

(2011) 09 J&K CK 0023
In the Jammu And Kashmir High Court
Case No : CIMA No. 97 of 2007

Oriental Insurance Company	Vs	APPELLANT
Karamjeet Singh and Others		RESPONDENT

Date of Decision : 09-09-2011

Acts Referred:

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

Citation : (2011) 3 JKJ 41

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hasnain Massodi, J.—The Civil First Miscellaneous Appeal on hand is directed against the award passed by Motor Accident Claims

Tribunal, Kishtwar in claim petition titled Karamjeet and anr. v. Oriental Insurance Company Ltd. and Ors. (21 /Claim of 2003), whereby the

Tribunal has awarded an amount of Rs. 6,35,728/- in favour of the claimants with interest @ 6% per annum from the date of filing of the claim

petition, till its final realization. The facts relevant to the disposal of the appeal are as under:-

Ms. Bindu Bala, aged 19 years daughter of respondents 1 and 2 died in a vehicular accident on 8th of April, 2000 when the Bus bearing

registration No. JK02E-6357 in which she was travelling, met with an accident at Amar Chashma, Batote. The respondents 1 and 2 on

01.07.2003 filed a claim petition registered as 21/Claim against the appellant and respondents 3 and 4 claiming an amount of Rs. 14.00 lacs on

account of death of their daughter. The case set up by the respondents 1 and 2 was that the accident was result of rash and negligent driving of the

offending vehicle, by its driver Shri Roop Lal-respondent No. 4 and that the appellant-Insurance Company with whom the offending vehicle was insured, was duty bound to indemnify the owner and pay compensation to the respondents 1 and 2.

2. The petition was opposed by the appellant on the grounds that as per the information received, the offending vehicle at the time of accident was over loaded and being plied in contravention of terms and conditions of the insurance company. The appellant also disputed the claim set up in the petition and labelled the amount demanded as excessive and unwarranted. The additional plea raised was that the owner of the offending vehicle violated the terms and conditions of the insurance policy inasmuch as the driver employed by insured was not holding effective and valid driving licence at the time of accident and that registration certificate and route permit of the vehicle were not in order.

3. The Tribunal on perusal of the pleadings settled following issues:-

1. That the deceased Bindu Bala has died due to the vehicular accident while travelling in the Bus bearing registration No. 6357-JK02E on 8.4.2002 at near Amar Chashma, Batote which accident took place due to the rash and negligent driving of the vehicle by its driver? OPP.
2. Whether the petitioners are the legal heirs of the deceased Bindu Bala as such, entitled to compensation or award in terms of Section 166 M.V.

Act? OPP.

3. In case Issue Nos. 1 and 2 are proved in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPP.

4. Whether the petitioners are not entitled to any compensation as the offending vehicle was not in order and the vehicle was driven by an

unauthorised person not holding a valid driving licence? OPR-1

5. Whether the owner and driver have violated the terms and conditions of the Insurance Policy if so how and what would be its effect? OPR-1

6. Relief.

4. The respondents 1 and 2 examined three witnesses in support of the claim. The appellant on the other hand decided not to adduce any evidence

either to prove the issues burden whereof was put on the appellant or to rebut the evidence adduced by the respondents 1 and 2. The Tribunal

decided all the issues in favour of the respondents 1 and 2 and against the

appellant and passed award on 28.12.2006. The Tribunal found the deceased to have been earning an amount of Rs. 3,500/-per month from her private job and after deducing 1/3rd of the income on account of personal expenses and applying multiplier of 17 assessed the loss of income as Rs. 4,75,728/-. The Tribunal further awarded an amount of Rs. 50,000/- on account of loss of deceased, Rs. 50,000/- on account of mental shock to the respondents 1 and 2 and another Rs. 50,000/- on account of untimely death of their daughter. The amount of Rs. 50,000/-was granted on account of loss of love and affection and an amount of Rs. 10,000/-on account of funeral expenses. The amount awarded was directed to carry interest @ 6% per month from the date of filing of the claim petition, till its final realization.

