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RESERVED

Case :- FIRST APPEAL FROM ORDER No. - 545 of 2011

Appellant :- The National Insurance Comp Ltd. Nawal Kishore Road Lko.

Respondents :- Smt. Pushpa Devi & Ors.

Counsel for Appellant :- U.P.S. Kushwaha

Counsel for Respondents :- S.K. Agarwal, Vishal Tahlani

Hon'ble Dilip B Bhosale, Chief Justice

Hon'ble Aditya Nath Mittal, J

Hon'ble Rajan Roy, J

(Per Hon'ble Dilip B Bhosale, CJ)

A Division Bench of this Court, having noticed the divergent views expressed by different Division Benches, vide order dated 2 August 2016, formulated the following question for reference to a larger Bench:

“Whether the Motor Accident Claims Tribunal constituted in U.P. under the Motor Vehicles Act, 1988 can permit, while hearing a claim petition, to file affidavits of the witnesses and treat them as Examination-in-Chief and may further permit the parties to cross-examine witnesses on the basis of such affidavits ?”

2. While dealing with the question whether the examination-in-chief of a witness can be filed on affidavit, the Division Benches in **Kripal Singh Vs. Mst. Kalia, 1982 ACJ 458; New India Assurance Co. Ltd. Vs. Richa Singh Katiyar & Ors., 2012 ACJ 1626; and Oriental Insurance Co. Ltd. Vs. Ram Ratan & Ors., 2013 (3) ALJ 600**, expressed divergent views.

3. The factual matrix, sans unnecessary details for addressing the question, is that the respondents had filed a claim petition before the Motor Accidents Claims Tribunal, Lucknow, with the assertion that on 23.09.2008,

an accident occurred, in which one Hariram sustained serious injuries and while he was being taken to hospital, succumbed to injuries. Accordingly, a claim petition was filed by his dependents. The claim petition was allowed with a direction to the Insurance Company to pay compensation which was quantified at Rs. 16,66,716/- with six percent simple interest. Feeling aggrieved by the said award, the Insurance Company filed the instant appeal. Claimants also filed an appeal (F.A.F.O. No.536 of 2011) for enhancement of compensation. When these appeals were being heard by the Division Bench, at the very outset, learned counsel for the Insurance Company submitted that the award impugned in the appeal, deserves to be set aside, on the ground that the parties were allowed to adduce their examination-in-chief by way of affidavit, which procedure was impermissible in law and on this count alone, the appeal deserves to be allowed. In support of this contention, learned counsel for the Insurance Company placed reliance upon the judgment of this Court in **Kripal Singh**. On the other hand, learned counsel for the claimants placed reliance upon the judgments of this Court in **Richa Singh** and **Ram Ratan**, to contend that it was open to the Tribunal to take affidavits of the witnesses on record in lieu of examination-in-chief. He submitted that such an objection was not raised before the Tribunal and, as a matter of fact, learned Advocate for the Insurance Company cross-examined the witnesses without demur. It is against this backdrop the Division Bench, vide order dated 02.08.2016, made reference to larger Bench, without expressing its opinion on the question.

4. We would like to have a close look at the judgments of the Division

Benches referred to in the reference order. In **Kripal Singh** (supra), the Division Bench, while dealing with the question, observed thus:

"3. Learned counsel for the appellants urged that the Tribunal had no authority in law to record evidence by means of affidavits and, the award given by the Tribunal is illegal. We find merit in the contention. Section 110-A of the Act confers power on the State Government to 'constitute one or more Motor Accidents Claims Tribunals' for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of or bodily injury to, persons arising out of motor vehicles or damages to any property of a third party so arising, or both. Section 110-C of the Act lays down that the Tribunal may, in holding inquiry, follow such summary procedure, subject to rule that may be made in this behalf, as it thinks fit. Sub-section (2) lays down that the Claims Tribunal shall have all the powers of the civil Court, for the purpose of taking evidence and enforcing the attendance of the witnesses, and for discovery and production of documents and material objects and for other purposes as may be prescribed. Section 111-A confers power on the State Government to make rules for purpose of carrying into effect the provisions of Section 110 to 110-E including the procedure to be followed by a Claims Tribunal in holding enquiry and also the powers of the civil Court which may be exercised by the Claims Tribunal. In pursuance of these provisions State Government has framed rules known as the U.P. Motor Accidents Claims Tribunal Rules, 1967. Rule 11 of the said Rules provides that after framing of the issues, the Claims Tribunal shall proceed to record evidence thereon which each party may like to produce. Rule 12 prescribes method for recording of evidence. It lays down that the Claims Tribunal shall examine the party or witnesses and maintain substance of memo of their deposition. Rule 21 makes some provisions of the Code of Civil Procedure applicable to the proceedings before the Tribunal. It is pertinent to note that Rule 21 does not make Order XIX of the Code of Civil Procedure applicable to proceedings before the Tribunal. A civil Court is empowered to admit evidence by means of affidavits as it is authorised to do so by Order XIX of the Code of Civil Procedure. Since that provision has not been applied to proceedings before the Tribunal evidence in the shape of affidavits can not be recorded. The provisions of the Motor Vehicles Act, 1919 and the Rules framed thereunder make it amply clear that after the framing of the issues parties are required to produce oral evidence as prescribed by Rule 12. There is no provision under the Motor Vehicles Act or the Rules framed thereunder

conferring jurisdiction on the Tribunal to record evidence by means of affidavits.

