

(2006) 01 PAT CK 0101
In the Patna High Court
Case No : M.A. No's. 9, 57 of 2001

Branch Manager, National Insurance Co. Ltd.

APPELLANT

Vs

Arjun Prasad and Others
 New India Assurance
Company Ltd. and Another Vs Sri Subodh Kumar and Others

RESPONDENT

Date of Decision : 23-01-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, 115

Constitution of India, 1950 — Article 226, 227

Motor Vehicles Act, 1988 — Section 140, 149, 149(2), 166, 170

Citation : (2006) 1 PLJR 637

Hon'ble Judges : M.L. Visa, J

Bench : Single Bench

**Advocate : Ashok Kr. Sinha and Shyam Sunder Pandey, for the Appellant;
Sanjeev Ranjan, for the Respondent**

Final Decision : Dismissed

Judgement

M.L. Visa, J.—Both these appeals have been heard together when they were listed under the heading for hearing under Order XLI Rule 11 of the CPC (in short, CPC) for final disposal at that stage with the consent of the parties because both the appeals arise out of the same judgment dated 29.9.2000 passed by the District Judge-cum-Motor Accident Claim Tribunal in MACT Claim Case No. 34/2000 and are being disposed of by this common order. Brief facts of the case are that on 6.3.2000 the deceased Arvind Kumar, a teacher in Primary School, Madhopur was coming from his school after boarding a commander jeep bearing No. BR 27-1180. The jeep was being driven negligently and rashly. When the jeep reached near village Pachhgavan a truck bearing No. WB 25-8411 came from opposite direction and the truck was also being driven rashly and negligently. Both the vehicles dashed against each other causing serious accident in which Arvind Kumar died. At the time of death Arvind Kumar was aged 26 years and he was drawing salary as Rs. 4637/- per month and at that time he was in training and was expected to get monthly salary of Rs. 6390 after

completing training. His parents, wife and sisters filed a case u/s 166 of the Motor Vehicles Act, 1988 (in short, the Act) claiming a sum of Rs. 15 Lacs as compensation. The owners and drivers of Jeep No. BR 27-1180 and Truck No. WB 25-8411 appeared and although driver and owner of the aforesaid jeep filed written statement but owner and driver of the aforesaid truck did not file any written statement and left taking steps in the aforesaid case. The National Insurance Company Ltd., appellant of M.A. No. 9/01 with whom the jeep was insured and The New India Assurance Company Ltd., appellant of M.A. No. 57/01, with whom the truck was insured appeared and contested the case. After hearing the parties the court awarded a sum of Rs. 7,84,000/- as compensation and after finding that accident took place due to negligence of drivers of both the vehicles directed both the appellants to make payment of compensation and each appellant was directed to pay Rs. 3,92,000/- i.e. half of the total amount. It further observed that since appellant of M.A. No. 9/01 had already paid a sum of Rs. 25,000/- u/s 140 of the Act, therefore, this appellant was to pay the balance amount of Rs. 3,67,000/- and interest at the rate of 12 per cent per annum from the date of filing of the case i.e. 31.3.2000 was also awarded and both the appellants were directed to pay the ordered amount within thirty days from the date of the order.

2. Being aggrieved by the judgment of the Tribunal appellants have preferred the appeals under consideration; The National Insurance Company Ltd., appellant of M.A. No. 9 of 2001, has challenged the judgment and award on the ground that compensation has been calculated by the court below by taking into consideration the hypothetical salary of the deceased as Rs. 7,000/- per month and this amount is a result of imagination because Service Code of deceased, marked Ext. 13, pointed out that deceased was in the pay scale of Rs. 3050-4550 and was getting a sum of Rs. 4412/- per month at the time of accident and deceased died on account of rash and negligent driving of both the vehicles, therefore, drivers should have also been equally liable to pay compensation to deceased; compensation amount has been calculated on the assumption of promotion and higher salary of deceased which is unwarranted in the eye of law and compensation amount should not have exceeded more than monthly salary of the deceased. The New India Assurance Company Ltd. and its Branch Manager, appellants of M.A. No. 57 of 2001 have also challenged the judgment and award of the court below on similar grounds that Truck No. WB 21-8411 which was insured by appellants was not insured for carrying passengers and liability of appellants under third party claim comes to Rs. 6,000 only; award has been fixed on an imaginary consideration of future increase of salary of deceased; finding of the court below that truck was being driven by its driver rashly and negligently is not based on any cogent evidence; compensation amount cannot exceed the amount if invested in fixed deposit in a bank, will fetch the amount equal to the salary of the deceased and wrong multiplier has been applied by the court below.

3. In both the appeals drivers and owners of the vehicles were also impleaded as

parties but they have not appeared in spite of valid service of notice on them.

