

(2006) 02 KL CK 0069
In the High Court Of Kerala
Case No : M.F.A. No. 305 of 2003

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Narayanan Nair

RESPONDENT

Date of Decision : 01-02-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 166, 170, 173

Citation : (2007) 1 ACC 201 : (2007) ACJ 889 : (2006) 3 ILR (Ker) 569 : (2006) 4 KLT 133

Hon'ble Judges : K. Hema, J

Bench : Single Bench

Advocate : Mathews Jacob, for the Appellant; Arikkat Vijayan Menon, Harisankar V. Menon, Meera V. Menon, P.K. Sivadasan Nair, S. Madhavan Nair and T.K. Koshy, for the Respondent

Final Decision : Allowed

Judgement

K. Hema, J.—A petition was filed by the insurer u/s 170 of the Motor Vehicles Act (the Act, for short), for grant of permission to contest the case on all grounds. The Tribunal, without disposing of the application, allowed the insurer to cross-examine the claimant. Thereafter, an award was passed directing the insurer to pay compensation. The insurer challenges the award on merit. Is it permissible? Can an appeal filed by the insurer challenging the award on grounds other than those are specified in Section 149(2) of the Act be entertained, in the absence of a specific order by the Tribunal u/s 170 of the Act, granting permission? This is the precise question which falls for consideration in this case.

2. This appeal is filed by the insurer. An award was passed against the insurer, u/s 166 of the Act. According to claimant, the vehicle involved in the accident bears No. KL-5A/6185 which is insured with appellant. The appellant admitted insurance, but contended that the said vehicle was not involved in the accident and hence, the insurer is not liable to pay compensation. This contention was taken up by the insurer in the written statement itself. An application was also

filed u/s 170 of the Act, seeking permission of the Tribunal to contest the case on all grounds. The Tribunal allowed the insurer to cross examine the claimant on the disputed facts, heard the case on merit and held that the disputed vehicle was involved in the accident and that the accident occurred due to the negligence of its driver. The Tribunal directed insurer to pay compensation. Hence, this appeal.

3. The maintainability of this appeal is under challenge. Learned Counsel appearing for the claimant vehemently contended that the Insurance Company is not entitled to file an appeal disputing the involvement of the vehicle, since the Tribunal did not grant permission to appellant u/s 170 of the Act. It was submitted that the Tribunal having failed to dispose of the application filed u/s 170 which was numbered as I.A. No. 2719 of 2001, the insurer did not have permission to contest the case on all grounds other than those specified in Section 149(2) of the Act. Hence, the appeal filed by insurer on merit is not maintainable, is the argument.

4. It is well-settled that an insurer will not be entitled to challenge the award on merit unless permission is granted by the Tribunal u/s 170 of the Act. In *National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others*, the Supreme Court held as follows:

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.

5. But, learned Counsel for appellant strongly contended that, in the peculiar facts and circumstances of this case, the appeal is still maintainable, even in the absence of a specific order u/s 170 of the Act. According to him, the omission on the part of the Tribunal to pass an order on the said application will not and shall not affect the insurer's right to file the appeal.

6. It was submitted by learned Counsel for appellant that the records in this case would reveal that it was at a stage when the owner-cum-driver of the vehicle failed to contest the case, in collusion with the claimant that appellant filed an application u/s 170 of the Act. According to him, the Tribunal was satisfied of this fact and that is why permission was granted to the insurer to cross examine claimant on the disputed involvement of the vehicle. Therefore, this is a case where the Tribunal applied its mind to the various conditions stated in Section 170 and allowed to contest the case on merit by cross-examining the claimant on merit and hence, the mere omission on the part of the Tribunal to pass a specific order in writing on the application will not be fatal to appellant's right of appeal, it is vehemently argued.

