

(2008) 12 AHC CK 0422
In the Allahabad High Court

Oriental Insurance Co. Ltd.	Vs	APPELLANT
Kanchan Pandey and Others		RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Constitution of India, 1950 — Article 227
Motor Vehicles Act, 1988 — Section 170

Citation : (2010) ACJ 2027 : (2009) 2 AWC 1207

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.M. Sahai and Ran Vijay Singh, JJ.—These two appeals directed against the award of the Motor Accident Claims Tribunal (in brief the Tribunal) give rise to an interesting questions of law, whether the statutory order u/s 170 of the Motor Vehicles Act, 1988 (in brief the Act) can be deemed to have been passed; whether the order passed by the Tribunal rejecting an application u/s 170 can be challenged in an appeal u/s 173(1); whether the order passed by the Tribunal permitting the insurance company to cross-examine the claimant's witness in absence of the owner satisfies the requirements of law as provided in Section 170 of the Act?

2. The brief facts are that on 24.1.2005 Shiv Shankar Mishra along-with Dilip Kumar Pandey was going to his residence, driving motor cycle No. UP-65/V-6821. The bus No. UP-42/T-2889 collided with motor cycle. Due to injuries received in the accident Shiv Shanker Mishra died on the spot. The pillion rider Dilip Kumar Pandey was also seriously injured and he died at the hospital. The bus belonged to U.P. State Road Transport Corporation. It was insured by the appellant.

3. The legal representatives of Dilip Kumar Pandey filed M.A.C.P. No. 44 of 2005 claiming Rs. 20 lacs as compensation u/s 166 of the Act. The appellant filed an application u/s 170 of the Act which was rejected on 7.4.2007 by the Tribunal.

The claim petition was allowed by the Tribunal and compensation of Rs. 2,11,000 was awarded to the claimants. The award of the Tribunal dated 27.9.2008 has been challenged by the appellant in F.A.F.O. No. 3775 of 2005.

4. The legal representatives of Shiv Shankar Mishra filed M.A.C.P. No. 45 of 2005 claiming Rs. 25 lacs as compensation u/s 166 of the Act. The appellant filed an application u/s 170 of the Act on which an order was passed on 19.9.2007, permitting the appellant to cross-examine the witness produced by the claimants P.W. 1, as the owner was not present. The claim petition was allowed by the Tribunal and compensation of Rs. 2,23,000 was awarded to the claimants. The award of the Tribunal dated 17.10.2008 has been challenged by the appellant in F.A.F.O. No. 3776 of 2005.

5. In both the claim petitions identical evidence was led and almost identical findings were recorded. The Tribunal held that motor cyclist was not negligent and the accident took place due to rash and negligent driving of the driver of the bus. The driving licence of its bus driver Jagarnath was valid. The claim petition was not bad for non-joinder of necessary parties. The bus was not being driven in breach of insurance policy, and the claimants were entitled to compensation from the appellants.

6. Both the claim petitions have been allowed, with regard to the same accident, by the same Tribunal, although on different dates. However, both the appeals, with the consent of the counsel for the appellant, are heard together.

7. We have heard the learned Counsel for the appellant. In F.A.F.O. No. 3775 of 2008 challenging the award of the Tribunal in M.A.C.P. No. 44 of 2005, the learned Counsel has urged that the order passed on application u/s 170 by the Tribunal rejecting the application can be challenged in an appeal u/s 173(1) of the Act, because the appellant wants to challenge the quantum of compensation etc., in absence of availability of any grounds of breach of insurance policy mentioned in Section 149(2) of the Act.

8. In F.A.F.O. No. 3776 of 2008, challenging the award of the Tribunal in M.A.C.P. No. 45 of 2005 the learned Counsel has urged that the order passed on application u/s 170 by the Tribunal permitting insurance company to cross-examine the witness of the claimant, in absence of the owner, amounts to allowing the application u/s 170. He urged that if any order is passed by the Tribunal on an application u/s 170, except an order of rejection, in law, it would be deemed that the application u/s 170 has been allowed. He vehemently urged that passing of the order of rejection would only prevent the insurance company to contest the claim on merits on all the points arising in the award.

9. The peculiar feature of these appeals is that although they arose out of the same incident, in which the owner was common, yet the Tribunal has passed two inconsistent orders on the applications filed by the insurer for granting permission u/s 170 of the Act. What is the effect of such inconsistent order, we propose to examine latter but before it we may extract Section 170 of the Act.