4. L.C.R. was called for which has been received and from perusal of which it appears that by order dated 16.8.2000 permission u/s 170 of the Act was granted to New India Assurance Company Ltd. which is appellant of M.A. No. 57 of 2001. So far the National Insurance Company Ltd. which is appellant of M.A. No. 9 of 2001, is concerned, there is no such permission. Since National Insurance Company Ltd., appellant of M.A. No. 9 of 2001, has challenged the amount of compensation by filing appeal u/s 173 of the Act but without obtaining permission u/s 170 of the Act, I would first like to discuss whether the appeal filed by this appellant is maintainable.

5. According to the provisions of Section 149(2) of the Act an insurer can contest the claim on the grounds mentioned in this section. Section 149(2) of the Act reads as under:

"Section 149(2): No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular."

6. It is true that according to the provisions of Section 170 of the act, if in course of any inquiry, the Claims Tribunal is satisfied that there is collusion between the person making the claim and the person against whom the claim is made or the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

7. If in course of any inquiry the Claims Tribunal is satisfied that on the point of collusion between the claimant and the persons against whom the claim is made or finding that person against whom claim is made has failed to contest, it will implead the insurer as party and in that case, insurer, as stated above, will have the right to contest the claim on all or any of the grounds available to the person against whom the claim is made. In case, the insurer is already a party from before and if he wants to contest the claim on all or any of the grounds available to the person against whom the claim has been made, he will seek permission of the Tribunal u/s 170 of the Act for contesting the claim in that manner but if neither he has been impleaded by Tribunal as a party nor he has sought any permission u/s 170 of the Act from the Tribunal for contesting the claim he can contest the claim only on the grounds enumerated in sub-section (2) of Section 149 of the Act which do not include amount of compensation. If an insurer is not permitted to contest the claim on any ground which does not find mention in sub-section (2) of Section 149 of the Act he cannot raise any such ground in the appeal. In an appeal he has to confine himself on the grounds which were available to him for contesting the claim before the Tribunal.

8. The appellant of M.A. No. 9 of 2001 in the present appeal has challenged the amount of award which according to it is excessive. This appellant was not impleaded as a party by Tribunal during enquiry u/s 170 of the Act. As already stated above, it has not obtained any permission u/s 170 of the Act from the Tribunal for contesting the claim on all or any of the grounds available to persons or person against whom the claim was made. The question whether the appeal preferred by an insurer in absence of an order u/s 170 of the Act is maintainable on the grounds other than grounds mentioned in Section 149(2) of the Act came under consideration in a case of United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others, whereafter considering a number of decisions reported in Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, , Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, , Chinnama George and Others Vs. N.K. Raju and Another, , H.S. Ahammed Hussain and Another Vs. Irfan Ahammed and Another, and National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, , the Apex Court has held as follows:

"13. In view of the aforesaid decisions on the point and on a consideration of the relevant provisions under the Motor Vehicles Act, it is plain and clear that the insurance company can contest the claim preferred before the Tribunal only on the statutory grounds prescribed u/s 149(2) of the Act, but, if there is a collusion between the person making the claim and the person resisting the claim or if the person against whom the claim is made has failed to contest the claim, the insurance company can step in and seek permission of the Tribunal and make a prayer for getting itself impleaded as a party to the proceeding and the insurer so impleaded can then contest the proceeding on grounds other than the grounds enumerated in sub-section (2) of Section 149 of the Act. This is an enabling provision in the event of a collusion between the claimant and the insured or the tortfeasor."

9. Although in that case the order of a Division Bench of the High Court by which it was held that in view of Section 149(2) of the Act, the appeal filed u/s 173 of the Act is not maintainable, was set aside and judgment and order passed by the Division Bench of the High Court was remanded back for hearing and disposal of appeal on merit in accordance with law because the High Court had dismissed the appeal on the sole ground that appellant had not obtained a reasoned order for permitting it to contest u/s 170 of the Act. In that case, Insurance Company was impleaded as 3rd respondent and driver and owner of the vehicle though appeared before Tribunal, did not contest the proceeding and they also did not file written statement nor did they choose to give evidence before the Tribunal and the appellant filed an application u/s 170 of the Act and Tribunal allowed this application simply stating that prayer was granted and provision of Section 170(b) of the Act which requires the Tribunal for recording reasons while passing an order u/s 170 were not fulfilled. Here the facts of the case are quite different because neither the appellant of M.A. No. 9 of 2001 was impleaded as a party by the Tribunal nor it took permission u/s 170 of the Act. In view of those facts the appellant of M.A. No. 9 of 2001 cannot be permitted to file appeal questioning the quantum of compensation because allowing it to do so will result in allowing it to file appeal on grounds other than mentioned in Section 149(2) of the Act which will be against the spirit of law.