4. The Claims Tribunal is a creature of the Motor Vehicles Act, 1939, it can exercise only those powers which are conferred on it by the statute, and cannot derive power from any other Code or statute. Since the Act and the Rules vest no such authority in the Tribunal it has no power to permit evidence by means of an affidavit or to give award on the basis of evidence contained in the affidavits. The Tribunal committed error in admitting the evidence by means of affidavits and delivering the award against the appellant on the basis of evidence contained in those affidavits.

5. We, therefore, allow the appeal, set aside the order of the Tribunal and remand the matter to the Tribunal to decide the claim petition in accordance with law at a very early date. During the pendency of the proceedings before the Tribunal, no proceedings shall be taken for recovery of Rs. 15, 000/- which has been paid to the claimants under the orders of this court. The parties shall bear their own costs”

(emphasis supplied)

5. In **Richa Singh Katiyar** (supra), another Division Bench, after considering **Kripal Singh**, held thus:

“12. Reliance has been placed by the learned counsel appearing for the appellant on a case in Kripal Singh v. Kalia, 1982 ACJ 458 (Allahabad), whereby the provisions contained in Motor Vehicles Act, 1939 have been interpreted. In the case of Kripal Singh (supra), a Division Bench of this Court has held that there is no provision in the Act or the Rules framed thereunder conferring jurisdiction on the Tribunal to record evidence by means of affidavits. It has been further held that the Claims Tribunal is a creature of the Motor Vehicle Act, 1939 and it can exercise only those powers which are conferred on it by the statute. The judgment in Kripal Singh's case (supra) seems to have lost its binding nature because of enactment of new Motor Vehicles Act, 1988 and the Rules framed thereunder, read with amended Code of Civil Procedure. As observed above, Rule 221 specifically provides that provisions contained in the Code of Civil Procedure may be made applicable to the permissible limit.

13. In view of above, we are of the opinion that in

case there is no conflict between the provisions contained in the Code of Civil Procedure to the extent of rule 221 of the U.P. Motor Vehicles Rules, 1998, then inference may be drawn and the procedure prescribed in the Code of Civil Procedure may be made applicable. Since the Rules itself provide that the provisions contained in the Code of Civil Procedure to some extent may be made applicable, the affidavit filed by the claimant while approaching the Tribunal shall not suffer from inadmissibility of evidence.

16. The purpose of statutory provisions is for due compliance of the principle of natural justice. The Rules provide for the examination of applicant in case present (Rule 205) and in case parties contest then witness be examined orally. However, it is silent whether there should be examination-in-chief in every case. Rules provide that the oral evidence may be recorded with regard to facts in dispute. In case a party had filed an affidavit and liberty is given to the other side to cross-examine the witness and other side accepts the proposal and cross-examines such witness, (in the present case like the claimant), then no objection may be raised at later stage with regard to violation of principle of natural justice or statutory provisions, more so when the statute is silent. As we have observed (supra), in absence of any repugnancy, inference may be drawn to regulate the proceedings of the Tribunal by applying the provisions of Code of Civil Procedure. Order 18, Rule 4 Code of Civil Procedure, since provides for adducing evidence by filing affidavit, there appears to be no illegality on the part of the Claims Tribunal while accepting the affidavit and permitting the appellant to cross-examine the witness.”

(emphasis supplied)

6. In **Ram Ratan** (supra), another Division Bench had an occasion to consider a similar question and, while dealing with the same, the following observations were made:

“28. Coming to second limb of argument. It is vehemently argued by the appellant's counsel that the claimant has filed an affidavit, in response to which he has been examined orally by the defendant's counsel. In absence of examination-in-chief, proceeding vitiates. Specific query was made by the court whether the appellant or the respondents had raised objections and took a plea that the tribunal should record examination-in-chief, the response is negative. Neither in the memo of appeal nor during the

course of argument, it has been pleaded or stated that the objection was raised during the proceeding against the filing of affidavit by the claimant. Once the appellant participated in the proceeding and raised no objection; rather cross-examined the prosecution witnesses including the claimant based on facts brought on record by affidavit, then at first appellate stage, such argument is not sustainable keeping in view the letter and spirit of Section 168 of the Act. Learned counsel for the appellant has invited attention to different provisions contained in Chapter IXX of the Motor Vehicles Rules, 1998. It shall be appropriate to consider the provisions regulating the trial before the tribunal.

