
(2010) 03 GAU CK 0069
In the Gauhati High Court
Case No : MAC Appeal No. 04 of 2009

New India Assurance Company Ltd.

APPELLANT

Vs

Kartik Shil and Others

RESPONDENT

Date of Decision : 10-03-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 149(1), 149(2), 163A, 166

Citation : (2006) 1 GLT 924

Hon'ble Judges : C.R. Sharma, J

Bench : Single Bench

Advocate : P.K. Dhar and D. Chakraborty, for the Appellant; Somik Deb, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Sarma, J.—The judgment and award dated 10.9.08 passed by the learned Member, Motor Accident Claims Tribunal, Udaipur in T.S. (MAC) No. 174 of 2007 is in challenge in this appeal, filed by the insurer u/s 173(1) of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act").

2. The material facts at various stages, which lead to the present appeal may, in brief, be stated as follows:

An application u/s 163-A of the MV Act was filed by the claimants-Petitioners, namely, Sri Kartik Shil and Smt. Jhulan Shil seeking compensation on account of death of their son, namely, Sri Prasenjit Shil in a vehicular accident which took place on 16.8.07, involving the offending Vehicle No. TR-03-1593 (Truck). According to the claimants, on 16.8.07 at about 7.30/8.00 p.m., while their son (hereinafter called "the deceased") was returning home from Cartel Chowmuhani Bazar, he was hit by the said offending vehicle, which was coming in a high speed; as a result of which he sustained injury and succumbed to the same. It has been alleged that the accident took place due to rash and negligent driving of the said Truck. As stated by the claimants, the age of the deceased at the time

of the accident, was 20 years and he used to earn Rs. 7,000/- per month as a barber. The claimants claimed compensation of Rs. 9 lakhs for the death of their deceased son aforesaid. The owner, the driver of the vehicle and the insurer who were added as Respondents also contested the claimants' claim. The claimant No. 2 examined herself as PW 1 and exhibited certain documents. On admission, the photocopies of certificate of registration, tax token, certificate of fitness, policy of insurance and driving licence of the driver of the offending vehicle were marked as exhibits. Considering the evidence and materials on record, the learned trial Judge arrived at the finding that the death of the deceased was caused due to the fault on the part of the offending vehicle, which was insured with the Respondent No. 2 i.e. the present Appellant. Though the claimants pleaded that the income of the deceased was Rs. 7,000/- per month, for want of sufficient evidence in this regard, the learned trial Judge calculated the income at Rs. 2,500/- per month. Considering the age of the deceased (21 years) the learned trial Judge computed the compensation by using the multiplier 17. While deciding the total loss of dependency, the learned trial Judge deducted one-third of the income from the total amount of compensation being the cost of personal expenses and thus, the total compensation was fixed at Rs. 3,40,000/-. To the said amount, another amount of Rs. 2,000/- was added as compensation towards funeral expenses. With the above finding, an amount of Rs. 3,42,000/- was awarded as compensation to be paid by the Insurance Company (Appellant). It was also directed that the said compensation should be paid within two months from the date of passing the order, failing for which the amount shall carry interest @ Rs. 9 percent per annum from the date of presentation of the claim petition before the Tribunal i.e. w.e.f. 29.11.2007 till realisation. It was also ordered that the awarded amount shall be equally divided between the claimant Nos. 1 and 2 and that fifty percent of the awarded amount shall be kept in long term fixed deposit scheme at least for five years with the Tripura State Co-operative Bank, Udaipur Branch. By the said order, the claimants were permitted to withdraw the interest thereof. Being aggrieved by the said judgment and award, the insurer as Appellant has come up with this appeal on the grounds, amongst others, that the award was passed without considering the pleadings as well as the evidence on record, that the multiplier was wrongly used by taking the age of the deceased and that the learned trial Judge committed error by deducting one-third of the total income as personal expenses instead of two-third of the said amount.

3. I have heard Mr. P.K. Dhar, learned Counsel appearing for the Appellant and Mr. Somik Deb, learned Counsel appearing for the claimants-Respondents.