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.

10. This section has come up for consideration before the Apex Court on number of occasions. It is well-settled by the Hon'ble 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 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 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 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....

11. In National Insurance Co. Ltd. Vs. Mastan and Another, , the Apex Court held as under:

It is beyond any doubt or dispute that in a proceeding where the right of the insurer to raise a defence is limited in terms of Sub-section (2) of Section 149, an appeal preferred by it against an award of the Motor Accident Claims Tribunal must only be confined or limited to some extent. But once a leave has been granted to the insurer to contest the claim on any ground as envisaged in Section 170 of the 1988 Act, an appeal shall also be maintainable as a matter of right, wherein the High Court can go into all contentions."

12. The Apex Court in Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, has held as under:

...The appeal being a product of the statute it is not open to an insurer to take any plea other than those provided u/s 149(2) of the Act. However, in a situation

where there is collusion between the claimant and the insurer or the insured does not contest the claim and further, if the M.A.C.T. does not implead the insurance company to contest the claim, in such a situation it is open to the insurer to seek permission of the M.A.C.T. to contest the claim on the grounds available to the insured or to a person against whom the claim has been made. If permission is granted and the insurer is allowed to contest the claim on merit, in that case it is open to the insurer to file an appeal against the award of the M.A.C.T. on merits. Thus, in such a situation the insurer can question the quantum of compensation awarded by the M.A.C.T.

13. From the aforesaid decisions it is clear that 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. But if the application is rejected, the appeal can be filed only on the grounds available u/s 149(2) of the Act, as no appeal is provided against the order rejecting the application u/s 170. An appeal u/s 173(1) of the Act lies only against the award of the Tribunal and the order u/s 170 not being an award, no appeal would be maintainable against such an order. A Division Bench of this Court, however, has held in *Oriental Insurance Co. Ltd. Vs. Manju and Others*, that the order rejecting the application u/s 170 of the Act can be challenged by the insurance company under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. We respectfully agree with the above view.

14. The next question is whether the order of the Tribunal permitting the insurance company to cross-examine the witness produced by the claimant amounts to allowing the application u/s 170 of the Act? In *Jyotsnaben Sudhirbhai Patel*'s case the Apex Court in paragraph 14 held as under:

In the instant case, the insurance company was impleaded as third respondent. The driver and owner of the vehicle, though appeared before the Tribunal, did not contest the proceedings. They did not file the written statement nor did they choose to give evidence before the Tribunal. Admittedly, the appellant filed an application u/s 170 of the Act seeking permission of the Tribunal to contest the proceedings giving the necessary details. The award passed by the Tribunal also evidently shows that pursuant to this permission, the counsel for the appellant insurance company cross-examined the witnesses produced by the claimant to prove the negligence of the offending vehicle. Unfortunately, however, the Tribunal, while passing its orders on the petition filed u/s 170 of the Act only stated that the prayer was granted, though the mandate of Section 170(b) of the Motor Vehicles Act states that the Tribunal while passing an order shall record its reasons.

15. The import of the decision in *Jyotsnaben Sudhirbhai Patel*'s case is that the Tribunals are required to assign reasons while allowing or rejecting an application u/s 170 of the Act. The Tribunal cannot ignore an application u/s 170. It is mandatory for the Tribunal to pass an order u/s 170 either in the affirmative or

in the negative. The reason for it is that the right to contest of the insurer depends on the order of the Tribunal. We may point out that an application may be allowed or the Tribunal sometimes stops short and may direct, "prayer is granted" or it may say, "heard", the insurer to examine the witnesses or cross-examine the witness as in this case. Or it may reject the application. In *Jyotsnaben Sudhirbhai Patel's* case (*supra*) it was categorically held that since the insurance company's right to contest gets enlarged, the recording of reasons and passing of the order was necessary.

16. We may now examine whether the order of the Tribunal in M.A.C.P. No. 45 of 2005 permitting the insurance company to cross-examine the witness in absence of the owner can be said to be allowing or deemed allowing of the application u/s 170 of the Act. The insurer and the insured stand on the same footing. But the insurer is impleaded only where the insured is in collusion with the insurer, to safeguard the interest of the insurance company, and to contest the claim on merits. The only other circumstance where the insurance company is allowed to contest the claim is when the owner is not contesting. If the contest by the owner is real then the insurance company cannot be permitted to cross-examine the witnesses only because owner was absent on a date. The order of prayer granted on the application or heard and permitted to cross-examine the witness may amount to allowing the application.

