
(2009) 01 AHC CK 0162
In the Allahabad High Court

National Insurance Co. Ltd.

APPELLANT

Vs

Smt. Jairani and Others

RESPONDENT

Date of Decision : 07-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 114

Constitution of India, 1950 — Article 227

Motor Vehicles Act, 1988 — Section 140, 149, 166, 170, 173

Citation : (2010) ACJ 1263 : (2009) 2 AWC 1077

Hon'ble Judges : V.M. Sahai, J;Ran Vijay Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

V.M. Sahai and Ran Vijay Singh, JJ.—This appeal directed against the award of the Motor Accident Claims Tribunal (in brief the Tribunal") gives rise to an interesting question of law, whether on an application filed u/s 170 of the Motor Vehicles Act, 1988 (in brief the Act) by the insurance company, if no order is passed by the Tribunal, what would be its effect on the award; whether the insurance company can be permitted to challenge the award of the Tribunal in an appeal u/s 173(1) if the application u/s 170 of the Act is not decided?

2. The brief facts are that on 26.11.1999 Dr. Shiv Kumar was riding on his Motor Cycle No. U.P.-78/G-6967. On the pillion of the motorcycle Shiv Shankar Verma was sitting. The Truck No. U.P.-78/T-1896 dashed the motor cycle. Due to injuries received in the accident Dr. Shiv Kumar died on the spot. The pillion rider Shiv Shankar Verma was also seriously injured and he died at Regency Hospital. The truck was owned by Smt. Satyawati and Shailendra Kumar. It was insured by the appellant.

3. The legal representatives of Dr. Shiv Kumar filed M.A.C.P. No. 142 of 2000 claiming Rs. 25,20,000 as compensation under Sections 140 and 166 of the Act and Rs. 30,000 damages for motor cycle. The owners and insurer both filed written statements. The appellant insurance company filed an application u/s 170

of the Act which remained pending and no order was passed on it by the Tribunal.

4. The Tribunal recorded a finding that the accident took place due to rash and negligent driving of the driver of the truck. The motor cyclist Dr. Shiv Kumar had a valid driving licence. The driving licence of the truck driver Ashok Kumar was valid. The claim petition was not bad for non-joinder of necessary parties. The claim petition was allowed by the Tribunal and compensation of Rs. 7,37,500 was awarded to the claimants. The award of the Tribunal dated 6.10.2007 has been challenged in this appeal.

5. We have heard Shri Vinay Khare, learned Counsel for the appellant and Shri Ramesh Singh, learned Counsel for the claimant's respondent Nos. 1 to 3. Shri Rajiv Gupta and Shri Rakesh Dubey learned Counsel for the owner's respondent Nos. 4 and 5 have also been heard. With the consent of the counsel for the parties we have taken up this appeal for final hearing. The filing of paper book has been dispensed with.

6. The learned Counsel for the appellant has urged that the Tribunal has not passed any order on the application u/s 170 either allowing or rejecting it which is a mandatory requirement of law, therefore, even in absence of availability of any grounds of breach of insurance policy mentioned in Section 149(2) of the Act the appellant can challenge the award of the Tribunal in an appeal u/s 173 of the Act. He urged that if the Tribunal does not pass any order on the application u/s 170 then in law it would be deemed that the application u/s 170 has been allowed. On the other hand the learned Counsel for the respondents have urged that since no order had been passed on the application filed u/s 170 it would be deemed that the application had been rejected by the Tribunal and the appellant could maintain this appeal only on the grounds provided u/s 149(2) of the Act.

7. For appreciating the arguments of learned Counsel for the parties it is necessary to extract Section 170 of the Motor Vehicles Act, 1988 as below :

Section 170. Impleading Insurer in certain cases.--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.

