

(1997) 11 P&H CK 0110
In the Punjab And Haryana At Chandigarh
Case No : F.A.O. No. 1094 of 1997

New India Assurance Co. Ltd. and Another	APPELLANT
Vs	
Charanjit Singh	RESPONDENT

Date of Decision : 19-11-1997

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 170, 96

Citation : (1999) ACJ 1506

Hon'ble Judges : V.S. Aggarwal, J; Amarjeet Chaudhary, J

Bench : Division Bench

Advocate : L.M. Suri and Deepak Suri, for the Appellant; Pritam Saini, for the Respondent

Judgement

V.S. Aggarwal, J.—The New India Assurance Co. Ltd. (hereinafter described as "the appellant") challenges the award of the Motor Accidents Claims Tribunal, Ambala dated 1.3.1997. By virtue of the impugned award the learned Tribunal had allowed the petition filed by Charanjit Singh (respondent injured). It was held that the respondent is entitled to receive Rs. 2,50,000 from the appellant and the respondent No. 2 before the Tribunal along with interest at the rate of 12 per cent per annum from the date of filing of application till the actual recovery.

The appellant and respondent No. 2 before the Tribunal were held jointly and severally liable to pay the amount of compensation. It has further been directed that amount of compensation shall be deposited in a scheduled bank in a fixed deposit for a period of five years and paid to the respondent thereafter. He could only withdraw the amount with permission of the court.

2. Relevant facts are that on 25.10.1993 at about 4.00 p.m., the respondent along with one Parkash Singh was going from Pinjore to Parwanoo. They were driving through the Bazar of Kalka on a scooter bearing No. CH-01-H-2911. The respondent was on the pillion. When they were passing through the Bazar, a Maruti car bearing registration No. CH-01-H-9779 came from the side of Parwanoo. It struck the front right side of the scooter, as a result of which

Parkash Singh fell down along with the scooter. Respondent suffered fracture on his right leg below the knee. Parkash Singh suffered minor injuries. The injured was removed to the hospital but it happened to be a holiday. Thereafter he was taken to a private Nursing Home. The doctor advised to take him to the Post-Graduate Institute of Medical Sciences & Research at Chandigarh. At the Medical Institute there was a strike. The injured was admitted in B.D. Hospital, Sector 23-B, Chandigarh by the owner of the car. Respondent injured was operated on 27.10.93. Parkash Singh, brother of the injured respondent No. 1 visited the Police Station, Kalka, but the first information report was not recorded. A complaint was made to the Inspector General of Police, Haryana, Chandigarh and to the Superintendent of Police, Ambala. It was contended that the accident was caused because of the negligence of the car owner (Phool Chand Dhiman), an advocate. Respondent injured claimed a compensation alleging that he was under treatment and had already spent Rs. 55,000 from 25.10.1993. He was working as proprietor of Sujjan Engineering Works, Mohali. His monthly income was about Rs. 10,000. He has suffered permanent disability. In all Rs. 4,00,000 were claimed as compensation including permanent disability, medical expenses, special diet and medicines.

3. The petition was contested by P.C. Dhiman. There was no controversy raised that there was an accident, as a result of which respondent received the injuries. However, respondent No. 2 claimed that accident was due to rush in the market and not because of his negligence.

4. The main contest was offered by the appellant No. 1. It was contended that there is a collusion between respondent P.C. Dhiman, the owner of the vehicle and the claimant. Plea was raised that P.C. Dhiman was not having a valid driving licence. In any case it was further asserted that the claim was highly exaggerated.

5. The learned Tribunal framed issues and recorded evidence. Thereupon a finding was recorded that accident in question had been caused on account of rash and negligent driving by Phool Chand Dhiman. It was concluded that respondent No. 2 held a valid driving licence. The learned Tribunal proceeded to hold that there was shortening of right leg of respondent by half an inch. There was circumferential wasting of quadriceps muscle of right thigh. There was no appreciable limp. There was permanent partial impairment of 8 to 10 per cent. The compensation was awarded as Rs. 50,000 for medical expenses, Rs. 50,000 for future expenses, Rs. 50,000 for loss of business and Rs. 1,00,000 for pain and suffering and for disability.

6. Aggrieved by the said award of the Tribunal, the present appeal has been filed. Along with the appeal the appellant filed an application u/s 170 of the Motor Vehicles Act, 1988 for permission to prosecute the appeal. According to the appellant under the terms of the policy of the insurance, the appellant company had reserved the right to take over the defence in the name of the insured and, therefore, permission should be granted to it to prosecute the appeal pertaining

to question of quantum of compensation. The collusion between respondent (claimant) and the owner of the offending vehicle was also asserted. The same was opposed. At the Bar there was no controversy raised that in normal circumstances, the insurance company can only take up the defences permitted under the law. Sub-section (2) of Section 149 which corresponds to Section 96(2) of the Motor Vehicles Act, 1939 reads:

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 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 nondisclosure of a material fact or by a representation of fact which was false in some material particular.