17. Let us examine the orders of the Tribunal. From the awards of both the claim petitions it is clear that the owner of the Bus No. UP-42/T-2889 U.P. State Road Transport Corporation was contesting both the claim petitions. It had filed written statements, produced and examined driver of the bus Jagarnath as DW-1, filed copy of driving licence of Jagarnath driver 29 Ga-4, registration book of the bus, permit, insurance policy 27 Ga-2, 29 Ga-2 and 29 Ga-3, naksha nazri (site plan), and technical report of inspection of bus and motor cycle. The insurance company had not led any evidence to establish that driving licence was invalid or the bus was being driven in breach of insurance policy.

18. In M.A.C.P. No. 44 of 2005, the application u/s 170 of the Act filed by the insurance company was rejected on 7.4.2007 by the Tribunal by the following order:

Heard. Owner is contesting hence rejected.

19. The application of the insurance company had been rejected on 7.4.2007, therefore, the appellant could assail the award of the Tribunal only on the grounds mentioned in Section 149(2) of the Act and neither on negligence or contributory negligence nor on quantum of compensation.

20. In M.A.C.P. No. 45 of 2005, an application u/s 170 of the Act was also filed by the insurance company. It appears on 19.9.2007 the owner was not present. The Tribunal passed an order on 19.9.2007 permitting the appellant insurance company to cross-examine the witness of the claimant P.W. 1 as the owner of the bus was absent. It is necessary to reproduce the order of the Tribunal as below:

Heard. Insurance Co. is permitted to cross-examine the witness of petitioner as owner is not present to cross-examine P.W.I.

21. On the principle laid down by the Apex Court in Jyotsnaben Sudhirbhai Patel's case (supra) the word "heard" has to be construed as permitting the insurance company to contest. But the incident being same, the owner being common, the Tribunal could not have passed two contradictory orders.

22. In both the appeals the appellant had challenged the award of the Tribunal on the questions of negligence or contributory negligence and quantum of compensation. In Appeal No. 3775 of 2008 arising out of M.A.C.P. No. 44 of 2005 the application u/s 170 had been rejected on 7.4.2007 by the Tribunal. The Tribunal had recorded a finding that no evidence had been led by the insurance company on the point of breach of insurance policy. No argument before us, has been raised by the learned Counsel for the appellant on the grounds mentioned in u/s 149(2) of the Act. The appellant cannot be permitted to raise the points of negligence or contributory negligence and quantum of compensation. The appeal lacks merit and deserves to be dismissed.

23. So far as Appeal No. 3776 of 2008 arising out of M.A.C.P. No. 45 of,, 2005 is concerned the Tribunal had recorded a finding that no evidence had been led by the insurance company on the point of breach of insurance policy. No argument before us, has been raised by the learned Counsel for the appellant on the grounds mentioned in u/s 149(2) of the Act. The appellant cannot be permitted to raise the points of negligence or contributory negligence and quantum of compensation. This appeal also has no merit and deserves to be dismissed.

24. The argument of the learned Counsel that the appellant could challenge the order passed by the Tribunal in these appeals, is liable to be rejected. We have examined the relief claimed in these appeals but we do not find that orders dated 17.4.2007 or 19.9.2007 have been challenged by the appellant. After the application u/s 170 was rejected it was open to the appellant to challenge the orders dated 17.4.2007 or 19.9.2007 under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. But the order dated 17.4.2007 or 19.9.2007 cannot be challenged in these appeals, as an appeal u/s 173(1) of the Act lies only against the award of the Motor Accident Claims Tribunal and the orders u/s 170 not being an award, no appeal would be maintainable against such an order.

25. For the aforesaid reasons, we do not find any merit in both the appeals. The appeals fail and are accordingly dismissed.

26. The amount of Rs. 25,000 deposited by the appellant in this Court u/s 173 of the Motor Vehicles Act, 1988 in both the appeals shall be remitted by the Registry to the Motor Accident Claims Tribunal within one month and shall be included in the amount to be paid by the appellant to the claimants.