*32. A plain reading of these provisions reveals that discretion has been given to the tribunal to proceed with oral examination of the witnesses. The provisions contained in Rules 208 to 212 should be read in context to the word, "enquiry" used in Section 168 of the Act. **Being summary trial, discretion has been given to the Presiding Officer of the tribunal to record oral testimony under Rule 208 by using word, if deems fit. However, discretion being judicious in nature, in case an objection is raised to the affidavit filed by a person, then it shall be incumbent on the tribunal to record examination-in-chief with due permission to cross-examine such witnesses.** In any case, if without raising any objection, an affidavit is relied upon by the parties and the defendant cross-examines the applicant during the course of proceeding before the tribunal, then no objection may be raised at appellate stage and trial shall not vitiate. During the course of argument, it has been admitted that no objection was raised by the appellant before the tribunal when the tribunal has relied upon the affidavit filed by the claimant and permitted the appellant to cross-examine a witness. Moreover, it was open for the appellant while filing written statement to raise objection by due pleading but the same admittedly has not been done."*

(emphasis supplied)

7. We have heard Shri U.P.S. Kushwaha, learned counsel for the appellant. We have also heard Shri Kiran Kumar Bhatpuri; Shri D. C. Shukla; Shri C.B. Pandey and Shri Rajiv Mishra, Standing Counsel for different Insurance Companies, who were present in the Court and Shri Sandeep Kumar Agarwal, for the respondents. We do not propose to make a

detailed reference to the submissions made by learned counsel for the parties, since we are going to deal with the question in depth, in the light of their submissions and the judgments relied upon by them in support thereof.

7.1 It would not be out of place to observe that some of learned counsel for the other Insurance Companies fairly stated that in view of the legislative changes since 1982, now an affidavit may be accepted in lieu of examination-in-chief. Shri U.P.S. Kushwaha and one or two other Standing Counsel for the Insurance Companies, placed heavy reliance upon the judgment of this Court in **Kripal Singh** (supra) and vehemently submitted that the Tribunal has no authority, in law, to record evidence by means of affidavit and if such a procedure is adopted, the award would be rendered illegal. Learned counsel for the claimants, on the other hand, submitted that **Kripal Singh** was decided in 1982 when neither the Motor Vehicles Act, 1988 (for short, 'Act, 1988') nor the U.P. Motor Vehicles Rules, 1998 (for short, 'Rules, 1998') were in existence nor the amended provisions of Order XXVIII Rule 4 of the Code of Civil Procedure, 1908 (for short, 'CPC') were available and in this backdrop, the law laid down in **Kripal Singh** has lost its binding nature.

8. The Act, 1988 is a beneficent legislation, intended to place the claimant in the same position that he was before the accident and to compensate him for the loss and, therefore, should be interpreted liberally so as to achieve the maximum benefit, as observed by the Supreme Court in **Syed Mehaboob Vs. New India Assurance Co. Ltd., (2011) 11 SCC 625**. The Motor Accidents Claims Tribunal (for short, 'Tribunal') have been

constituted under Section 165 of the Act, 1988 so as to provide a speedy and effective remedy to the victims of an accident and the dependents of the deceased. As observed by the Supreme Court in **Raj Kumar Vs. Ajay Kumar & Anr., (2011) 1 SCC 343**, Sections 168 and 169 of the Act, 1988, make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth, who is required to 'hold an enquiry into the claim' for determining the just compensation. The Tribunal should, therefore, take an active role to ascertain the true and correct position so that it can assess just compensation. It is with this object that a summary procedure is prescribed for such Tribunals while enquiring into a claim.

9. It is against this backdrop, we now proceed to look at the relevant provisions of the Act, 1988. Sections 168 and 169 of the Act, 1988 are relevant for our purpose. Section 168 of the Act, 1988 empowers the Tribunal to pronounce the award on the application for compensation made under Section 166, after giving notice to the insurer and after giving the parties an opportunity of being heard. The submissions of learned counsel for the parties were centered around Section 169 for quite some time. Section 169 of the Act, 1988 reads thus:

“169. Procedure and powers of Claims Tribunals.—

(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the

Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry.”

