

(2008) 03 DEL CK 0161

In the Delhi High Court

Case No : MAC A.P.P. No. 4 of 2005

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Aishi Lal Saluja and Others

RESPONDENT

Date of Decision : 05-03-2008

Acts Referred:

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

Citation : (2008) 03 DEL CK 0161

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : S.L. Gupta, for the Appellant; Priyanka Kasana, for the Respondent

Final Decision : Dismissed

Judgement

Kailash Gambhir, J.—Perusal of the present appeal shows that the defense was not taken over by the appellant as envisaged u/s 170 of the Motor Vehicles Act.

2. In view of the settled legal position, the present appeal filed by the insurance company challenging the quantum of compensation is not maintainable. Reference in this regard is made to the judgment of the Apex Court in New India Assurance Company Ltd. Vs. Smt. Shanti Pathak and Others, .

3. The facts of the case inter alias are that on 22.10.1998 Shri Aishi Lal Saluja was going on his scooter bearing registration No. DL-9SA 0171 from Punjabi Bagh Chowk towards the direction of Jakhira and when he reached beyond the Power House, a bus bearing registration No. DL-1P 7563 driven by Shri Dharambir in a rash and negligent manner came from behind and hit Shri Aishi Lal Saliya.

4. The Tribunal after taking into consideration the facts of the case as well as evidence led by the parties had passed an award in the sum of Rs. 9,24,000/- along with interest at the rate of 9% per annum payable from the date of the institution of the petition till the date of realisation. The said order passed by the Tribunal is now under challenge in the present appeal.

5. I have heard learned Counsel for the parties at considerable length.
6. Counsel appearing for the respondent has taken a preliminary objection to the very maintainability of the present appeal on the ground that the appellant cannot assail the findings of the Tribunal on the quantum of compensation as determined by the Tribunal. Counsel contends that the appellant had not taken over the defense of the owner and driver as envisaged u/s 170 of the Motor Vehicles Act and, Therefore, is debarred from challenging the impugned award so as to assail the findings of the Tribunal on the quantum of compensation.
7. The contention of counsel for the respondent is that right to file an appeal is a statutory right and the insurer can assail the findings of the Tribunal confining to defenses as available u/s 149(2) of the Motor Vehicles Act. Counsel further contends that it is only in a case where there is collusion between the claimants and the insured, the insurer can assail the findings of the Tribunal on the grounds of quantum as well as negligence subject however to the condition that the insurer had taken permission of the Court to take over the defense of the owner or driver as the case may be as envisaged u/s 170 of the Motor Vehicles Act. No such permission was sought by the appellant u/s 170 of the Motor Vehicles Act by the Tribunal and, Therefore, in the absence of the same, the appellant being the insurer of the offending vehicle cannot maintain the present appeal on grounds other than those available to it u/s 149(2) of the Motor Vehicles Act.
8. On the other hand, counsel for the appellant strongly disputes this position and contends that the insurer cannot be rendered remedyless especially in a case where the Tribunal has awarded an excessive amount of compensation in favor of the claimants ignoring all basic principles of law for the award of compensation. Counsel for the appellant has also placed reliance on the judgment of the Supreme Court reported in *New India Assurance Company Ltd. Vs. Smt. Shanti Pathak and Others*, to contend that the Apex Court had interfered to lower down the compensation amount even in a case where the insurer had not taken any permission from the Court u/s 170 of the Motor Vehicles Act. Counsel for the appellant also contends that the Hon"ble Supreme Court has already referred the said issue of lack of competence of the insurer to assail the findings of the Tribunal on the ground of quantum of compensation and negligence to a larger Bench and, Therefore, this Court may await the decision of the Supreme Court in this regard.
9. Motor vehicle accident claim is a tortious claim directed against tortfeasors who are the insured/owner and the driver of the vehicle, the insurer comes in to the picture as a result of the statutory liability created under the Motor Vehicles Act. The legislature intended and 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 enshrined in Section 170 is satisfied.

10. Right of appeal is a creature of statute. The Parliament, while enacting Sub-section (2) of Section 149 only specified some of the defenses which are based on conditions of the policy and, Therefore, any other breach of conditions of the policy by the insured which does not fall under Sub-section (2) of Section 149 cannot be taken as a defense by the insurer. Had it been the intention of the Parliament to include the breach of other conditions of the policy as a defense, it could have easily provided for 'any breach of conditions of insurance policy' in Sub-section (2) of Section 149. But it is not the case, since the legislator has enumerated specifically the grounds of defenses available to the insurer. If the insurer is permitted to take any other defense other than those specified in Sub-section (2) of Section 149, it would mean we are adding more defenses to insurer in the statute which is neither found in the Act nor was intended to be included.

11. After having given my thoughtful and conscious consideration to the issue involved in the present case, I am of the view that the issue is no more rest integra as in plethora of cases, the Hon'ble Supreme Court has authoritatively held that in the absence of permission sought from the tribunal as envisaged u/s 170 of the Motor Vehicles Act, 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 vehicles is concerned. It would be appropriate to refer Section 170 of the Motor Vehicles Act as under:

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.

12. It is an admitted case between the parties that no such permission u/s 170 of the Motor Vehicles Act was sought by the appellant which clearly means that the procedure laid down u/s 170 of the Motor Vehicles Act was not followed. In the judgment of the Supreme Court reported in Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, ., the Supreme Court has held 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 mentioned in Section 170 are found to be satisfied and for that purpose the insurance company has to obtain an order in writing from the Tribunal and such an order should be a reasoned order of the Tribunal. In such circumstances unless the said

procedure is followed, the appellant insurer cannot have a wider defense on merits than what is available to it by way of a statutory defense. Relevant part of Para 4 of the said judgment in this regard is referred as under:

4. It clearly shows that the Insurance Company when imp led 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.

13. In view of the said legal position, I cannot appreciate the argument of counsel for the appellant that even without seeking permission of the Court as required u/s 170, the Appellant can proceed with the appeal. The procedure to be followed is that an application u/s 170 of the Motor Vehicles Act is to be preferred by the appellant insurance company before the Tribunal for taking over the defense of an owner or driver and then the Tribunal is required to pass specific order and that too a reasoned order, as per the observations of the Supreme Court referred above and Therefore, in the instant matter the argument of counsel for the appellant cannot be appreciated that non-filing of an application u/s 170 of the Motor Vehicles Act by the appellant in this regard is no bar in preferring the present appeal.

14. In the light of the above discussion, I do not find any merit in the submission of counsel for the appellant. The judgment cited by the counsel in Shanti Pathak's case (supra) has not dealt with the said legal proposition and, Therefore, the same is not applicable in the facts and circumstances of the present case.

15. There is no merit in the appeal.

16. Dismissed.