It clearly provides the grounds which permit the insurance company to defend the action. Co-related with the same is Section 170 of the Motor Vehicles Act, 1988. The same is also being reproduced below for the sake of facility:

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.

In other words in addition to Sub-section (2) of Section 149 referred to above, if it is shown that there is a collusion between the person making the claim and the person against whom the claim is made, or, when the person against whom the claim is made has failed to contest the claim, the insurer can be given the right to contest the claim on all or any of the grounds available to the person against whom the claim has been made. It is patent that once there is collusion, that is, alleged, then the insurer has to prove the same and not merely allege it. It can be proved by circumstances existing on the record.

7. Can in the facts of the present case, the appellant be permitted to contest and assail the order of the Tribunal on the ground that compensation awarded is excessive?

8. The Supreme Court in the case of British India General Insurance Co. Ltd. v. Captain Itbar Singh 1958 ACJ 1 (SC), has considered the said question. In para 5 the Supreme Court held that subsection (2) of Section 96 gives the right to the insurance company to be made a party and it can confine to the defences available therein. The relevant findings are being reproduced below:

(5) To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right, therefore, is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that Sub-section (2) makes available to an insurer? That clearly is a question of interpretation of the Sub-section.

However, the Supreme court went on to hold that if the right is reserved by the insurance company in the policy to defend the action in the name of the insured, then he can be allowed to take up those pleas. The findings in this regard are in para 16 which reads:

Again, we find the contention wholly unacceptable. The statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and, therefore, to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the

policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship, if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do.

The said decision of the Supreme Court was taken note of by the Division Bench of this Court in the case of *Unique Motor and Genl. Ins. Co. Ltd. v. Kartar Singh* 1964 PLR 1083. It was held that insurance company can defend the action in the name of the insured and take up all the defences that can be available to the insured provided there is a clause in the insurance policy to that effect. The Full Bench of the Jammu & Kashmir High Court also went into the same controversy in the case titled *United India Fire & General Ins. Co. Ltd. v. Lakshmi Shori Ganjoo* 1982 ACJ 470 (J&K). In para 33 the court answered the question in the following words:

(33) Where an insurer finds that it has not reserved such a right but that the insured and the claimant have colluded with each other as it is a possibility that cannot be ignored, it is open to an insurer to bring that fact to the notice of the Tribunal and seek its permission u/s 110-C (2-A) to contest the claim on all the grounds available to an insured. On being satisfied that there is such a collusion, the Tribunal would grant permission and on such permission being granted, the insurer steps into the shoes of the insured and defends the claim on all available grounds, if the award goes against the insurer, it can challenge it in appeal also on all such grounds on which it had contested the claim before the Tribunal. The right of appeal against an award of the Tribunal is the creation of the statute. The Act had confined the right to avoid the liability of the insurer to the injured on certain grounds specified in it. It is not open to this Court to add to those grounds on the plea that hardship would be caused to the insurer. An insurer can avoid any hardship by remaining vigilant during the trial of the claim petition and also by providing, in the policy of insurance, for a right to defend the action in the name of the assured and that he had full liberty to do. Where the insurer has failed to do it, he cannot avoid the liability if the insured is found liable.

The Madhya Pradesh High Court in the case of *United India Insurance Co. Ltd. Vs. Pratibha Rathi and Others*, , dealt with the same question. The provisions of Sub-section (2) of Section 96 of the Motor Vehicles Act, 1939, corresponding to subsection (2) of Section 149 of the present Act have been considered. It was held that appeal is in continuation of the same right and there is no provision which bars or restricts scope of Sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 to the forum of the Tribunal. The relevant findings are:

(11) It is true that Section 96 (2) and Section 110-C (2-A) in terms do not refer to the appellate stage. That does not mean that the insurer can, by filing an appeal or contesting an appeal, raise contentions which are foreign to the scope of Section 96 (2) and which have not been attempted to be invoked before the Tribunal u/s 110-C (2-A) or in respect of which the insurer had not made

reservation in the policy or had not invoked the reservation before the Tribunal. An appeal is continuation of the original proceedings. Statutory restrictions imposed on a party in raising defences before the Tribunal will lose all efficacy if those restrictions are to be confined to the original proceedings and not to the stage of an appeal which is only the continuation of original proceedings. If a party has a right to raise a particular contention before the original forum, that right must subsist in the appellate forum also. If a party is statutorily prevented from raising a particular contention in the original forum, that disability will operate at the appellate stage also. There is no provision in the Act which expressly or by necessary implication confines the restrictions of Section 96 (2) only to the forum of the Tribunal. In the circumstances, it must follow that the restrictions contained in Section 96 (2) will apply in the appellate forum also.

