supra). In that case O. Chinnappa Ready and D.P. Madon, JJ, considered the very same question in the light of Clause 15 of the Letters Patent of the Bombay High Court. Madon, J, speaking for the court in para 107 of the Report at p. 473, made the following pertinent observations : 107 SCC 473:

107. Petitions are at times filed both under Articles 226 and 227 of the Constitution. The case of Hari Vishnu Kamath v. Syed Ahmad Ishaque AIR 1955 SC 233 before this court was of such a type. Rule 18 provides that where such petitions are filed against orders of the tribunals or authorities specified in Rule 18 of Chapter XVII of the Appellate Side Rules or against decrees or orders of courts specified in that rule, they shall be heard and finally disposed of by a Single Judge. The question is whether an appeal would lie from the decision of the Single Judge in such a case. In our opinion, where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Such was the view taken by the Allahabad High Court in Aidal Singh and Others Vs. Karan Singh and Others, and by the Punjab High Court in Raj Kishan Jain Vs. Tulsi Dass etc., and Barham Dutt and Others Vs. Peoples'' Co-operative Transport Society Ltd., New Delhi and Others, and we are in agreement with it.

The aforesaid decision squarely gets attracted on the facts of the present case. It was open to the respondent to invoke the jurisdiction of the High Court both under Articles 226 and 227 of the Constitution of India. Once such a jurisdiction was invoked and when his writ petition was dismissed on merits, it cannot be said that the learned Single Judge had exercised his jurisdiction only under Article 226(sic 227) of the Constitution of India, This conclusion directly flows from the relevant averments made in the writ petition and the nature of jurisdiction invoked by the respondent as noted by the learned Single Judge in his judgment, as seen earlier. Consequently, it could not be said that Clause 15 of the Letters Patent was not

attracted for preferring appeal against the judgment of the learned Single Judge.

(D) The decision of Lokmal News Papers (P.) Ltd. (supra) was also referred subsequently by Supreme Court in Dwarika Prasad Tiwari Vs. M.P. State Road Transport Corporation and Another,

(E) In Surya Dev Rai Vs. Ram Chander Rai and Others, following important observations are made:

22. Article 227 of the Constitution confers on every High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction excepting any court or tribunal constituted by or under any law relating to the armed forces. It is well settled that Bench the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. Else the parameters invoking the exercise of power are almost similar.

Difference between a writ of certiorari under Article 226 and supervisory jurisdiction under Article 227.

24. The difference between Articles 226 and 227 of the Constitution was well brought out in Umaji Keshav Meshram (supra). Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate c6urts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.

25. Upon a review of decided cases and a survey of the occasions, wherein the High Courts have exercised jurisdiction to command a writ of certiorari or to exercise supervisory jurisdiction under Article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands

almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labelling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions. Firstly, the writ of certiorari is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate, revisional or corrective jurisdiction. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, maybe, by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well.
Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice. [Para 38]

On the other hand, supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner nor permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction. [Paras 24 and 38]

Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

Supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved. The High Court may have regard to legislative policy formulated on experience and expressed by enactments where the Legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of the proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceedings to judicial review by way of appeal or revision. [Para 26]

The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. [Para 38]

10. On the other hand Mr. Biswas, learned Counsel for the respondent has argued that three conditions could be contemplated relatable to the impugned order of High Court (Single Judge).

(i) in respect of the styled petition/application preferred under Article 227 of the Constitution the objection of the appellant could have been that the High Court was obliged to assess whether such petition/application was to be entertained under Article 227 of the Constitution,

(ii) in course of proceeding before Learned Single Judge the court itself was to decide whether it has jurisdiction to take up writ petition so preferred under Article 226 of the Constitution, and

(iii) If the styled petition/application preferred under Article 227 of the Constitution if was also preferred under Article 226 of the Constitution then this court (Single Bench) could have on occasion to assess as to whether the jurisdiction was to be exercised under Article 226 or 227 of the Constitution.

