

(2016) 09 BOM CK 0180
In the Bombay High Court
Case No : First Appeal No. 114 of 2015

IFFCO TOKIO General Insurance Co. Ltd. APPELLANT
Vs
Mr. Kevin Fernandes RESPONDENT

Date of Decision : 01-09-2016

Acts Referred:

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

Citation : (2017) AAC 1493 : (2016) 4 ACC 918 : (2017) 3 AIRBomR 623 :
(2017) 1 BCR 413

Hon'ble Judges : Nutan D. Sardesai, J.

Bench : Single Bench

Advocate : Shri E. Afonso, Advocate, for the Respondent Nos. 1 to 4; Shri Narayan Govekar, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

Nutan D. Sardesai, J. - Admit.

2. Shri E. Afonso, learned Advocate waives service of notice on behalf of the respondents no.1 to 4.

3. In this appeal filed by the insurer challenging the judgment and award passed by the learned Motor Accidents Claims Tribunal, North Goa, Panaji ("the Tribunal" for short) in the Claim Petition No.93 of 2013, the respondents have raised a preliminary objection to the very maintainability of the appeal under Section 149(2) of the Motor Vehicles Act, 1988 ("the Act" for short). The appeal was not maintainable at the instance of the insurer as no application was filed under Section 170 of the Act. The next plank of objection to the maintainability of the appeal was that it was filed jointly by the insurer with the insured and it was not maintainable also on that count. Shri E. Afonso, learned Advocate for the respondents relied in National Insurance Co. Ltd. Chandigarh v. Nicolletta Rohtagi and others [(2002)7 SCC 456] and Chinnama George and others v. N.K. Raju and another [(2000)4 SCC 130]. Shri Govekar, learned Advocate for the insurer-

appellant relied in *United India Insurance Co. Ltd. v. Shila Datta and others* [2012(1) ALL MR 411 (S.C.)], *Bajaj Allianz General Insurance Co. Ltd. v. Kamla Sen and others* [2014 ACJ 2396] and *Bajaj Allianz General Insurance Company Ltd. v. Tufel Habib Bagvan and another* [2016(4) ALL MR 386] and submitted that the preliminary objections had to be dismissed.

4. Section 149 of the Act deals with the duty of the insurers to satisfy the judgments and awards against the persons insured in respect of the third party risk. Sub-section 2 in particular reads thus:

"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 persons 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 non-disclosure of a material fact or by a representation of fact which was false in some material particular."

Section 170 of the Act deals with the impleading of the insurer in certain cases and reads thus:

"Where in the course of any inquiry, the Claims Tribunal is satisfied that -

a. there is collusion between the person making the claim and the person against

whom the claim is made, or

b. 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 the 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."

5. At the outset, it is apparent from the records relied upon by the insurer that the insurer was added as a party to the proceedings from the inception and it was not a case as if the appellant insurer was later on impleaded as a party in terms of the predicates of Section 170 of the Act. The records relied upon by the appellants-insurers does not indicate that an application was at all made by the insurers before the Tribunal under Section 170 of the Act in the absence of the records and proceedings being available for scrutiny.

6. In *Nicolletta Rohtagi* (supra), a common question arisen in all the appeals was whether in the absence of an appeal to the High Court by the insured against the award of a Claims Tribunal, the insurer could maintain the appeal against such award to challenge the quantum of compensation as well as the Claims Tribunal's finding as regards the negligence of the offending vehicle. It was contended on behalf of the insurer that non-filing of an appeal by the insured amounted to a failure to contest the claim and that the right to contest included the right to file an appeal against the award of the Tribunal. The next contention was that whether despite the existence of the facts postulated in Section 170 of the Act, the Tribunal does not implead the insurance company to contest the claim on grounds available to the insured or any other persons against whom the claim has been made, or in such a situation rejects the insurer's application for permission to contest the claim on merit or whether the claimant has obtained an award by playing fraud, in such cases the insurer has a right of appeal to contest the award on merits.

7. In *Nicolletta Rohtagi* (supra), the Hon'ble Apex Court rejected these contentions raised on behalf of the insurer on examining the relevant provisions of the 1939 Act as also those of the 1988 Act. The Hon'ble Apex Court considered the appeal of *Rohtagi* in which the dependents of the deceased Anil Rohtagi had filed a Claim Petition before the Tribunal and the Tribunal awarded the compensation of Rs. 13,13,150/- with interest 20% p.a. The appeal preferred against the award before the High Court by the insurer was dismissed on the ground that no appeal at the instance of the insurer was maintainable as regards the quantum of compensation giving rise to the appeal before the Hon'ble Apex Court. Since the learned Judges were of the view that since two Benches of the Court comprising of two learned Judges had taken a contrary view in *Rita Devi v. New India Assurance Co. Ltd.* [(2000)5 SCC 113] and *United India Insurance Co. Ltd. v. Bhushan Sachdeva* [(2002)2 SCC 265], the matter was required to be

decided by a Bench of the three learned Judges and accordingly the matter was placed before the Bench of three Judges.