The Orissa High Court in the case of United India Insurance Co. Ltd. Vs. Sarat Kumar Sahoo and Another, , was dealing with an appeal of the insurance company on the quantum of compensation. An objection was raised about the maintainability of the appeal. It was held that appeal was maintainable because the company was not taking any points beyond the scope of Sub-section (2) of Section 96 of the Motor Vehicles Act, 1939. The ratio of the said decision indeed would not be applicable to the present question in controversy. The Allahabad High Court in the case of New India Assurance Company Ltd., Etawah Vs. Smt. Shakuntala Devi, , while considering Sub-section (2) of Section 149 read with Section 170 of the Motor Vehicles Act, relied upon the decision in the case of British India General Insurance Co. Ltd. v. Captain Itbar Singh 1958 ACJ 1 (SC), and in para 29 held as under:

(29) We may say so with all respect that reasoning of the latter Division Bench for taking a view that in the old Act the insurance company could defend the case when the owner is absent and so in all cases where owner absents himself the insurance company gets an automatic right to defend the claim also on the grounds not covered by Section 96 (2) is in the teeth of Section 110-C (2-A) of the old Act. The statute permitted such defence only for the reasons to be recorded in writing. We with all respect are unable to agree with this view. We are bound by the decision of Supreme Court in British India General Insurance Co. Ltd. 1958 ACJ 1 (SC) and are in agreement with earlier Division Bench decision in the case of United India Fire & Genl. Ins. Co. Ltd. 1985 ACJ 245 (Allahabad).

But despite that permission was not granted to the company to contest the appeal because it was held that exceptions drawn u/s 170 were not attracted. In paras 31 and 32 the findings returned were as under:

(31) We have ourselves examined the impugned award given by the Motor Accidents Claims Tribunal. The claim was contested by the owner of the vehicle as well as by the insurance company. The insurance company has contested the claim only on the grounds permissible by Section 149(2) of the Act. Owner of the vehicle has appeared and duly contested the claim. Exceptions carved out by

Section 170 of the new Act or Section 110-C (2-A) of the old Act are not attracted, as such, even assuming that the reasoning of the latter Division Bench is applied to the case, the insurance company cannot be permitted to raise additional points other than those contemplated by Section 149(2) of the Act in the facts of this case.

(32) We accordingly reject the submissions of the appellant's counsel that the insurance company should be permitted to raise grounds in appeal beyond the scope of Section 149(2) of the Motor Vehicles Act. Accordingly, both the points raised by the learned Counsel for the appellant have no force and are accordingly rejected.

Lastly, we would refer with advantage to the decision of Jammu & Kashmir High Court in the case of Oriental Insurance Co. Ltd. v. Ram Parkash 1996 ACJ 777 (J&K). Herein the insurance company had reserved the option to take defence on behalf of the insurer but has not exercised this option before the Tribunal. The appeal was dismissed holding that the insurance company cannot challenge the quantum of compensation.

9. In the present case in hand, it has been held that such a right has been reserved in the insurance policy. In this regard no dispute was raised before us. It is apparent from the catena of pronouncements referred to above that the legislature has provided certain defences which are available to the insurance companies. Sub-section (2) of Section 149 spells the said defences. But if the insured colludes with the claimant or does not contest the claim, Section 170 comes to the rescue of the insurance company.

10. Reverting back to the facts of the present case, besides the insurance policy it gives the right to the appellant to take up the defences of the insured. The important facts are that the trial court itself recorded in the award that the effective written statement was filed only by the appellant. It is patent from what has been recorded that the trial court had felt that P.C. Dhiman was not contesting the case seriously. P.C. Dhiman seemingly not even chose to appear as a witness before the Tribunal. All these factors prompt us to conclude that it is a fit case where the permission should be granted to the appellant to contest the appeal regarding quantum of compensation because collusion between the respondents and against the appellant contemplated u/s 170(a) of the Motor Vehicles Act, 1988 is established.

11. As regards the quantum of compensation that has been claimed and awarded, the respondent had appeared in the witness-box and stated that he was in B.D. Hospital for 15-16 days. The operation was performed on 27.10.1997. A steel plate was inserted in his right leg. Skin-grafting was done after removing the bone from near the buttock. He visited the hospital every week. His leg was X-rayed 15 to 20 times. The X-ray films were produced. It further transpired in the evidence that respondent No. 1 is the proprietor of Sujjan Engineering Works, Mohali. Because of his injuries, he could not use the

machines. The sale of the material manufactured fell from Rs. 1,50,000 to Rs. 55,000. Rs. 5,000 were claimed as the taxi charges. He further contended that there was limp in his right leg.

12. Perusal of the said evidence shows that there was precious little on record to indicate that for future expenses Rs. 50,000 have to be awarded. The learned Tribunal fell into an error inadvertently in awarding the said expenses. The same necessarily could not have been allowed in the absence of effective evidence.

13. As regards the actual medical expenses, the loss of business and for pain, suffering and disability of 8 per cent, we find no reason to interfere in the findings recorded by the learned Tribunal. The same is based on evidence. No interference is called for.

14. For these reasons, we only accept this appeal in part and modify the order of the Tribunal. Instead of Rs. 2,50,000, the compensation is reduced to Rs. 2,00,000 with no other interference in the impugned award.