11. According to Mr. Biswas, the court generally does not exercise the power of appeal under Article 227 of the Constitution, as the appellants herein had not raised any legal objection and have neither pleaded nor have sought permission of this court have not taken grounds in the present appeal that the petition before the learned Single Judge of the High Court could not to be adjudicated only upon and decided under Article 227 of the Constitution but could be adjudicated under Article 226 of the Constitution, therefore, beyond the memorandum of appeal the argument could not be advanced in the light of decision of Supreme Court in 1986 SC 488 Lakshmiratan Engineering Works Ltd. v. Asstt. Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur and Anr. where distinction was explained between "appeal" and "memorandum of appeal" in reference to Order 41 of CPC. As per para 10 of Lakshmiratan Engineering Works Ltd. (supra) even under Order 41 of the Code of Civil Procedure, the expressions "appeal" and "memorandum of appeal" are used

to denote two distinct things. In Wharton''s Law Lexicon, the word "appeal" is defined as the judicial examination of the decision by a higher court of decision of an inferior court. The appeal is the judicial examination; the memorandum of appeal contains the grounds on which the judicial examination is invited. For purposes of limitation and for purposes of the rules of the court it is required that a written memorandum of appeal shall be filed. When the proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax.

12. For convenience Order 41, Rule 2 of CPC is provided as below:

Grounds which may be taken in appeal, - The appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the appellate court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

13. According to Mr. S. Deb, learned senior counsel for the appellants, the writ appeal is to be tested under the provisions of the High Court Rules and not under the provisions of the Civil Procedure Code.

14. According to Mr. Biswas, a judgment dated 9.12.2005 of Supreme Court passed in Civil Appeal No. 7409 of 2005 arising out of SLP(C) No. 26666/2004) (Milan Rani Sahad v. New India Assurance Co. Ltd. and Ors. shall protect the cause of the respondent. The extract of order dated 9.12.2005 are provided as below:

Heard learned Counsel for the parties. Leave granted.

The Motor Accident Claims Tribunal ("the Tribunal") passed an award. Challenging the same the Assurance Company ("the Company") filed First Appeal No. 65 of 1997 before the High Court which was dismissed on 22.9.1998 on the ground that the same was not maintainable. Apart from filing the appeal, the Company also filed a writ petition bearing Civil Rule No. ISO/1997 which was allowed and the matter was remitted to the Tribunal by order dated 2.9.1998. Against said order, a writ appeal was filed which has been dismissed. Learned Counsel appearing on behalf of the appellant submitted that when an appeal filed by the company was not maintainable and rightly dismissed, the High Court should not have entertained the petition under Article 227 of the Constitution of India, allowed the same and remitted the matter to the Tribunal. Reliance in this connection has been placed on the case of Sadhana Lodh Vs. National Insurance Company Ltd. and Another, In our view, the present case is squarely covered by the aforesaid decision of this court, as

such the High Court was not justified in entertaining the writ petition and passing order of remand therein.

For the foregoing reasons, the appeal is allowed and the impugned orders passed by the learned Single Judge as well as the Division Bench are set aside and the writ petition filed before the High Court is dismissed.

15. In Sadhana Lodh Vs. National Insurance Company Ltd. and Another, it was held by the Supreme Court that right of appeal is a statutory right and writ petition under Article 226/227 by an insurer challenging the award of Tribunal was not maintainable as remedy of filing an appeal before the High Court u/s 173 of the Motor Vehicles Act, 1988 was available to the insurer. The relevant paragraphs of Sadhana Lodh (supra) are extracted as below:

The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal.

Under Section 173 of the Act, an insurer has right to file an appeal before the High Court on limited grounds available u/s 149(2). The appeal being a product of the statute it is not open to an insurer to take any plea other than those provided u/s 149(2). However, in a situation where there is a collusion between the claimant and the insured or the insured does not contest the claim and further, if the Tribunal does not implead the insurance company to contest the claim, in such a situation it is open to an insurer to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merit, in that case is open to the insurer to file an appeal against the award of the Tribunal on merits. Thus, in such a situation, the insurer can question the quantum of compensation awarded by the Tribunal.

Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court u/s 115 CPC. Where remedy for filing a revision before the High Court u/s 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution.

The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or a

tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision.

16. We have heard learned Counsel for the parties and have perused the records. The Assurance Company has preferred Writ Petition (Civil) No. 121 of 2000 before this High Court (Single Judge) under Article 227 of the Constitution wherein, question of exercising jurisdiction by learned Tribunal was sought to be reviewed under the power of superintendence under Article 227 of the Constitution with specific prayer to admit the application, call for the records of the case from Tribunal and after hearing set aside the order and award dated 4.12.1999 in T.S. (MAC) 188/95 and to pass fresh award or orders for a fresh inquiry and determination of just compensation. The writ petition above mentioned was not preferred under both Article 226 and Article 227 but only under Article 227. The pleadings in to petition were contemplating under the provisions of Article 227 because for a petition under Article 226 different pleadings and prayers are to be made for invoking writ jurisdiction for the enforcement of any of the fundamental rights enshrined in Part III of the Constitution including Articles 14, 16, 19, etc.