8. In *Nicolletta Rohtagi* (supra), during such time, Their Lordships considered Section 147 of the Act dealing with the requirements of policies and the limits of liability, Section 149 of the Act regarding the duty of the insurers to satisfy the judgments and awards against the persons insured in respect of the third party risks and Section 170 of the Act regarding the impleadment of the insurer in certain cases and finally the remedy of Appeals in terms of Section 173 of the Act. The three Judge Bench considered the judgment in *Chinnama George* (supra), where it was held that if none of the conditions as contained in sub-section (2) of Section 149 exists for the insurer to avoid the liability, the insurer is legally bound to satisfy the award and the insurer cannot be a person aggrieved by the award. In such a case, the insurer will be barred from filing an appeal against the award of the Tribunal.

9. In *Nicolletta Rohtagi* (supra), it was also held that the insurer cannot maintain a joint appeal along with the owner or driver if the defence of any ground under Section 149(2) is not available to it. Their Lordships observed that the insurer cannot escape from its liability to pay the compensation on any exclusionary clause in the insurance policy except those specified in Section 149(2) of the Act or where the condition precedent specified in Section 170 is satisfied. The insurer is entitled to assail the award under Section 170 of the Act provided there is a collusion between the person making a claim and the person against whom the claim has been made and in such instance upon the Tribunal impleading the insurer it is permissible for the insurer to contest the claim also on the grounds which are available to the insured or to the person against whom the claim has been made.

Section 149(2) of the Act limits the insurer's appeal on the grounds enumerated therein and the appeal being a product of the statute, it is not open to an insurer to take any other plea other than those provided in Section 149(2) of the Act. *Chinnama George* (supra), held that unless any of the conditions as contained in Section 149(2) of the Act exist (i.e. there has been a breach of the conditions of the policy or the policy is void) and such defence is taken in the pleadings and pressed before the Claims Tribunal, the insurer is legally bound to satisfy the award made by the Tribunal and barred from filing any appeal against the award.

10. In *Nicolletta Rohtagi* (supra), it was further held that the insurer's joint appeal with the owner or the driver of the motor vehicle is also incompetent unless one of the grounds under Section 149(2) is available to it. In *Shila Datta* (supra), the three Judge Bench of the Hon'ble Apex Court held that where the insurer is a party-respondent either on account of being impleaded as a party by the Tribunal under Section 170 or being impleaded as a party-respondent by the claimants in the Claim Petition, it will be entitled to contest the matter by raising all the grounds, without being restricted to the grounds available under Section 149(2) of the Act. Whatever be the reason or the ground for the insurer being

impleaded as a party, once it is a party-respondent, it can raise all the contentions that are available to resist the claim. One of the contentions raised in this appeal was the correctness of the three Judge Bench decision in Nicolletta Rohtagi (supra), which was said to be pending for consideration in a large number of cases before the Court.

11. In Shila Datta (supra), the correctness of the judgment in Nicolletta Rohtagi (supra) was assailed on the premise that the liability of the insurer to reimburse the insured on two premises namely 1) compensation and 2) whose liability would be to pay, as envisaged under sub-section (1) of Section 149 vis-a-vis the right of the aggrieved persons to prefer an appeal in terms of Section 173 of the Act, had not been considered in the backdrop of the history in which sub-section (1) of the Section 149 was enacted. In view of these questions raised in the matter, Their Lordships were of the opinion that it was a fit case where the matter should be referred to a larger Bench and directed accordingly so that the records of the case be placed before the Hon"ble the Chief Justice of India for appropriate orders.

12. In Shila Datta (supra), their Lordships also formulated questions which arose for their consideration in regard to the position of an insurer under the Act namely the insurer can contest the Motor Accidents Claim on merits, in particular, in regard to the quantum, in addition to the grounds mentioned in Section 149(2) of the Act for avoiding liability under the policy of insurance and whether an insurer can prefer an appeal under Section 173 of the Act, against an award of the Claims Tribunal, questioning the quantum of compensation awarded. In view of the points urged by the insurer, Their Lordships considered the relevant legal provisions namely Sections 149, 147, 163(A), 168, 170 and 173 of the Act and observed that the reference to these provisions were to show that an award by the Tribunal could not be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.

