

(2006) 07 DEL CK 0065

In the Delhi High Court

Case No : CM (M) No. 1127 of 2005 and CM No. 7623 of 2004

National Insurance Co. Ltd.

APPELLANT

Vs

Sh. Ramesh Kumar and Another

RESPONDENT

Date of Decision : 25-07-2006

Acts Referred:

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

Citation : (2006) 4 ACC 764 : (2007) ACJ 2542 : (2006) 134 DLT 340

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Pradeep Gaur and Amit Kumar, for the Appellant; Harish Khanna and Thakur Virender Pratap Singh Charak, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—Admit.

2. At the request of the learned Counsel for the parties, the petition is taken up for final disposal.

3. A claim petition under the Motor Vehicles Act, 1988 (herein-after referred to as the said Act) was filed by respondent no.1 in which the owner of the vehicle (respondent no.2) along with insurance company (petitioner herein) were impleaded as respondents. Written statement was filed by the owner and the insurance company.

4. The driver had died at the time of the accident and thus could not be impleaded as a party. Both the respondents filed their written statement but the owner absented himself from the proceedings and was proceeded ex parte. The insurance company (petitioner herein) filed an application u/s 170 of the said Act which reads as under:

170. Impleading insurer in certain cases " Where in the course of any inquiry, the Claims Tribunal is satisfied that:

a. there may be collusion between the persons 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. The petitioner claimed that since the owner had absented himself from the legal proceedings the evidence was being recorded in the absence of the said party, the petitioner was entitled to the benefit of Clause (b) of Section 170 of the said Act. This request was declined by the MACT. There are two reasons recorded for such rejection. The first reason is that the written statement was filed by the owner and thus it cannot be said that the owner failed to contest the proceedings. The second appears to be that both Clause (a) & (b) of Section 170 of the said Act have to exist at the same time. The impugned order does not say so but the reasoning appears to proceed on the basis that the word "or" in the said provision should read as "and". The trial court has relied upon the judgments of the Division Bench of this Court and of the Apex Court to arrive at such a conclusion.

6. On hearing learned Counsel for the parties, I am of the considered view that the impugned order of the MACT suffers from patent error in law and thus is required to be interfered with. A reading of the provisions of Section 170 of the said Act shows that both Clause (a) & (b) of the said Act are two alternatives and in either of the alternatives the insurance company has been given such a right. The reason for the same is that the two are mutually exclusive. The right of the insurance company has been restricted within the purview of the said Act both in terms of the defenses that an insurance company can raise and the grievance in appeal which an insurance company can raise. The exception to this is in case of a collusion between the claimant and the person against whom the claim is made or if the person against whom the claim is made fails to contest the claim. The object of Clause (b) is that it should not be that the claimant gets the benefit of an undefended litigation without being called upon to prove certain crucial aspects.

7. In my considered view the trial court has misread the observations of the Division Bench in *United India Insurance Co. Ltd. v. Patricia Jean Mahajan and Ors.* (2001) ACC 480. The impugned order quotes selectively from the order to come to such a conclusion. A perusal of para 12 of the said judgment would show that in the particular case the party against whom the claim was made not only filed the written statement but also recorded their statements. It is in view thereof that the Division Bench observed that there is no clue what else was required to be done by such a party and what further acts were to be performed by them. The relevant para 11 & 12 read as under:

11. As would be evident from its heading this Section provides for impleadment of Insurer in certain cases. Tribunal could order such impleadment where it felt satisfied that there was a collusion between the claimant/s or such person/s against whom a claim was raised or where such person/s had failed to contest the claim. Therefore, one of the crucial conditions to be satisfied by the insurer for seeking impleading and for permission to contest the claim on wider defenses, in addition to or apart from statutory defenses made available u/s 149 is that the insurer must allege a collusion between the claimant/s and the person/s against whom claim is made or it must show that such person/s had failed to contest the claim and Tribunal must record its satisfaction on either count. Then only it could implead the insurer as a party to the proceedings and allow it to contest the claim on all or any of the defenses available to the insured and other person/s against whom claim was made. where neither of the requirements was satisfied either by Insurer or by Tribunal exercise of power u/s 170 would be a nullity.