The scope of judicial scrutiny under Article 226 is confined to a question as to whether action taken by the State Government or its instrumentalities is against statute, fundamental rights or constitutional provisions. It is most pertinent to refer the observation of the Supreme Court in AIR 2006 SC 3601 Ekta Shakti Foundation v. Govt. of NCT of Delhi as below:

While exercising the power of judicial review of administrative action, the court is not the appellate authority and the Constitution does not permit the court to direct or advise the executive in matter of policy or to sermonize any matter which under the Constitution lies within the sphere of the Legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or is violative of the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the court it cannot interfere. The correctness of the reasons which prompted the Government in decision making is not a matter of concern in judicial review and the court is not the appropriate forum for such investigation. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown courts will have no occasion to interfere and the court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the court cannot interfere even if a second view is possible from that of the Government.

Article 14 has no application or justification to legitimize an illegal and illegitimate action. The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits.

17. This High Court (Single Judge) has consciously observed in the impugned order that the jurisdiction of this court under Article 227 of the Constitution is very much circumscribed as the court is not sitting on appeal over the impugned judgment and award passed by the Tribunal. Only the apparent illegality and perversity available on the face of the records can be cured by interference in exercising the power under Article 227 of the Constitution. It is true that in addition to above observations, learned Single Judge, nowhere, has stated or referred that the court was considering the writ petition under Article 226 of the Constitution. It is also true that learned Single Judge has entertained the writ petition 121 of 2000 under Article 227, i.e., in exercise of its power of superintendence, therefore, this High Court (Division Bench) lacks inherent power or has no jurisdiction to entertain an appeal/writ appeal in exercise of its appellate jurisdiction against an order and judgment passed by learned Single Judge in a writ petition in exercise of its power of superintendence under Article 227 of the Constitution.

18. In order to declare that a particular judgment or order given by learned Single Judge has been passed under Article 226 or Article 227 of the Constitution, this court (DB) has to possess sufficient power of appellate jurisdiction to scrutinize and analyze the judgment/order passed under both Article 226/227. In reality, the impugned order dated 18.12.2000 of learned Single Judge was in exercise of its jurisdiction under Article 227 as such to declare such order to have been passed under Article 226 and not under Article 227, this court (DB) lacks jurisdiction and power since the appeal against the impugned order cannot be entertained, therefore, scrutiny and analysis of impugned order in order to declare the same to have been passed under Article 226 is also not permissible by Division Bench of this court.

19. It is only in the light of verdict of Supreme Court in Umaji Keshav Meshram (supra) subsequently followed in Lokmat (P.) Newspaper Ltd. (supra), the writ appeal could be entertained by the Division Bench if learned Single Judge has exercised its jurisdiction under Article 226 but if the jurisdiction has been exercised under Article 227, then the writ appeal would not be maintainable, however, where facts justify filing of petition both under Article 226 and Article 227 and the petition so filed if dismissed by learned Single Judge on merits, then petition should be treated to have been made under Article 226 of the Constitution so as not to deprive the writ petitioner of his valuable right to prefer appeal/writ appeal before the Division

Bench. To declare with certainty as to whether in substance the petition was under Article 226 or under Article 227 the relevant averments in writ petition, pleadings, facts and records as well as the prayers have to looked into. Since, as revealed in the present writ appeal the impugned order dated 18.12.2000 was passed by learned Single Judge in exercise of its jurisdiction under Article 227 keeping in view the averments, pleadings and prayers of the W.P. 121 of 2000 then without making any comments on the merits of the impugned order or maintainability of W.P. (C) 121 of 2000 at this stage presently this court (Division Bench) for lack of power or lack of jurisdiction is unable to entertain the writ appeal in question.

20. Though the writ petition under Article 226/227 of the Constitution by an insurer was held to be not maintainable in view of the verdict of Supreme Court in Sadhana Lodh (supra), as remedy of filing an appeal before the High Court is available u/s 173 of Motor Vehicles Act, in view of such prevailing position of law and in the facts and circumstances of the present case also this court (Division Bench) is unable to scrutinize the impugned order dated 18.12.2000 to say that such order was passed under Article 226 of Constitution. Treating the impugned order dated 18.12.2000 to have been passed in W.P.(C) No. 121 of 2000 under Article 227 of the Constitution this court cannot entertain the present writ appeal against the said impugned judgment and order, therefore, the present writ appeal is dismissed.