7. Learned Counsel for appellant also placed reliance upon a decision rendered by the Supreme Court reported in *United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others*, , to fortify his arguments. That was a case where the owner-cum-driver did not file any written statement and he failed to contest

the case. The Tribunal, therefore, passed an order on the application filed by the insurer u/s 170, "granted as prayed for". It was not a speaking order. As per the settled legal position, a non-speaking order passed u/s 170 of the Act is illegal and hence it was contended before the Supreme Court that the insurer was not entitled to file an appeal on merit in the absence of a legally valid order being passed u/s 170 of the Act. The Supreme Court, after considering the various aspects, held in Jyotsnaben's case, as follows:

Section 170(b) of the MV Act states that the Tribunal while passing an order shall record its reasons. But it is very much evident in the present case that the driver and the owner of the motor vehicle did not file the written statement and failed to contest the proceedings. The Tribunal could have merely recorded that fact while allowing the application. For failure to do so, the appellant shall not suffer prejudice. Therefore, the appellant Insurance Company was justified in contesting the proceedings on grounds other than those enumerated u/s 149(2) pursuant to the permission granted by court. For the same reason, the Insurance Company can be legitimately considered to be a "person aggrieved" within the meaning of Section 173 of the Act.

8. As rightly argued by learned Counsel for appellant, it would appear from the dictum laid down in Jyotsnaben's case that the Supreme Court is of view that a mere omission on the part of a court to do some thing shall not prejudice any party. If, from the records, it can be inferred that the requirements of Section 170 are made out and that the Tribunal had also applied its mind to those relevant facts, a non-speaking order is to be treated as inconsequential. Therefore, even though the order passed u/s 170 in Jyotsnaben's case did not specify that the conditions precedent for granting permission u/s 170 of the Act are satisfied, the Supreme Court held that an appeal filed by insurer is still maintainable.

9. But, the situation here is different. Unlike in Jyotsnaben's case, there is total lack of an order u/s 170 of the Act in this case. Further, the owner-cum-driver herein filed written statement, specifically disputing involvement of his vehicle in the accident. He also examined himself as a witness on his side. Despite all these, the Tribunal had allowed the insurer to cross examine claimant, at a stage when the owner failed to challenge his evidence on merits. This may be because, the Tribunal was satisfied that the requirements of Section 170 of the Act are made out.

10. It is needless to say that even in cases where written statement is filed by the owner or driver, and they examine themselves as witnesses, the Tribunal may be able to conclude elements of collusion between the claimant and the owner/owner, depending upon the facts and circumstances of each case. It may be possible to infer that there is failure on the part of the owner or driver to contest the case, notwithstanding the positive steps taken by them like filing of written statement, examining witnesses etc. A contest, in this context does not mean, filing of written statement or examining a witness. A contest must be a

genuine contest, challenge or opposition and not a mere eye-wash.

11. Looking into the various aspects, the Tribunal will be in a position to say whether there is a bona fide contest or not, or whether there is any collusion or not. In cases where the driver and owner have filed written statement and examined witness, the Tribunal will have to scan through the relevant matters and decide whether there is collusion or not and whether they are actually contesting the matter or not. In such a situation, a reasoned order will be required, showing reasons to support the conclusions, either way. In the absence of a speaking order in writing, it will not be possible for this Court to infer from vacuum, that the Tribunal was satisfied of the requirements of Section 170 of the Act and that it had granted permission.

12. This is a case where a speaking order ought to have been passed by the Tribunal on the application filed u/s 170 of the Act, without leaving it to this Court or the parties to read its mind from emptiness. The failure to dispose of the application, doubtlessly, has prejudiced the insurer to a great extent. It has jeopardised appellant's entitlement to file an appeal, since the very right of appeal of the insurer dangles on the decision that ought to have been taken by the Tribunal on an application u/s 170 of the Act. This Court is prevented from even deciding the question of maintainability of this appeal, in the absence of an order passed on the application filed u/s 170 of the Act.

13. Hence, the award passed without disposal of an important interlocutory application is unsustainable. It therefore, deserves an interference and the case requires fresh consideration by the Tribunal.

14. The impugned award is set aside and the case is remanded to the Tribunal, directing the Tribunal to dispose of the application u/s 170 of the Act, after hearing both sides. The claim petition shall thereafter be considered afresh and disposed of, in accordance with law. Parties shall appear before the Tribunal on 21.8.2006. The claim being one of the year 1993, the disposal shall be expediated by the Tribunal. It shall dispose of the case, at any rate, not later than two months from the date of receipt of copy of this judgment.

This appeal is allowed.