4. Raising the question of maintainability, Mr. Somik Deb, learned Counsel appearing for the claimants-Respondents, taking me through the provision of Section 149 of the MV Act has submitted that the insurer, in the present case, by invoking the statutory appellate jurisdiction u/s 173(1) of the MV Act cannot raise the question regarding the quantum of the amount as well as the multiplier used in computing the compensation. In support of his contention, the learned

Counsel has referred to a Full Bench judgment of the Hon'ble Apex Court in the case of National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, The learned Counsel further contended that the insurer in an appeal u/s 173(1) of the MV Act cannot assail any award passed by the Tribunal except on the grounds mentioned in Sub-section (2)(a) ((b) of Section 149 of the MV Act and as such this appeal having been filed challenging the quantum of compensation vis-a-vis the use of multiplier cannot stand the test of law and as such the same is not maintainable.

5. Refuting the said argument, advanced by the learned Counsel for the claimants, Mr. P.K. Dhar, learned Counsel appearing for the Appellant has submitted that the learned trial Judge, while computing the compensation, has used wrong multiplier by taking the age of the victim into consideration. Referring to the decision of this Court in the case of Bina Prasad Sonari v. Manager, United India Insurance Co. Ltd. and Ors., reported in 2004 Supp GLT 149 learned Counsel submitted that in case of death of an unmarried person the multiplier should be determined on the basis of age of the claimants/parents and not on the basis of the age of the deceased. In view of the above, it is submitted that as the award was made by using the multiplier on the basis of the age of the deceased, the same was liable to be set aside.

6. Having heard the learned Counsel appearing for both the parties and perusing the materials on record, I am of the considered opinion that the short question involved in this matter is as to whether the appeal in the present form is maintainable or not. Section 149(2), which reads as follows, provides the circumstance under which the insurer can defend the action.

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 proceeding; 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 fire 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.

A careful reading of the said provision of law clearly indicates that the insurer is not entitled to challenge the award, granted by the Tribunal, questioning the quantum of the same. As the quantum in the impugned judgment was arrived at by applying a multiplier, the challenge to the use of such multiplier indirectly amounts to challenging the quantum of the compensation.

7. In the case of Bina Prasad Sonari (*supra*), the appeal was preferred by the claimant himself for the death of the unmarried son (aged about 22 years). The Tribunal granted compensation of Rs. 1,20,000/- using 10 as the multiplier. To the said amount another sum of Rs. 10,000/- was added as expenses for carrying the dead body. Being aggrieved, the claimant preferred the appeal. Before the learned Single Judge on behalf of the Appellant, it was argued that the learned Tribunal erred in law in using the multiplier 10 instead of using 17 as the multiplier as per the 2nd Schedule to Section 163A of the MV Act. In support of the said contention, reliance was placed on *Kaderkunju and Another Vs. Maheswaran Pada Nair and Others*, . Controverting the said argument on behalf of the Respondent, it was contended that, the application having been filed u/s 166 of the MV Act and the deceased being unmarried, the age of the mother i.e. the claimant was required to be taken into consideration for the purpose of determining the multiplier. It was also contended that since the claimant was 50 years old, the Tribunal could have used 13 as the multiplier which is the appropriate multiplier for a deceased above 50 years, as per the 2nd Schedule aforementioned. In support of the said contention, reliance was placed in the case of *Donat Louis Machado and Others Vs. L. Ravindra and Others*, In the above case, the learned Single Judge observed:

Turning to the case at hand, it needs to be noted that since the age of the claimant, as mother of the said deceased, was 50 years, the appropriate multiplier for a person aged 50 years, even in terms of the said Second Schedule, would be 13. Since the learned Tribunal has used 10 as the multiplier, it is clear that the multiplier, so used by the learned Tribunal, was inadequate and needs to be corrected.

With the above observation, the learned Single Judge fixed the quantum of compensation at Rs. 1,56,000/- by using the multiplier 13. As discussed earlier, the above referred appeal was filed by the claimant herself. The provision of the

Motor Vehicles Act does not debar the claimants from agitating the quantum of compensation fixed by the Tribunal. But the Section 149(2) of the MV Act has clearly debar an insurer from challenging the award, except on the grounds cited in Section 149(2) of the MV Act. Therefore, the case of Bina Prasad Sonari (supra) as referred to by the learned Counsel for the Appellant being filed by the claimant does not help the Appellant.