8. The title of the section is innocuous. It provides for impleadment of the insurer in certain cases. But in effect it gives importance to the right of the insurance company to contest the claim. It is only under this provision that the insurer can

challenge the quantum of compensation etc., if the conditions mentioned in the section are satisfied. Two contingencies are contemplated. Sub-section (1) provides that if the Tribunal during inquiry finds collusion between owner and the claimant, it would direct insurer to be impleaded. Secondly, if the proceedings are not being pursued by the owner the insurer shall be permitted to prosecute the matter and could raise all the pleas which could be raised by the insured. The rationale of the section is that the ultimate liability to pay compensation etc., being of the insurer, it must be permitted to safeguard its interest, not only on the grounds mentioned in Section 149(2) but on merits. The importance of the right lies in the bar in law for the insurer to move further if the application of the insurer is rejected. Prima facie the right of the insurer under this Section to move an application u/s 170 or being impleaded as party does not appear to have much significance. But once the provisions of appeal etc., are examined closely, It results in serious consequences for the Insurer, namely, if the application of the insurer is rejected, It does not have any remedy under the Act, either before the Tribunal or before the appellate court to challenge it. The result of rejection of the application is that the insurer is precluded from challenging it under the Act any further and the finding on quantum of compensation etc., attains finality. In such circumstances the section has to be construed reasonably to advance the purpose and objective of its enactment. This Section has come up for consideration before the Apex Court on number of occasions. It is well-settled by the Apex Court that where an application u/s 170 of the Act had been allowed by the Tribunal, it is open to the insurance company to challenge the award not only on the grounds of breach of the insurance policy mentioned in Section 149(2) of the Act, but to contest the claim on merits, namely, quantum of compensation and all or any other grounds which were available to the owner of the vehicle. A three Judges Division Bench in State of Maharashtra Vs. Marwanjee P. Desai and Others, had held as under:

...it is open to an insurer to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits in that case it is open to the insure to file an appeal against an award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenge only that part of the order while filing appeal on grounds specified in Sub-section (2) of Section 149 of 1988 Act. But such application for permission has to be bona fide and filed at the stage when the insured is required to lead his evidence....

9. The decision in Nicolletta Rohtagi's case had been followed in National Insurance Co. Ltd. Vs. Mastan and Another, ; Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, ; Sadhana Lodh Vs. National Insurance Company Ltd. and Another, and United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others, . The Apex Court in Jyotsnaben Sudhirbhai Patel's case has laid emphasis that the Tribunal while deciding application u/s 170 of the Act must record reasons. From these decisions the scope of Section 170 stands clearly

explained. The insurance company can file appeal u/s 173(1) on all the grounds which are available to the owner of the vehicle and the grounds mentioned in Section 149(2) of the Act if the application u/s 170 had been allowed by the Tribunal. However, if the application u/s 170 had been rejected by the Tribunal then the insurance company can maintain the appeal only on the grounds available u/s 149(2) of the Act.

10. The question is whether on an application filed u/s 170 of the Act by the insurance company, if no order is passed by the Tribunal, what would be its effect on the award? An application may be allowed or rejected by the Tribunal. If the application is allowed there is no difficulty. If the application has been rejected, the rejection order can be challenged as held by a Division Bench of this Court in *Oriental Insurance Co. Ltd. Vs. Manju and Others*, , under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India but not in an appeal u/s 173(1) of the Act.