10. Learned counsel of appellant of M.A. No. 9 of 2001 in the alternative has argued that if this Court finds that appeal u/s 173 of the Act preferred by appellant is not maintainable, in that case the appellant be permitted to convert the memo of appeal in a civil revision. In support of his argument he has relied upon a decision of the Supreme Court in the case of Sadhana Lodh Vs. National Insurance Company Ltd. and Another, . In this case, the question for consideration was whether the petition under Articles 226/227 of the Constitution of India against an award made by the Tribunal under the provision of the Act is maintainable and the Supreme Court held that the right of appeal being a statutory right on limited grounds, the grounds of challenge cannot be enlarged by filing a writ under Articles 226/ 227 of the Constitution. Learned counsel of appellant relied upon the observation made by the Supreme Court in this

judgment that where a remedy by way of 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 of the CPC but he has not taken note of the fact that in the same para which is para No. 6 of the judgment from where he has picked up the aforesaid observation, the Supreme Court has observed as follows:

"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 of India on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and 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) of the Act [see National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, . This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution."

11. After observing as above, the Supreme Court observed that if remedy by way of appeal has not been provided for against the order and judgment of a District Judge, in that case remedy will be to file a revision before the High Court u/s 115 C.P.C. Giving a combined reading to the aforesaid observations, it is clear that the verdict of the Supreme Court is that where the law provides remedy by filing an appeal on limited grounds, those grounds cannot be enlarged by filing a writ petition. If a writ is not maintainable how any party can be allowed to file a revision enabling him to take grounds to challenge award which are not enumerated in Section 149(2) of the Act.

12. It is not a case where no remedy by way of an appeal has been provided. Had it been so, learned counsel of appellant would have been right in his submission that in such circumstances, remedy was to file revision. Here the case is quite different. Remedy to appeal is provided u/s 173 of the Act but since Section 149(2) of the Act limits the grounds of an insurer for challenging the award for contesting the claim on some grounds mentioned in this section the appeal will also be confined to these grounds because in appeal an insurer cannot take any other ground to challenge the award. I, therefore, find no merit in the argument of learned counsel of appellant that appellant be permitted to convert this appeal in a civil revision.

13. Considering the entire material on record so far M.A. No. 9 of 2001 is concerned, I find that the appellant has taken the ground of challenging the quantum of compensation without obtaining any permission u/s 170 of the Act from the Tribunal. The appeal is, therefore, not maintainable.

14. Appellants in M.A. No. 57 of 2001 are New India Assurance Company Ltd.

and its Branch Manager of Gaya Office. These appellants are insurer of the truck No. WB 25-8411 which was involved in the accident. As already stated these appellants were granted permission u/s 170 of the Act to contest the case on all grounds available to an owner. The appellants have challenged the award on the grounds that Truck No. WB 25/8411 was not insured for carrying passengers and liability of insurer in respect of third party was limited to Rs. 6,000/-, the Tribunal has taken into consideration the imaginary future increase of salary of deceased and awarded compensation on this imaginary income of the deceased, the appellant Insurance Company was no way connected with the insurance of the vehicle carrying passengers and finding of the Tribunal that the truck in question was driven rashly and negligently by its driver is not based on any satisfactory evidence. No documentary evidence was produced by the applicants regarding quantum of money which the deceased had to incur for his maintenance, wrong multiplier had been applied and the Tribunal did not consider the settled principle of law that the compensation amount calculated in money value through multiplier method should be limited to such an extent that if invested in fixed deposit in bank or other financial institution it may fetch the amount upto the annual income of the deceased.

15. Learned counsel appearing on behalf of the appellants has argued that the deceased was a teacher of a Primary School and he was under training in the pay scale of Rs. 3050-4590 and he was getting a sum of Rs. 4412 during training but the Tribunal has fixed his monthly salary at the rate of Rs. 7000/- taking into consideration his future promotional avenues which is not proper. From the award 01 Tribunal I find that the court below considered the evidence of Dinesh Prasad (AW-3), Headmaster of the School that deceased was a teacher and was under training in the pay scale of Rs. 3050-4590 and was getting Rs. 4412/- from January, 2000 and period of his training was for one year and after training teachers were to get monthly salary of Rs. 6485/-. The Tribunal further considered the evidence of this witness that deceased was a member of scheduled caste and, therefore, after the period of five years he was to get his promotion in the pay scale of Rs. 5500-9000 and deceased was appointed by Public Service Commission and was a Government employee. It further appears that these facts were not challenged by the appellants by putting any question to this witness in cross-examination. Learned counsel appearing on behalf of the appellants has submitted that the finding of the Tribunal that deceased was to get the promotion in future is based merely on imagination because admittedly deceased was under training and it is not sure that he would have completed his training successfully and his service would have been regularised and he would have got promotion. The fact that deceased was a Government servant appointed as a teacher is not disputed. No doubt he was on training but then period of training was only for one year out of which he had already completed more than three months at the time when fatal accident took place. If the argument advanced on behalf of the appellants that promotion of deceased was an event of future which cannot be assumed as certainty is accepted, in that