8. In the case of National Insurance Company Ltd. Chandigarh (supra) a Full Bench of the Hon'ble Supreme Court observed that when an insurer is impleaded and has been given notice of the case, he can contest the claim only on the grounds mentioned in Sub-section (2) of Section 149 of MV Act and that he cannot take any other ground except those mentioned in the said sub-section. In fact, the grounds available to the insured cannot "be taken by the insurer in challenging the claim or the award, as the case may be. The insurer must remain confined to the statutory defences which are available to him under Sub-section (2) of Section 149 of the MV Act. Even in appeal also, the insurer cannot challenge the award except on those grounds mentioned in Sub-section (2) of Section 149 of the MV Act. In the case of United India Insurance Co. Ltd. Vs. Bhushan Sachdeva and Others, , the Hon'ble Supreme Court held that it was open to the Insurance Company to invoke the right u/s 173 of the MV Act, as the insured had failed to appeal against the award passed against him. It was also held that if the insured had dropped out from contesting a claim midway, in such an eventuality, the MV Act enables the insurer to contest it on all grounds available to the insured. While declaring that the decision in United India Insurance Company Ltd. v. Bhushan Sachdeva (supra) did not lay down the correct view of the law, the Hon'ble Supreme Court in the case of National Insurance Company, Chandigarh (supra) observed as follows:

We have noticed the legislative development in regard to third-party rights in England and for and that the object of those legislations was to protect the interest of third-party rights. The 1939 Act as well as the 1988 Act both were enacted on the pattern of English statutes with the object to relieve the distress and miseries of victims of accidents and reduce the profitability of the insurer in regard to occupational hazard undertaken by them by way of business activities and not to promote business interests of insurance companies even though they may be nationalised companies.

We have earlier noticed that motor vehicle accident claim is a tortious claim directed against tortfeasors who are the insured and the driver of the vehicle and the insurer comes to the scene as a result of statutory liability created under the Motor Vehicles Act. The legislature has ensured by enacting Section 149 of the Act that the victims of motor vehicle are fully compensated and protected. It is for that reason the insurer cannot escape from its liability to pay 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 Hon''ble Supreme Court further held:

We have already held that unless the conditions precedent specified in Section 170 of the 1988 Act are satisfied, an insurance company has no right of appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further, the Tribunal does not implead the insurance company to contest the claim, in such cases 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 insurer 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 the 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. So far as obtaining compensation by fraud by the claimant is concerned, it is no longer *res integra* that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award.

9. Section 170 of the MV Act is an enabling provision under which the insurer can contest the claim on all or any of the grounds that are available to the person against whom the claim has been made. The provisions of Section 170 is quoted below:

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.

10. In view of the above provision laid down in Section 170, in order to contest the claim on the grounds which are available to the person against whom the claim has been made, the insurer must satisfy the Tribunal that (a) there is collusion between the person and the person against whom the claim is made or the person against whom the claim is made has failed to contest the claim. Only in such circumstances, the Tribunal, for reasons to be recorded in writing, direct that the insurer 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 which are available to the person against whom the claim has been made. Without such order or permission as prescribed by Section 170 of the MV Act, the insurer must confine to the grounds available under Sub-section (2) of Section 149. In the present case, there is nothing on record to find that the insurer was granted permission by the Tribunal to contest the claim on the ground available to the insured or a person against whom the claim was made. To a query raised by this Court the learned Counsel appearing for the Appellant submitted that no such permission was granted.

11. In view of the above discussion, the present Appellant having failed to comply with the requirement of Section 170 of the MV Act cannot challenge the award on any other grounds, except those mentioned in Section 149(2) of the MV Act. The grounds that award was excessive and that the award was quantified by applying wrong multiplier are not grounds made available by Sub-section (2) of Section 149 of the MV Act. Therefore, the Appellant does not have sufficient ground to challenge the award by filing a statutory appeal u/s 173(1) of the MV Act, for which the same cannot be entertained.

12. In view of the above discussion, I find no merit in this appeal requiring admission. Hence, the appeal is dismissed. No cost.