11. But if no order is passed on the application u/s 170 of the Act then the insurance company cannot challenge it under Article 227 of the Constitution of India. Is there any remedy? The Tribunal may sometimes by mistake or oversight fail to pass an order on the application u/s 170 of the Act and deliver the award. What would be the effect of such mistake or omission? Whether the omission to pass an order on the application filed u/s 170 of the Act would result in deemed allowing or rejecting it? In law an act is deemed to be done if the law provides so or it is ancillary to the main order. For instance if an appeal or writ petition is allowed or dismissed then the applications ancillary to it are deemed to have been allowed or dismissed. If no order is passed by the Tribunal allowing the application it cannot be deemed to be allowed for the simple reason that it could not be allowed only, if the facts, namely, collusion between the owner and claimant were proved or the owner was not contesting. In absence of this finding the application u/s 170 cannot be allowed nor can it be deemed to be allowed. In *Jyotsnaben Sudhtrbhai Patel's* case it was categorically held that since the insurance company's right to contest gets widened the recording of reasons and passing of the order was necessary. In other words, it cannot be implied or deemed to be allowed. The principle of deemed allow or reject may apply to formal applications which do not affect the merit of the matter. But the same cannot be said of those applications which stand on their own, namely, an application for substitution of legal heirs, etc. If the Court does not pass an order on a substitution application and a decree is passed in a suit or appeal then the decree would be a nullity having been passed against a dead person. An application u/s 170 of the Act, is not a formal application. It confers a statutory right, on the insurance company. It enlarges the scope of contest by the insurance company. That is why the Apex Court has held that recording of reasons is mandatory. If no order is passed and award is made, then it would in our opinion, being in violation of mandatory provisions of law, be rendered invalid and would be nullity.

12. If an award is made without deciding the application u/s 170 of the Act it may be bad for omission to deny the right to contest to the insurer which is a vital right. Section 170 of the Act confers a right on the insurance company to file an application if the conditions mentioned in the section are satisfied. It also casts a duty on the Tribunal to decide it in accordance with law. If the Tribunal has failed to perform its legal duty, the insurance company cannot be deprived of its right to contest on merits. In law, the insurance company cannot apply for review of the award as under the Act power of review had not been conferred on the Tribunal. The Uttar Pradesh Motor Vehicles Rules, 1998 (in brief the Rules) applies only some of the provisions of the Code of Civil Procedure, 1908 to the summary proceedings before the Motor Accident Claims Tribunal. The provisions of Rule 221 of the Rules, 1998 is extracted below:

221. CPC to apply in certain cases.--The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings before the Claims 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.

13. Order XLVII of the Code of Civil Procedure, 1908 has not been made applicable to the proceedings before the Tribunal. The insurance company is rendered remediless if the application u/s 170 of the Act is not decided. Since review application is not maintainable no other application with whatsoever nomenclature would be maintainable. By Rule 221 of the Rules only limited provisions of the Code of Civil Procedure, 1908 have been applied to the proceedings before the Tribunal. Section 114 or Order XLVII of the CPC had not been made applicable to the proceedings before the Tribunal. It is well-settled that the right of appeal, revision or review are the creations of statute and no litigant has got an inherent right to prefer appeal, revision or review except if wrangled through fraud or misrepresentation [See *United India Insurance Co. Ltd. v. Rajendra Singh and Ors.* 2000 (2) TAC 613 (SC) : 2000 (2) AWC 1349 (SC) and *Rajendra Kumar and Ors. v. Rambhai and Ors.* 2003 (1) TAC 492 (SC) : 2002 (4) AWC 2740 (SC)].

14. Therefore, we are of the considered opinion that Section 170 being mandatory and award made by the Tribunal without deciding the application would be a nullity and review application or any other application with whatsoever nomenclature, except for correction of clerical or arithmetical errors, would not be maintainable before the Tribunal.

15. The next question is whether the insurance company can be permitted to challenge the award of the Tribunal in an appeal u/s 173(1) if the application u/s 170 of the Act was not decided? It is settled that right of appeal is a statutory right. The three Judges Division Benches of the Apex Court in *Nicolletta Rohtagi's* case and *Sadhana Lodh's* case had held that the insurance company has a statutory right to file an appeal u/s 173 of the Act on limited grounds available u/s 149(2). The Hon'ble Court further held that if permission u/s 170 is

granted by the Tribunal, then the insurance company can contest the claim on merits and question the quantum of compensation. The Apex Court in Jyotsnaben Sudhirbhai Patel's case while taking the same view has added that Section 170 is an enabling provision in the event of collusion between the claimant and the owner or the tortfeasor, the insurance company can be permitted by the Tribunal u/s 170 to contest the claim petition. A question arises as to whether where the owner has filed his written statement or has examined some witness or cross-examined some witness, can it be said that he is contesting the claim on merits of the claim. The Apex Court in Darshan Singh Vs. Ram Pal Singh and another, had the occasion to consider the meaning of the expression "contest". It held as under:

