

(2008) 10 BOM CK 0081
In the Bombay High Court
Case No : First Appeal No. 487 of 2003

New India Assurance Company Ltd.

APPELLANT

Vs

Renu Nareshchandra Katoch and Others

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 149(2), 170, 173

Citation : (2008) 6 ALLMR 881 : (2009) 3 BomCR 839

Hon'ble Judges : Varale Prasanna B., J;Rohee K.J., J

Bench : Division Bench

Advocate : A.J. Pophaly, for the Appellant; Anjan De, for Respondents 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

Rohee K.J., J.—The Insurer/original respondent No. 3 has preferred this appeal against the award passed by the Motor Accident Claims Tribunal, Nagpur in Claim Petition No. 399 of 1993 on 28.4.2003 in favour of the claimants (respondents No. 1 to 3 herein) and against the appellant as well as the owner (respondent No. 4) and the driver (respondent No. 5).

2. It is not disputed that the claimants are the legal heirs of deceased Nareshchandra Katoch who died in an accident on 1.11.1993. It is also not disputed that Nareshchandra Katoch was serving as Major in Indian Army and at the relevant time he was posted at Guards Regimental Centre, Kamptee Cantonment, Kamptee. According to the claimants the truck owned by respondent No. 4 and driven by respondent No. 5 dashed against the scooter of Major Nareshchandra with the result Major Nareshchandra died on the spot. At the time of his death the salary of Major Nareshchandra was Rs. 7395/-per month and he was 36 years old. He was hail and hearty. He had earned all promotions well in time. Had he been alive, he would have been promoted as Lieutenant Colonel, Colonel, Brigadier and Major General. According to the claimants, they are entitled to claim Rs. 50,00,000/- However, they restricted

their claim to Rs 35,62,000/-.

3. The owner and driver of the offending vehicle filed joint written statement on 22.8.1995 denying the claim. They contended that the deceased himself was negligent and was responsible for the accident. They further submitted that the truck in question was insured with the insurer.

4. The Insurer (present appellant) filed separate written statement on 22.8.1995 taking the same defence like that of the owner and driver of the truck involved in the accident.

5. Claimant No. 1 Smt. Renu widow of Major Nareshchandra examined herself as P.W. 1. P.W. 2 Captain Kongarao Srihari Pongara produced the service record of the deceased; It seems that the driver of the truck involved in the accident was not examined as a witness.

6. The Claims Tribunal held that the death of Major Nareshchandra was the direct result of the rash and negligent driving of the truck driver. While calculating the amount of compensation, the Claims Tribunal took into consideration further promotional avenues of the deceased. The Claims Tribunal applied multiplier of 16 and held that the claimants are entitled to compensation of Rs. 23,33,500/- including the amount of no fault liability and granted future interest @ Rs. 9 % per annum from the date of petition till realisation. The Claims Tribunal held the driver, owner and insurer of the offending truck as jointly and severally liable to pay the said amount.

7. The owner and driver of the truck involved in the accident did not challenge the said Award. It is the insurer who has challenged this Award by preferring the present appeal u/s 173 of the Motor Vehicles Act.

8. The claimants moved Civil Application No. 4914/2006 for dismissal of the appeal u/s 149 and 170 of the Motor Vehicles Act, 1988. The claimants moved Civil Application No. 5830/2008 for final disposal of the appeal. We have, therefore, taken up the appeal for final disposal on preliminary objection raised by the learned Counsel for the claimants in respect of the maintainability of the appeal.

9. We have heard Shri A.J. Pophaly, Advocate for the appellant/insurer and Shri Anjan De, Advocate for the claimants.

10. Shri Anjan De urged that the grounds upon which the insurer can deny its liability in relation to a third party are contained in Sub-section (2) of Section 149 of the Motor Vehicles Act. Ordinarily the Insurance Company would have no right to question the quantum of compensation in the absence of leave having been granted in its favour in terms of Section 170 of the Motor Vehicles Act. Shri De pointed out that in the present case no defence as is permissible u/s 149(2) (a)(b) has been raised by the appellant/insurer. Shri De further pointed out that the appellant/insurer never sought permission of the Tribunal u/s 170 of the Motor Vehicles Act to contest the claim on the grounds that are available to the

person against whom the claim has been made. The appellant/insurer, however, is trying to challenge the award of the Tribunal on the ground of negligence of the deceased as well as on the quantum granted by the Tribunal. Such an appeal is not tenable. In order to substantiate his submission Shri De relied on National Insurance Co. Ltd., Chandigarh Vs. Nicolledda Rohtagi and Others, , wherein the Apex Court considered the following question:

Where an insured has not preferred an appeal u/s 173 of the Motor Vehicles Act, 1988 against an award given by the Motor Accidents Claims Tribunal, is it open to the insurer to prefer an appeal against the award by the Tribunal questioning the quantum of the compensation, as well as finding as regards the negligence of the offending vehicle?