13. In Shila Datta (supra), the point of maintainability of a joint appeal by the owner of a vehicle and the insurer came up for consideration. Their Lordships observed that there was no dispute that when an award is made by the Tribunal, the owner of the vehicle, being a person aggrieved, can file an appeal challenging his liability on any ground or challenge the quantum of compensation. An appeal which is maintainable when the owner of the vehicle files it, does not become non-maintainable merely on account of the insurer being a co-appellant with the owner. When the insurer becomes a co-appellant, the owner of the vehicle does not cease to be a person aggrieved. This question had come up for consideration in Narendra Kumar v. Yarenissa [1998(9) SCC 202] where it was held that even in the case of a joint appeal of the insurer and the owner of the offending vehicle if an award has been made against the tortfeasor as well as the insurer, even though an appeal filed by the insurer was not competent, it may not be dismissed as such. The tortfeasor can proceed with

the appeal after the cause title is suitably amended by deleting the name of the insurer.

14. In *Shila Datta* (supra), Their Lordships also considered the judgment in *Chinnama George* (supra), where it held that a joint appeal would not be maintainable and specifically observed that this issue did not arise for consideration of the three Judge Bench in *Nicolletta Rohtagi* (supra), as the question therein was whether an insurer could file an appeal. Their Lordships on a careful consideration were of the view that the decision in the *Chinnama George* (supra), to the extent it holds that a joint appeal is not maintainable, did not lay down the correct law. As observed in *Narendra Kumar* (supra), the owner of the vehicle does not cease to be an aggrieved person merely because the insurer was ultimately liable under the terms of the policy or under Section 149 of the Act. If the owner by himself, can file an appeal as an aggrieved person and such appeal is maintainable, we fail to understand how the presence of the insurer as a co-appellant would make the appeal not maintainable. Whether the owner joins the insurer or the insurer joins the owner makes no difference to the fact that the owner continues to be a person aggrieved. When a joint appeal is filed, to say that the insurer is not an aggrieved person and the owner of the vehicle would not be an aggrieved person, would lead to an anomalous situation and border on an absurdity. Without entering in the question whether an insurer is an aggrieved person, Their Lordships made it clear that on account of the insurer being a co-appellant, would not affect the maintainability of the appeal. This would settle the question raised by Shri E. Afonso, learned Advocate appearing for the respondents opposing the appeal filed by the insurer jointly with the insured.

15. In *Kamla Sen* (supra), a two Judge Bench of the Hon'ble Apex Court dealt with an appeal by special leave against the Judgment and order passed by the High Court of Judicature at Jabalpur, Madhya Pradesh whereby the High Court had dismissed the appeal of the appellant/insurer on the ground that since it had failed to move an application under Section 170 of the Act, it was not open to the appellant to challenge the award of the Motor Accidents Claims Tribunal, Hoshangabad, except on the grounds provided under Section 149 of the Act. Their Lordships squarely quoted the judgment in *Shila Datta* (supra), and following the observation made in the said case, set aside the judgment of the High Court remanding the matter for reconsideration as per law and to decide the same on merits upon notice to the parties to the lis.

16. In *Tufel Habib Bagvan* (supra), the learned Single Judge of this Court dealt with the Writ Petitions at the instance of the insurer whose request to cross-examine the claimant and their witnesses came to be rejected by the Motor Accidents Claims Tribunal, Shahada. In the brief facts the claimants had filed the petition for compensation on account of the rash and negligent driving of the rickshaw.

17. In *Tufel Habib Bagvan* (supra), in the course of the proceedings, the owner of

the rickshaw was cross-examined by the claimants. The insurer filed an application before the Motor Accidents Claims Tribunal under Section 170 of the Act seeking permission to cross-examine the claimants and their witnesses which was rejected on the ground that the owner of the rickshaw contested the petitions and cross-examined the witnesses which order came to be assailed in the Writ Petition. On behalf of the appellant insurer reliance was placed in Shila Datta (supra), while the claimants relied in Nicolletta Rohtagi (supra) to oppose the plea of the insurer to cross-examine the claimants and their witnesses.

18. In Tufel Habib Bagvan (supra), the learned Judge of this Court considered Sections 149 and 170 of the Act as also the judgment in Shila Datta (supra), and that in Nicolletta Rohtagi (supra), and observed that the Hon'ble Apex Court in Shila Datta (supra), specifically observed that the point raised had neither arisen for consideration in Nicolletta Rohtagi (supra), nor was it considered therein and quashed the impugned order.

19. A consideration of the judgment in Shila Datta (supra), in particular being of a three Judge Bench latter in point of time to that in Nicolletta Rohtagi (supra), would hold the field and contrary to the contention of the learned Advocate for the respondents that it was still holding the field. Rather the correctness of the three judge Bench decision in Nicolletta Rohtagi (supra) came up for consideration before the three judge Bench in Shila Datta (supra). Considering the law laid down in Shila Datta (supra), i do not find any merit in the contention of Shri E. Afonso, learned Advocate for the respondents that the appeal is not maintainable at the instance of the insurer for want of an application under Section 170 of the Act and/or that the appeal jointly with the insured is not maintainable and therefore the preliminary objections are dismissed.