9.1 Keeping in view the principal object behind the constitution of the Tribunal, which is expected to deliver speedy justice to the dependents of a breadwinner, who dies in a motor accident, if the provisions contained in Section 169 (1) are read carefully, it is clear that this provision directs the Tribunal to follow such summary procedure as it thinks fit, to complete the enquiry in respect of accident claims. In other words, it states that, in holding any enquiry under Section 168 of the Act, 1988, the Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure, as it thinks fit. The object was to free the Tribunals from the procedural technicalities that dominate the trial of a suit in civil court. The whole object of a summary procedure is to ensure that a claim application is heard and decided by the Tribunals expeditiously. The inquiry under Section 168 and the summary procedure that the Tribunal has to follow do not contemplate the controversy arising out of a claim application being decided in piecemeal. The Tribunal is required to dispose of all issues one way or the other in one go while deciding the claim application [see **Bimlesh & Ors. Vs. New India Assurance Co. Ltd., (2010) 8 SCC 591**]. Thus, the Tribunal is free to follow any procedure, which it considers expedient in the interest of justice. In other words, the Tribunal is at liberty to follow any procedure

that it may choose to evolve for itself so long as the said procedure is not arbitrary and is consistent with the rules of natural justice and does not contravene the positive provisions of law. It is clear that wide powers are conferred on the Tribunal by the legislature in order to do justice and to achieve the purposes for which the Tribunal has been constituted. From the language employed in sub-section (2) of Section 169, it is clear that the Tribunal has inherent powers to apply all or any of the provisions of the CPC, on the principles of justice, equity and good conscience.

9.2 Sub-section (2) of Section 169 further states that the Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (for short, 'CrPC'). This expression, in our opinion, is only in addition to what has been provided in the first part of sub-section (2). A specific reference to Section 195 and to Chapter XXVI has obviously been made to deal with an offence alleged to have been committed in respect of a document produced in the proceeding before it, which is filed or caused to be filed by a complainant and not a party. Merely because a specific reference to Section 195 and Chapter XXVI of CrPC is made in sub-section (2), does not, by any stretch of imagination, mean exclusion of application of other provisions of CPC. We have no hesitation in observing that the Tribunal shall have all the powers of a civil court for the purpose of taking evidence on oath.

9.3 As can be seen from sub-section (1) of Section 169, in holding any enquiry under Section 168, the Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit. In

any event, whether rules are made or not, the procedure to be followed has to be of a summary nature. Sections 168 and 169 envisage a summary enquiry. A summary enquiry does not entail application of strict rules of pleadings or an elaborate procedure of adducing evidence involving lengthy examination of witnesses. Such summary proceedings are prescribed to facilitate speedy disposal of the claim keeping in view the object of creating the Tribunal. Thus, the purport of the provisions contained in Section 169 is that, though the procedure to be followed by the Tribunal is a summary procedure, but, in a given case, especially one involving complex or intricate issues, it can exercise all of the powers of a civil court vested in it under sub-section (2) of Section 169. This does not mean that in every case, the elaborate procedure prescribed for the civil court has to be followed for examination of witnesses and recording of evidence. The Tribunal is conferred with the discretion to utilise these powers as and when it deem fit.

9.4 Sections 168 and 169 of the Act, 1988, thus, make it evident that the Tribunal is free to adopt such summary procedure, as it thinks fit, and for all practical purposes, it has all the powers of a civil court for the purpose of taking evidence on oath, including that of enforcing attendance of witnesses and of compelling the discovery and production of documents and the material objects and for such other purposes, as may be prescribed.

10. Before we proceed further, it would be relevant and necessary to have a glance at the Rules, 1998. These Rules are framed in exercise of the powers under Sections 28, 38, 65, 95, 96, 107, 111, 138, 176 and 213 of the Act, 1988, read with Section 21 of the General Clauses Act, 1897 and in

supersession of all existing rules on the subject. For dealing with the question referred to for our consideration, Rules 204, 205, 206, 208, 210, 212 and 221 may be relevant. Rule 204 provides the procedure for making an application for payment of compensation made under Section 166 of the Act, 1988. Rule 205 provides for the examination of the applicant. Rule 206 empowers the Tribunal, after considering the application and the statement, if any, recorded under Rule 205, to dismiss the application summarily if, for reasons to be recorded, it is of the opinion that there are no sufficient grounds for proceeding therewith. Rule 208 provides for appearance and oral examination of parties. As per sub-rule (2) of Rule 208, where the claim is contested, the Tribunal shall, with a view to elucidating matters in controversy between the parties, examine orally such of the parties to the claim proceeding as it deems fit and shall reduce the substance of the examination, if any, to writing. The use of the words 'such of the parties to the claim proceeding as it deem fit' is indicative of a discretion vested in the Tribunal in this regard, meaning thereby, it is not mandatory for it to examine any of the parties orally, but, it is permissible, if it deems fit. However, when it examines parties orally, it shall reduce the substance of the examination, if any, to writing. Rule 210 provides for summoning of witnesses. Rule 212 is important, and reads thus:

"212. Method of recording evidence – (1) The Claims Tribunal shall, as examination of a party or a witness proceeds, make a brief memorandum of the substance of what is deposed and such memorandum shall be written and signed by the Claims Tribunal and shall form part of the record:

Provided that the evidence of any medical witness

shall, as nearly as may be, be taken down word for word:

Provided further that where the Claims Tribunal is unable to make a memorandum it shall cause the reason of such inability to be recorded and shall cause the memorandum to be made in writing from its dictation.