After considering the relevant provisions, the Apex Court in para 18 observed as under:

The aforesaid provisions show two aspects. Firstly, that the insurer has only statutory defences available as provided in Sub-section (2) of Section 149 of the 1988 Act and, secondly, where the Tribunal is of the view that there is a collusion between the claimant and the insured, or the insured does not contest the claim, the insurer can be made a party and on such impleadment the insurer shall have all defences available to it. Then comes the provision of Section 173 which provides for an appeal against the award given by the Tribunal. u/s 173, any person aggrieved by an award is entitled to prefer an appeal to the High Court. Very often the question has arisen as to whether an insurer is entitled to file an appeal on the grounds available to the insured when either there is a collusion between the claimants and the insured or when the insured has not filed an appeal before the High Court questioning the quantum of compensation. The consistent view of this Court had been that the insurer has no right, to file an appeal to challenge the quantum of compensation or finding of the Tribunal as regards the negligence or contributory negligence of offending vehicle.

After considering the case law, Apex Court observed in para 26 as under:

For the aforesaid reasons, an insurer if aggrieved against an award, may file an appeal only on those grounds and no other. However, by virtue of Section 170 of the 1988 Act, where in course of an enquiry the Claims Tribunal is satisfied that (a) there is a collusion between the person making a claim and the person against whom the claim has been made, or (b) the person against whom the claim has been made has failed to contest the claim, the Tribunal may, for reasons to be recorded in writing, implead the insurer and in that case 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. Thus, unless an order is passed by the Tribunal permitting the insurer to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds

which are available to the insured or to a person against whom a claim has been made.

In para 27 it is observed as under:

This matter may be examined from another angle. The right of appeal is not an inherent right or common law right, but it is a statutory right. If the law provides that an appeal can be filed on limited grounds, the grounds of challenge cannot be enlarged on the premise that the insured or the persons against whom a claim has been made have not filed any appeal. Section 149(2) of the 1988 Act limits the insurer's appeal on those enumerated grounds and the appeal being a product of the statute, it is not open to an insurer to take any plea other than those provided in Section 149(2) of the 1988 Act.

In para 32 the Apex Court answered the question as under:

For the aforesaid reasons, our answer to the question is that even if no appeal is preferred u/s 173 of the 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regards negligence or contributory negligence of the offending vehicle.

11. It would be seen that the Apex Court overruled the decision in *United India Insurance Co. Ltd. Vs. Bhushan Sachdeva and Others*, . The decision in *Nicolletta Rohtagi's* case (supra) has been followed by the Apex Court in *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, and *R. Mannakatti and Anr. v. M. Subramanian and Anr.* 2005 (11) S.C.C. 389 . The learned Single Judge of this Court has also relied on *Nicolletta Rohtagi's* decision in *United India Insurance Company Limited Vs. Vijaya and Others*, and *Oriental Insurance Co. Ltd. Vs. Rajkaur Ranjitsingh Bhatti and Others*, .

12. Shri Pophaly, the learned Counsel for the appellant/insurer relying on *National Insurance Company Ltd. Vs. Indira Srivastava and Others*, submitted that just compensation cannot be a bonanza or source of profit. By relying upon the *Oriental Insurance Co. Ltd. v. Jashuben and Ors.* 2008 DGLS (soft) 194 : 2008 (2) T.A.C. 12 (S.C), he urged that the Tribunal could not have taken into consideration the future prospects of the deceased while calculating just compensation. According to Shri Pophaly just compensation in the present case could not have exceeded Rs. 10 lacs and that the Tribunal has passed award for an excessive amount.

13. As regards tenability of the appeal by Insurer, Shri Pophaly submitted that the correctness of 3 Judges' Bench decision of the Apex Court in *Nicolletta Rohtagi's* case (supra) has been referred to a Larger Bench by order dated 3.12.2007 in *United India Insurance Co. Ltd. v. Shila Datta and Ors.* in SLP Nos. 17301-17302/2007 by the Apex Court. Hence he urged that this Court may wait till the decision of the Larger Bench.

14. We are unable to agree with the suggestion made by Shri Pophaly because of

the observations in State of Rajasthan Vs. R.S. Sharma and Co., that Justice, between the parties in a particular case, should not be kept in a suspended animation. Hence in view of clear decision in Nicolletta Rohtagi's case (supra), we are of the considered view that the present appeal preferred by the insurer is not tenable and it will have to be dismissed. We, therefore, pass the following order:

The appeal is dismissed with no order as to costs.

The learned Counsel for the appellant prays for staying the effect and operation of this judgment for two months. The prayer is rejected. i