12. Needless to emphasize that an insurer had only limited statutory defenses available u/s 149. If it wanted to take up more defenses, it could do so only on satisfying requirements provided in Section 170 and if it failed, it could not be allowed to contest the claim on wider defenses through an appeal on the basis of Tribunal order u/s 170 which is proved wrong for not being in conformity with its provisions. In the present case, Tribunal order dated 30.09.1997 obtained by the appellant falls short of the Tribunal requirement on the face of it and it could not provide any crutches to sustain this appeal. A perusal of its application shows that it proceeded on the plea that Insurer and driver of offending trawler were not interested in proper conduct of the claim and put forward the best evidence and that it had reserved the right to take all defenses available to the Insurer in its policy. It does not contain any allegation of collusion between claimants and persons against whom claim was made or that they had failed to contest the claim. On the contrary it was on record that they had filed their written statement and had also recorded their statements. There is no clue what else was required of them which they had failed to do or perform. Apart from this, could Tribunal order dated 30.09.1997 be justified because appellant had reserved its right to take all defenses available to insured in its policy. Appellant is drawing support for this from AIR 1959 SC 1352. Even if it was assumed that reservation of wider defenses in the insurance policy was good enough, it would remain to be seen whether it would still hold good after enactment of Section 170. In my opinion, it would not because it would otherwise render provisions Section 170 redundant. Therefore all told, preliminary objection taken by respondents 1-6 casts a thick cloud on the maintainability of this appeal which was liable to be rejected for this alone. But even otherwise if it was tested on merits also it would meet the same fate.

8. The facts of the present case are quite distinct since the owner after filing written statement absented himself from the legal proceedings. The result is that the filing of the written statement would be of no value if the owner does not

produce the evidence in respect thereof and cross examine the witnesses of the claimant. The mere filing of written statement cannot be said to be sufficient.

9. Learned Counsel for the petitioner has also drawn the attention of this Court to the judgment of the Supreme Court in *National Insurance Co.Ltd v. Nicolletta Rohtagi and Ors.* III (2002) ACC 292 where it has been clarified that the provision of Section 170 of the said Act is to be invoked where either of the conditions in Clause (a) or conditions in Clause (b) are satisfied. Learned Counsel states that in view thereof the observations made in the impugned order to the following effect cannot be sustained:

I am as such of the considered view that Clause (b) of Section 170 of the Act should be read in the light of Clause (a) thereof. In other words, Clause (b) of Section 170 would be inviolable where failure of owner/driver to contest is in furtherance of collusion between them and the claimant.

10. I find force in the contention of the learned Counsel. I am unable to agree with the conclusion arrived at by the MACT that Clause (b) would be inviolable where failure of owner/driver to contest is in furtherance of collusion between them as provided in Clause (a). Clause (a) & (b) are two distinct situations envisaged by the legislature where a wider defense is available to the insurance company. The object is also clear that two colluding parties should not avail of the benefit of restrictive rights available to insurance company and the failure of the person against whom the claim is made to defend the legal proceedings should not let the matter go uncontested and grant undue advantage to the claimant. In the second eventuality even the wider defense is available to the insurance company so that matters which would have been defended by the person against whom the claim is made are also open to be pleaded by the insurance company.

11. Learned Counsel for respondent no.1 points out that the insurance company has contested the matter and cross examined the witnesses of the respondent no.1 It is stated that such cross examination has not been restricted to defenses as are available to the petitioner-company under the said Act but the witnesses have been cross examined both in respect of quantum of claim and rash and negligent driving. Thus it is stated that there has been cross examination on merits of the claim. Learned Counsel for the petitioner states that if that be so, then the petitioner would be satisfied that the said cross examination may be considered by the trial court but at the same time contends that even in that eventuality the trial court would have to pass the necessary orders u/s 170 of the said Act in view of the judgment of the apex court in *Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another*, where it was observed in para 4 as under:

4. It clearly shows that the insurance company when impleaded as a party by the court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for

that purpose the insurance company has to obtain order in writing from the tribunal and which should be a reasoned order by the tribunal. Unless that procedure is followed, the insurance company cannot have a wider defense on merits than what is available to it by way of statutory defense. It is true that the claimants themselves had joined respondent no.1, Insurance company, in claim petition but that was done with a view to thrust the statutory liability on the insurance company on account of the contract of the insurance. that was not an order of the court itself permitting the insurance company which was imp leaded to avail of a larger defense on merits on being satisfied on the aforesaid two conditions mentioned in Section 170. Consequently, it must be held that on the facts of the present case, respondent no. 1, insurance company was not entitled to file an appeal on merits of the claim which was awarded by the tribunal.

12. I find force in the contention of the learned Counsel for the petitioner since it has been observed that in the absence of an order of the court u/s 170 of the Act, the insurance company would not have the larger defenses on merits available to it.

13. In view of the aforesaid the impugned order is set aside and the trial court is directed to re-examine the matter in terms of the parameters observed aforesaid.

14. In case the trial court finds that the witnesses of respondent no.1 have been examined by the counsel for the petitioner on merits including quantum of compensation and rash and negligent driving then there is no requirement of any further opportunity to be given to the petitioner but permission would have to be granted u/s 170 of the said Act. In an alternative situation the right must be made available to the petitioner to cross examine the witnesses of respondent no.1.

15. The petition stands disposed of leaving the parties to bear their own costs.

No further directions are called for on this application.

The application stands disposed of.