(2) The copies of medico-legal reports, post-mortem reports, papers relating to reports submitted by Investigating Police Officer or any other person which the Claims Tribunal deems appropriate, shall be admissible in evidence without formal proof thereof. However, the witness relating to these documents and papers may be examined on oath if required necessary in the circumstances of the case.”

10.1 This Rule prescribes the method of recording evidence. It requires the Tribunal to make a brief memorandum of the substance of what is deposed through examination of a party or witness. It shall be in writing and signed by it. As against this, the evidence of any medical witness is required, as nearly as may be, to be taken down word for word. As per the second proviso to this Rule, where the Tribunal is unable to make a memorandum, it shall cause the reasons of such inability to be recorded and shall cause the memorandum to be made in writing from its dictation. Thus, Rule 212 at first blush requires the examination of a party or a witness to be recorded in writing before the Tribunal, whether in the form of a brief memorandum of substance by the Tribunal or on its dictation. There is no provision in the Rules, 1998 for recording of oral evidence of the parties or witnesses on affidavit. Rule 221 states that the provisions of the First Schedule to the CPC shall, so far as may be, apply to proceedings before the Tribunal, namely, Rules 9 to 13 and 15 to 30 of Order V; Order IX, Rules 3 to 10 of Order XIII, Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of

Order XXIII. If Rule 221 is read with Section 169 of the Act, 1988, we do not find any conflict as such and the Rules do not provide that the provisions of CPC, other than those referred to in Rule 221, would not apply or cannot be taken recourse to, by the Tribunal while dealing with a claim petition and it can exercise all the powers of a civil court for the purpose of taking evidence on oath. In any case, the provisions of Rule 221 cannot override the provisions contained in sub-section (2) of Section 169 of the Act, 1988 and restrain the Tribunal from taking recourse to the procedure contemplated under the other provisions of CPC. Sub-section (2) of Section 169, as observed earlier, in unequivocal terms confers all the powers of a civil court on the Tribunal for the purpose of taking evidence on oath.

10.2 It would be necessary to notice that the Rules, 1998 were brought into force in 1998 when the provision in CPC for examination-in-chief on affidavit was not available. Such a provision was inserted in CPC by Act 22 of 2002 with effect from July 2002. Therefore, it was submitted that under the substantive provision in sub-Section (2) of Section 169, the examination-in-chief of a witness on affidavit would also be permissible in the discretion of the Tribunal, as, sub-Rule (2) of 208 cannot supplant this power vested in it under sub-Section (2) of Section 169 of the Act, 1988. At the cost of repetition, we observe that the Rules, 1998 would not override the substantive provision contained in sub-section (2) of Section 169, which confers on the Tribunal all the powers of a civil court for the purpose of taking evidence on oath.

11. The Act 22 of 2002 inserted Rule 4 to Order XVIII with effect from

01.07.2002, thereby providing that in every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence. Under sub-rule (2) of Rule 4, the evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the court, shall be taken either by the court or by the Commissioner appointed by it. Thus, the cross-examination and re-examination has to take place in the court or by a Commissioner appointed by it. Under sub-rule (3), the court or the Commissioner, as the case may be, shall record evidence (cross-examination or re-examination), either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner, he shall return such evidence together with his report, in writing, signed by him, to the court appointing him and the evidence taken by the Commissioner shall form part of the record itself. Thus, the examination-in-chief shall be on affidavit, whereas cross-examination and re-examination shall be in court or by the Commissioner. The validity of the amendment to Order XVIII Rule 4 was considered and upheld by the Supreme Court in **Salem Advocate Bar Association, T.N. Vs. Union of India, (2003) 1 SCC 49** as well as in **Salem Advocate Bar Association, T.N. Vs. Union of India, (2005) 6 SCC 344**. The Supreme Court in the latter judgment has observed that by permitting affidavits to be filed as evidence, the right of cross-examination and re-examination in the open court has not been disturbed by Order XVIII, Rule 4 inserted by Act 22 of

2002. The object of the Act 22 of 2002 was to facilitate the speedy disposal of the case.

11.1 The summary procedure contemplated under the provisions of Section 169 of the Act, 1988 is certainly the summary procedure to be borrowed from the CPC. Order XXXVII CPC deals with the summary procedure. Rule 7 of Order XXXVII CPC provides as under:

"7. Procedure in suits - Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner."

11.2 In this regard, the provisions of Order XVIII Rule 13 CPC are also relevant, which read thus:

"13. Memorandum of evidence in unappealable cases.- In cases in which an appeal is not allowed, it shall not be necessary to take down or dictate or record the evidence of the witnesses at length; but the Judge, as the examination of each witness proceeds, shall make in writing, or dictate directly on the typewriter, or cause to be mechanically recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the Judge or otherwise authenticated, and shall form part of the record."