5. The award dated 28.12.2006, is assailed on the grounds that there was no evidence before the Tribunal to take Rs. 3,500/- per month as income generated by private employment of the deceased as Accounts Clerk. The multiplier of 17 applied by the Tribunal is found fault with on the ground that the Tribunal while identifying the multiplier ought to have taken into account age of respondents 1 and 2 and not the deceased. It is further pleaded that the Tribunal having regard to the marital status of the deceased ought to have deducted one half of the income on account of personal expenditure.

6. I have gone through the memorandum of appeal as also the record received from the Tribunal and have heard learned counsel for the parties.

7. The appellant has not adduced any evidence to substantiate the grounds sought to be pressed into service by the appellant to wriggle out of its responsibility to indemnify owner of the offending vehicle. It may be recalled that the defence set up by the appellant in an opposition to the claim petition was that the driver of the offending vehicle was not holding effective and valid driving licence at the time of accident. It was next urged that the vehicle was being plied in contravention of the terms and conditions of the insurance policy at the time of accident. The appellant having failed to bring any evidence on the file to discharge the burden, the Tribunal was right in deciding both the issues against the appellant and in favour of the respondents 1 and 2. The appellant did not find it necessary to refute and rebut the evidence adduced by the respondents 1 and 2 in support of the

claim petition. The Tribunal thus had no reason to disbelieve the evidence brought on the file by the respondents 1 and 2 which inter alia proved

that the deceased was working as Accounts Clerk with a local contractor and was getting an amount of Rs. 3,500/-per month as salary from the

private employee. Similarly, there was cogent evidence before the Tribunal regarding the circumstances in which the accident had taken place. PW

Subash one of the passengers of the offending vehicle stepped in the witness box and deposed that the offending vehicle at the time of accident

was being driven rashly and negligently by respondent No. 4. The appellant made no effort to discredit the testimony rendered by PW Subash or

any other witness examined by respondents 1 and 2. So viewed, the grounds set out in the appeal to question the conclusions arrived at by the

Tribunal are devoid of any substance.

8. The appellant next seeks to question the award on the ground that the compensation assessed by the Tribunal is excessive and not as per the

settled legal norms. The appellant while making reference to different aspects of the matter, expected to be looked into by the Tribunal while

assessing just compensation, disputes the loss of income as also the multiplier applied by the Tribunal.

9. It is argued by learned counsel for the respondents 1 and 2, and rightly so that the appellant in absence of leave u/s 170 Motor Vehicles Act is

not competent to question the quantum of compensation. The argument sounds convincing and deserves consideration.

10. The insurer in terms of Section 149(2) of the Act is competent to take up any one or more defences enumerated in the aforesaid provision, to

escape liability to indemnify the insured /owner of the offending vehicle. It is pertinent to point out that while Section 149 cast a duty on the insurer

to indemnify the owner, it makes it mandatory for the Tribunal to array the insurer as a party to the proceedings and permit it to raise any one or

more defences set out in Section 149(2) of the Act in opposition to claim petition.

The insurer may plead breach of a condition of the policy like a condition excluding the use of a vehicle for hire or reward, use of vehicle for

organizing, racing and speedy contests or for a purpose not allowed by the permit under which it is used or a condition excluding driving by a

named person or any person not duly licensed or by any person who has been

disqualified for obtaining a driving licence during the period of disqualification. The insurer may allege breach of the condition excluding liability, for injury caused or contributed to by conditions of war, civil war etc. Section 149(2) of the Act also makes it possible for the insurer to plead that the insurance policy is void as it was obtained by non disclosure of material facts or by the representation of facts which have been false in some material particulars. The insurer cannot raise any defence other than the defences detailed in Section 149(2) of the act, except when it is permitted by the Tribunal in terms of Section 170 of the Act to raise any other defence available to the owner or driver of the offending vehicle. It is important to note that Section 170 of the Act visualizes a situation where the owner and/or driver of the offending vehicle is are in collusion with the claimants or otherwise avoid to contest a claim. It needs no emphasis that in a good number of cases, the owner and driver of the vehicle involved in an accident, satisfied that they are to be indemnified by the insurer under the insurance policy, may not be too keen to contest a claim, as acceptance of the claim because of the insurance cover, is not to expose the driver or owner to any pecuniary loss. In such cases, it would be unjust to ask the insurer to oppose the claim petition, with its hands, tied at its back, and the defences available to the owner and driver of the vehicle involved in the accident, not made available to the insurer. However, an insurer to have the liberty to raise all defences in opposition to the claim including the defences available to the owner and driver of the offending vehicle, has to lay a motion before the Tribunal detailing reasons that must persuade the Tribunal to grant the leave and the Tribunal may, for the reasons to be recorded in writing, grant leave to the insurer to contest the claim on all or any of the grounds that are available to the person against whom claim has been made. In absence of such express permission by the Tribunal, the insurer is stripped of any right to contest the claim on the grounds other than those set out in Section 149(2) Motor Vehicles Act.