34. The meaning of the word "contest" is, according to Black's Law Dictionary, to make defence to an adverse claim in a court of law; to oppose, resist or dispute; to strive to win or hold; to controvert, litigate, call in question, challenge, to defend. The contest continues right up to the final decision or, in other words the right to contest comes to an end only when a final decision is given one way or the other putting an end to the litigation between the parties with regard to the alienation. It is well-settled proposition of law that appeal is a continuation of suit and any change in law, which has taken place between the date of decree and the decision of the appeal, has to be taken into consideration. When a suit filed by the reversioner is dismissed and he files an appeal before the appellate court also he is contesting the alienation. If he does not contest the alienation, then he cannot achieve success. Therefore, when the axe has fallen before the contest was over, let the axe fall where it falls.

16. The contest of the claim on merits by the owner must be such as if he is trying to defeat the claim and is making every possible effort to win the case. The contest should be real and merely filing of written statement or leading some oral and documentary evidence or cross-examination of some witnesses, would not be sufficient. The Tribunal must come to definite conclusion that the owner of the vehicle is making every possible effort to succeed in getting the claim petition dismissed. Only then the application of the insurance company u/s 170 of the Act can be rejected. In absence of finding by the Tribunal about genuineness of contest by the owner supported by cogent reasons the application u/s 170 of the Act filed by the insurance company should not be rejected.

17. The question still is whether where no order is passed by the Tribunal on an application u/s 170, can it be challenged in an appeal u/s 173(1) of the Act? It is true that an appeal u/s 173(1) of the Act lies only against the award of the Motor Accident Claims Tribunal but if the award is a nullity it can be challenged in an appeal u/s 173(1) of the Act and the appeal would be maintainable. The decision of the Apex Court in Bhanu Kumar Jain Vs. Archana Kumar and Another, would apply and the insurance company would not be estopped from raising the question that the award of the Tribunal is a nullity in an appeal u/s 173 of the Act.

18. Before parting with the case we may point out that Motor Accident Claims Tribunals in Uttar Pradesh are not following the mandate of Section 170 of the Act and the law declared by the Apex Court in Jyotsnaben Sudhirbhal Patel's case. While making the award the applications u/s 170 of the Act are not being decided. Due to this approach of the Tribunals the insurance companies who file an application u/s 170 are seriously prejudiced. Under the Act the only right an insurance company has is to file an application u/s 170 to contest the claim on merits and also on the grounds which are available to the owner of the vehicle, if their application is allowed. The presiding officers of the Motor Accident Claims Tribunals are not performing their judicial duty to decide the application u/s 170 first and then pass an award within reasonable time, so that if the insurance company is desirous of challenging the order u/s 170 before a higher Court, it may have reasonable time. We do not propose to direct any action at this stage. However, we direct the Registrar General to issue a circular forthwith to all Motor Accident Claims Tribunals functioning in State of Uttar Pradesh to pass appropriate orders by giving reasons on the applications filed u/s 170 of the Motor Vehicles Act, 1988.

19. For the aforesaid reasons, we allow this appeal. The award of the Motor Accident Claims Tribunal dated 6.10.2007 being nullity is set aside. The claim petition is remanded back to the Motor Accident Claims Tribunal with a direction to decide the application filed by the insurance company u/s 170 of the Act in accordance with law and thereafter decide M.A.C.P. No. 142 of 2000 afresh, only after a reasonable time.

20. Parties shall bear their own costs.