11.3 The provisions of Order XVIII Rule 13 CPC and the provisions of Rule 212 of the Rules, 1998 are in conformity with each other, except the fact that the provisions of Order XVIII Rule 13 provide for the drawing up of a memorandum of evidence in unappealable cases while the provisions of Rule 212 of the Rules, 1998 apply to all cases and the only exception is regarding the evidence of any medical witness which has to be taken down word by word. We do not find any conflict as such between the provisions

contained in CPC and the provisions contained in Act, 1988 and Rules, 1998, and therefore, in our opinion, the procedure prescribed in the CPC can be made applicable, particularly in view of the language employed in subsection (2) of Section 169 of Act, 1988.

12. The matter of recording the evidence on affidavit, had also engaged attention of the Bombay High Court in ***Shamrao Vishnu Kunjir Vs Suresh Vishnu Kunjir & Ors.***, AIR 2005 Bom 294, wherein the Bombay High Court considered this aspect in detail and held as under:

"7. Order 18 Rule 4 as it stood before its substitution by Act of 1999 and 2001, provided that the oral evidence of the witness had to be recorded in the presence of the Judge. By the amendment it is now to be recorded on affidavit. Earlier it had to be recorded in the manner set out in Rule 5, which was, to take it down, in the language of the Court in writing or in the presence and under the personal direction and superintendence of the Judge or from the dictation of the Judge directly on a typewriter or if the Judge for reasons recorded, directs to be recorded by a mechanism in the presence of the Judge. The purpose and object of the Amendment Acts have been considered by the Apex Court in Salem Advocates Bar Association v. Union of India, AIR 2003 SC 189. The object of amending Order 18, Rule 4 is to subserve the larger purpose of cutting down in the disposal time of recording evidence, thereby reducing the period of disposal of the cases by dispensing with the lengthy procedure of the Court recording evidence of every witness produced before it or summoned to appear before it. The earlier procedure resulted in the trial being inordinately delayed and was one of the main reasons for the docket explosion in the Courts. The amendment seeks to obviate the same by permitting examination to be on affidavit instead of the examination-in-chief being recorded by the Court.

8. The objective of speedy disposal of trial of the case by allowing examination-in-chief to be recorded on affidavit does not mean that the procedure of recording of evidence of the witness has to be by-passed or dispensed with, by filing the affidavit without examining the witnesses as is the popular notion. All that has happened is that instead of recording the evidence before the Court, the duty is now

placed on the legal profession, thereby meaning Advocates appearing for the parties to follow the same procedure in their Chambers meaning thereby that they have to personally examine the witness and get his statement recorded in his presence by one of the modes earlier set out under Order 18, Rule 5 and then transcribe the same on an affidavit which is to be filed in the Court. Dispensation of oral evidence, by way of examination-in-chief therefore, is not dispensation of the procedure for recording evidence. The place of recording evidence has only changed. The procedure for recording evidence even at the stage of examination-in-chief remains substantially the same. Even before the amendment Act of 1999 and 2000 it was open to the Court, under the provisions of Order 19, R. (1), (2) to permit evidence to be recorded on affidavit. This was discretionary. It is now made mandatory under Order 18, Rule 4 of C.P.C."

12.1 Further, in **Peacock Industries Ltd. Vs. Budhrani Finance Ltd. and State of Maharashtra & Ors., MANU/MH/0391/2006**, decided on 14.07.2006, the Bombay High Court has again dealt with this aspect more comprehensibly with reference to the provisions of Section 145 of the Negotiable Instrument Act, 1881 and Section 296 CrPC. The question before Hon'ble the High Court of Bombay was as under:

“(A) Whether sub-section (2) of Section 145 of the Negotiable Instruments Act, 1881, (for short, "the Act") confers an unfettered right on the complainant and the accused to apply to the Court seeking direction to give oral examination-in-chief, of a person giving evidence on affidavit, even in respect of the facts stated therein and that if such a right is exercised, whether the Court is obliged to examine such a person in spite of the mandate of Section 145 (1) of the Act?

(B) Whether the provisions of Section 145 of the Act, as amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act 2002, (for short "the amending Act of 2002") are applicable to the complaints under Section 138 of the Act pending on the date on which the amendment came into force? In other words, do the amended provisions of Section 145 (1) and (2) of the Act operate retrospectively?

12.2 While dealing with the questions, the Bombay High Court observed thus:

"23. A plain reading of sub-section (1) of Section 145, which starts with non obstante clause carving out an exception to the provisions of the Code, gives complete freedom and option to the complainant to give his evidence on affidavit making it further clear that such evidence shall be read in any enquiry, trial and other proceedings subject to all just exceptions. In other words, the choice or the option is left to the complainant either to give his evidence on affidavit or give oral examination-in-chief. That is the mandate of sub-section (1) of Section 145 as observed by the Division Bench in KSL and Industries Ltd case. Sub-section (2) gives right to the Court, if it thinks fit, to summon and "examine" any person giving evidence on affidavit as to the facts contained therein. Similarly, sub-section (2) makes it mandatory for the Court to summon and "examine" any person giving evidence on affidavit as to the facts contained therein on the application of the prosecution or the accused.