11. It would be advantageous to extract in this regard following observation of the Apex Court in National Insurance Co. Ltd., Chandigarh Vs.

Nicolletta Rohtagi and Others, :-

.....we are of the view that the statutory defences which are available to

the insurer to contest a claim are confined to what are provided in

Sub-Section (2) 149 of 1988 Act and not more and for that reason if an insurer is to file an appeal the challenge in the appeal would confine to

only those grounds

The Court has further observed:-

.....an insurer if aggrieved against an a ward, may file an appeal 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, implied 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. Thus where conditions precedent embodied in section 170 are satisfied and the

award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or

contributory negligence of the offending vehicle even if the insured has not filed any appeal against the quantum of compensation.

12. In the present case, though the insurer on 6.2.2006 filed an application u/s 170 of the Act for grant of leave to contest the claim petition on all

the grounds viz negligence, quantum as available to the insured, yet no order allowing the application was made by the Tribunal. The Tribunal on

the other hand, as is evident from the interim order dated 6.2.2006 directed the application to be annexed with the main file.

Learned counsel for the appellant placing reliance on New India Assurance Company Ltd. v. Gh. Qadir and ors 2009 (2) JKJ (HC) 378 and

New India Insurance Company Limited v. Jasvinder Singh and Ors. 2010 ACJ 948, 2011 (1) JKJ [HC] 525 insists that the Tribunal in the facts

and circumstances of the case is to be presumed to have granted leave to the insurer/appellant to raise all the defences/pleas as were available to

the insured and that the appellant was thus competent to question the award on the grounds other than the grounds enumerated in Section 149(2)

of the Act. The argument does not sound convincing for the reason that in both the reported cases relied upon by learned counsel for the appellant,

the application u/s 170 was filed before the parties commenced their evidence. The Tribunal having permitted the insurer to cross examine the

witnesses produced by the claimants on all aspects, it was held that because of such permission accorded by the Tribunal, it was to be presumed

that permission u/s 170 of the Act was accorded to the insurer. In the present case, the application was filed much after the claimants concluded

their evidence. In the circumstances, the Tribunal did not grant leave to the appellant to cross examine the witnesses examined by the

claimants/respondents 1 and 2, after the appellant had filed application u/s 170 of the act, so as to raise the presumption that leave to raise all the

defences including the defences available to the insured had been impliedly granted by the Tribunal. The Tribunal as a matter of fact did not avoid

to pass any order on the application but directed the application to be annexed with the main file.

This apart, as held by a Division Bench of the Allahabad High Court in *The New India Assurance Company Limited Vs. Dr. Prem Singh*

Bhadauria and Smt. Sadhna Tripathi, , as a non-reasoned order u/s 170 of the Act is not to give the insurer right to raise the defences in opposition

to the claim petition as are available to the insured, it would be far-fetched, to say that failure of the Tribunal to pass any order on an application u/s

170 of the Act is to be construed as implied permission. In *United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others*, The

Tribunal made a cryptic order while dealing with an application u/s 170 of the Act. The order of the Tribunal read - ""granted as prayed for"". The

Supreme Court held the order to be without reasons and not to satisfy requirement of Section 170 of the Act.

13. For the reasons discussed above, the appellant is debarred from questioning the award on the ground of quantum and cannot be permitted to

dispute the compensation awarded by the Tribunal to the respondents 1 and 2.

14. For the reasons discussed above, there is no merit in the appeal. The appeal is accordingly dismissed.