case the argument that deceased might not have completed his training successfully was also an event of future and it cannot be taken with certainty. Normally Government servants on their appointment remain for some period either on training or on probation and after completing that period they are treated as permanent employees. In the present case, evidence on record is that after completing training deceased was to get a monthly salary of Rs. 6485. The Tribunal taking into consideration the fact that deceased was a member of scheduled castes, therefore, after completion of five years of service he was to get his next promotion in the scale of Rs. 5500-9000 has fixed his monthly salary at Rs.7000/-.

16. Admittedly, deceased was a Government servant appointed by Public Service Commission and had a stable job. He died in the accident while he was under training. In such type of cases to ignore the prospects of future of deceased while estimating the loss of dependency does not seem proper. The Supreme Court in the case of General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, estimated the monthly income of deceased at Rs. 2000/- when at the time of death of deceased his actual income was Rs. 1032/-. In that case, it was held that "We think, having regard to the prospects of advancement in the future career, respecting which there is evidence on record, we will not be in error in making a higher estimate of monthly income at Rs. 2000/- as the gross income." It was further observed that "from this has to be deducted his personal living expenses, the quantum of which again depends on various factors such as whether the style of living was spartan or bohemian. In the absence of evidence it is not unusual to deduct one-third of the gross income towards the personal living expenses and treat the balance as the amount likely to have been spent on the members of the family and the dependents." The Supreme Court thereafter fixed the loss of dependency @ Rs. 1400 per month or Rs. 17,000 per year and applied a multiplier of 12 and thereafter added a sum for loss of consortium and loss of the estate each in the conventional sum of Rs. 15,000/-. This also answers the argument advanced on behalf of the appellants that no documentary evidence was produced by the applicants regarding quantum of money which the deceased had to incur for his maintenance. So I find that in the present case there was evidence before the court below about the future prospects of deceased and considering that evidence it nominally enhanced the monthly income of deceased from Rs. 6486/- which he was to get after completion of his training to Rs. 7000/- and from this amount one-third has been deducted towards personal maintenance of deceased and balance amount has been considered as the amount of annual dependency.

17. Learned counsel of appellants has also argued that the court below has applied incorrect multiplier.

18. From the award I find that the court below has taken the multiplier as 14. The award shows that matriculation examination certificate (Ext. 9) and service book (Ext. 15) were produced before the court below apart from oral evidence

for proving the date of birth of deceased as 8.1.74. Admittedly, the accident took place on 6.3.2000 and at the time of accident the age of deceased was 26 years 2 months. The Tribunal has also taken into consideration the age of deceased at the time of his accident as 26 years. According to the Second Schedule of the Act, in such type of cases multiplier is 18 but the Tribunal has chosen 14 as multiplier. If monthly salary of deceased is taken into consideration as Rs. 6485/- which he was to get after completing training and after deducting one third from this amount as spent towards maintenance of deceased the balance is considered as annual dependency and it is multiplied by 18, the amount of compensation will come more than the amount which has been awarded by the Tribunal. I, therefore, find that while fixing the compensation the Tribunal has at one hand considered the future prospects of deceased but on the other hand it has applied multiplier 14 in place of multiplier 18. The argument that Tribunal could not have considered the monthly income of deceased more than what he was receiving at the time of death does not appear convincing because admittedly the deceased was on training for a short period and immediately after completing his training he was to get Rs. 6485/- per month as salary. I, therefore, find that no error has been committed by the Tribunal in fixing the amount of compensation.

19. It has been argued on behalf of the appellants that there was no sufficient evidence on record that driver of the truck was driving the vehicle rashly and negligently. I find that court below after considering the evidence of witnesses who were passengers of Jeep No. BR 27-1180 found that driver of truck and jeep both were driving the vehicles rashly and negligently and both the vehicles dashed against each other. I do not find any substance in the argument of learned counsel of appellants that this finding of Tribunal suffers from any illegality and irregularity.

20. Considering the entire material on record I find no merit in the appeal i.e. M.A. No. 57 of 2001. In the result, both the appeals i.e. M.A. No. 9 of 2001 and M.A. No. 57 of 2001 are dismissed.