24. Thus, it is clear that sub-sections (1) and (2) of Section 145 create two distinct and separate rights, former being in favour of the complainant and the latter being for the benefit of both, the complainant and the accused, besides the right of the Court to summon and examine any person giving evidence on affidavit. The word "examine" in Section 145 (2), thus, would mean and include "examination-in-chief", "cross-examination", "re-examination" and "examination by the Judge". Let me first consider the right of the Court under sub-section (2) of Section 145. The right of the Court under sub-section (2), is to call a witness, who has given his evidence on affidavit as provided for under sub-section (1), for putting questions as contemplated under Section 165 of the Indian Evidence Act. Putting questions to the witness by the Court is also an examination of a witness. The examination of a witness by the Court cannot be termed as "examination-in-chief" or "cross-examination" or "re-examination". It is an independent right conferred on the Court under Section 165 to put questions to the witness in order to discover or to obtain proper proof of relevant facts, in any form at any time. When the court exercise this right, neither party nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question."

13. In **Shamrao Vishnu Kunjir** (supra), it was held that allowing of examination-in-chief to be recorded on affidavit, does not mean that the procedure of recording of evidence has to be bypassed or dispensed with by filing the affidavit without examining the witness as is the popular notion. All that has happened is that, instead of recording the evidence before the court, the duty is now placed on the legal profession, meaning thereby, Advocates appearing for the parties to follow the same procedure in their chambers, further meaning thereby, that they have to personally examine the witness and get his statement recorded in his presence by one of the modes earlier set out under Order XVIII, Rule 5 of CPC and then transcribe the same on an affidavit which is to be filed in the court. Dispensation of oral evidence, by way of examination-in-chief, is not dispensation of the procedure for recording evidence but only place of recording evidence has changed. The procedure for recording evidence, even at the stage of examination-in-chief, remains substantially the same. It was also mentioned that even prior to the amendment, it was open to the court under the provisions of Order XIX Rules 1 and 2 CPC to permit evidence to be recorded on affidavit. This was discretionary. It is now made mandatory under Order XVIII, Rule 4, CPC. Thus, the object and purport of Rule 4 of Order XVIII has been explained in the said judgment.

14. As is evident, major legislative changes have been made in Order XVIII Rule 4 CPC. Prior to the amendment of Order XVIII Rule 4, it was mandatory to record evidence of the witnesses orally in open court in the presence and under the personal direction and superintendence of

the Judge, but now under the amended CPC, it is mandatory that in every case, the examination-in-chief of a witness shall be on affidavit.

14.1 The prime object of amending Order XVIII Rule 4 CPC is to minimize the disposal time of recording evidence as well as dispensing with the lengthy procedure of the court for recording evidence of every witness produced before it or summoned to appear before it. Certainly, the earlier procedure of recording evidence resulted in inordinate delay in trial and caused the problem of docket explosion in the courts. It is experienced that Claims Tribunal of this State are also having high pendency of claim petitions, for various reasons. By permitting examination-in-chief by filing affidavit will certainly curtail such delay. Therefore, in our opinion, the affidavit filed by a witness while approaching the Tribunal cannot suffer from the specter of being inadmissible in evidence in view of the amended provisions of CPC.

14.2 The powers of the civil court under Order XVIII stand also vested in the Tribunal in view of the language employed in sub-Section (2) of Section 169. As noticed earlier, the provisions of Order XVIII CPC did not exist at the time of framing of Rules, 1998, and therefore, the provisions contained therein have to be read, understood, interpreted and applied accordingly, keeping in mind sub-section (2) of Section 169 of the Act, 1988, which contains the substantive provision as to the powers of the Tribunal regarding taking evidence on oath.

14.3 The object of Rule 4 of Order XVIII being to facilitate speedy

disposal of trials, the same is in tune with the object of Sections 168 and 169 of the Act, 1988, therefore, the examination-in-chief on affidavit in the proceedings before the Tribunal advances the object for which it has been constituted, by cutting down on the time and energy which would otherwise have to be spent on an examination-in-chief without, in any manner, taking away the sanctity attached to it.

14.4 As far as Rule 221 of the Rules, 1998, which provides for the application of certain provisions of the First Schedule to the CPC before the Claims Tribunal, namely, Rules 9 to 13 of Order V; Order IX, Rules 3 to 10 of Order XIII; Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of Order XXIII, is concerned, it does not mean that the provisions of Order XVIII Rule 4 cannot be applied by the Tribunal at its discretion and to hold as such will be contrary to sub-Section (2) of Section 169 of the Act, 1988.

15. In view of the above discussion, the net result is that, it is not impermissible for the Tribunal to permit examination-in-chief on affidavit in terms of Order XVIII Rule 4 CPC subject, of course, to any valid objection being raised by the defendants. But in a given case, it can very well require the examination-in-chief in court in terms of Rule 208 read with Rule 212 of the Rules, 1998. In the event of any objection to the examination-in-chief on affidavit, the Tribunal would be required to take a decision thereon. However, if no objection is taken in this regard before the Tribunal, then it is not open for the defendant to take this plea as a ground to challenge the award of the Tribunal, in an appeal preferred under Section 173 of the Act, 1988.

16. Before we proceed further, we observe that from a perusal of the provisions contained in Section 110-C of the Motor Vehicles Act, 1939 and Section 169 of the Act, 1988, it is clear that no legislative changes have taken place with regard to the conferment of the powers of the civil court to the Tribunal. Similarly, from a perusal of Rules 12 and 21 of the U.P. Motor Vehicle Rules, 1969 and Rules 212 and 221 of the Rules, 1998, it is clear that the method of recording evidence is also the same.

17. The applicability of CPC to the proceedings before the Tribunal under the Motor Vehicles Act 1939 (old Act) came up for consideration before the Supreme Court in **Rajasthan State Road Transport Corporation Vs. Poonam Pahwa & Ors., (1997) 6 SCC 100**. On a consideration of the Rules made under the Act, 1988 as applicable to the State of Haryana and Punjab, the Supreme Court opined that provisions of Order XXI Rule 1 CPC were applicable to such proceedings. Furthermore, in paragraph 39 of the report, the Supreme Court held that even if it is assumed that by adopting the Punjab Motor Accidents Claims Tribunal Rules, 1964, the subsequent amendments reflected in the said Rules were not adopted or incorporated by the State of Haryana, and therefore, Order XXI of CPC was not applicable expressly, yet the appellant would be fastened with the liability to pay interest by applying the underlying principles of Order XXI Rule 1 of CPC. It went on to hold that the Motor Accidents Claims Tribunal being a statutory Judicial Tribunal specifically constituted for adjudicating a claim arising out of motor accidents has the trappings of a court. In this regard, it relied upon its earlier decision in **Bhagwati Devi & Ors. Vs. M/s. I.S. Goel**

& Ors., 1983 ACJ 123 (SC), wherein the Tribunals were held to be Court for the purposes of Section 25 CPC. It also referred to the decision in **State of Haryana Vs. Smt. Darshana Devi & Ors., (1979) 2 SCC 236**, where the provisions of Order XXIII CPC were applied to the proceedings before the Tribunal, even though the said provision was not expressly applicable under the Rules. The principles contained in the CPC have been made applicable before the statutory Judicial Tribunals in a catena of cases which have been referred in the said judgment.

18. As far as the Division Bench judgment of this Court in **Kripal Singh** (supra) is concerned, the same was rendered when Act 22 of 2002 inserting Rule 4 in Order XVIII CPC was not in existence. At that time, even the civil courts could not accept or allow the examination-in-chief on affidavit, therefore, Section 169(2) of the Act, 1988 vesting all the powers of the civil court upon such Tribunals was not of much help. On account of the amendment of 2002, the legal position as regards the powers of the civil court in the matter of examination of witnesses has undergone a change. Consequently, sub-section (2) of Section 169 has to be understood in the light of this change.

19. In **Richa Singh Katiyar** (supra), the Division Bench held that examination-in-chief on affidavit followed by cross-examination in court to be valid and legal. The Division Bench considered the provisions of the Rules, 1998, provisions of Order XVIII Rule 4 CPC as also the judgment in **Kripal Singh** (supra). It opined that there was no conflict between the provisions contained in Order XVIII Rule 4 CPC and the Rules, 1998,

specially Rule 221.

20. In **Ram Ratan** (supra), the other Division Bench came to the same conclusion that examination-in-chief on affidavit was permissible. However, none of these decisions lay down any such proposition of law that even cross-examination or re-examination would be permissible on affidavit. In fact, we are of the view that this question did not arise in the present case, yet, it has been referred by the Division Bench.

21. Thus, we are of the opinion that the examination-in-chief on affidavit is permissible at the discretion of the Tribunal, subject to any objection being raised by the defendants, which would require a decision thereon by the Tribunal. As far as cross-examination and re-examination are concerned, same are not permissible on affidavit and have to take place before the Tribunal. It is further clarified that in the absence of any objection before the Tribunal regarding the examination-in-chief on affidavit, no challenge to its award would be permissible in an appeal filed under Section 173 of the Act, 1988 before the High Court. The reference is answered accordingly.

22. The registry is directed to place the instant appeal before the appropriate Bench for its consideration on merits in the light of the observations made in this judgment.

October 27th, 2016

AHA

(Dilip B Bhosale, CJ)

(A N Mittal, J)

(Rajan Roy, J)