

(2009) 03 AHC CK 0126

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No.450 of 2009

Regional Manager, Center Point, District Aligarh

APPELLANT

Vs

The New India Assurance Company Ltd.through its Regional
Manager, Center Point, District Aligarh

RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 149(2), 163A, 170, 173

Citation : (2009) 03 AHC CK 0126

Hon'ble Judges : Sabhajeet Yadav, J

Final Decision : Allowed

Judgement

Sabhajeet Yadav, J.—By this petition, the petitioner has sought relief of writ of certiorari for quashing the order dated 07.02.2009 (Annexure7) of the writ petition) passed by the Motor Accident Claims Tribunal, Aligarh (hereinafter referred to as "the Claims Tribunal) in MACP No.76 of 2007 Anokhe Lal and others Vs. Anwar Khan and others, whereby application of the petitioner under Section 170 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") for contesting the claim petition on merits has been rejected by the claims tribunal.

2. The brief facts of the case are that an accident took place on 29.6.2006. It is alleged that in the said accident Omwati Devi was hit by Tata 407 Truck No.U.P. 81/D2522 owned by respondent no.7, as a result of which she died. The claimants/respondents no.1 to 6 filed a claim petition on 12.2.2007 under Sections 140 and 166 of the Act being MACP No.76 of 2007 before the Claims Tribunal claiming compensation of Rs.6,37,000/ for the death of deceased Omwati Devi aged about 45 years. The claimantrespondent no.1 is husband and the claimantsrespondents no.2 to 6 are sons of deceased Omwati Devi. The claim petition was contested by owner of offending motor vehicle by filing his written statement on 11.1.2008 before the Claims Tribunal, which is on record as Annexure2 of the writ petition. The driver of the truck was also made a party in

the claim petition but he did not contest the claim petition nor did he file his written statement. The aforesaid claim petition was also contested by the petitioner/insurer/Insurance Company by filing its written statement on 28.5.2008. A true copy of written statement filed by the Insurance Company/petitioner on 28.05.2008 is on record as Annexure3 of the writ petition.

3. On 19.12.2008 issues were framed by the Claims Tribunal in the said claim petition. Thereafter the claimants examined Dharmendra Singh S/o Anokhey Lal as PW1 and Manveer S/o Surajpal as PW2 in order to prove the averments made in the claim petition. These witnesses were not cross examined by the owner of the truck. But the petitioner Insurance Company cross examined them. It is stated that the owner of the truck was not contesting the claim petition properly as he had neither examined himself as a witness nor he had produced the driver of the truck as a witness before the Tribunal. The owner had merely filed his written statement and has not cross examined the witnesses PW1 and PW2 produced by the claimants. The owner has failed to lead any evidence from his side and as such there was no contest by the owner of the truck. Since the owner of the truck was not contesting the claim petition effectively, therefore, the petitioner/Insurance Company moved an application under Section 170 of the Act seeking permission of the Tribunal to contest the case on all the grounds which are available to the insurer as well as to the owner/insured of the offending motor vehicle. A true copy of the application under Section 170 of the Act is on record as Annexure6 of the writ petition. The Claims Tribunal vide order dated 07.02.2009 has illegally rejected the said application of the petitioner merely on the ground that the owner of the offending motor vehicle has filed written statement and as such contesting the claim petition without considering both the facts and law, hence this petition.

4. Heard Sri Amit Manohar for the petitioner.

5. Since this petition is filed by the Insurance Company against the rejection of its application under Section 170 of the Act, wherein claimants and owner as well as driver of the offending motor vehicle have been arrayed as respondents. Having regards to the facts and circumstances of the case, keeping the petition pending for the purpose of hearing of the claimants and owner of the offending motor vehicle would prolong the proceeding before the Claims Tribunal and would delay the disposal of claim petition, which would ultimately adversely affect the interest of claimants and the respondents, owner/insured and driver of the motor vehicle have no vested right to be heard in opposition of the said application under Section 170 of the Act, therefore, issuing notices and providing opportunity of hearing to them would be useless formality, accordingly, I need not to hear them for disposal of instant writ petition.

6. While placing reliance upon a decision of Kerla High Court rendered in Oriental Insurance Company Ltd. Vs. Narayanan Nair and others 2007 (1) Transport and Accident Cases 233 (Kerala), learned counsel for the petitioner has submitted that the expression "contest" used under Section 170 of the Act does not merely

mean filing of written statement or examining a witness. A contest must be genuine contest, challenge or opposition and not a merely eyewash and a Division Bench of this Court in a decision rendered in *National Insurance Company Ltd. Vs. Jairani and others* 2009 (1) ADJ 209 (DB), has held that the contest of claim on merits by the owner must be such as if he is trying to defeat the claim and is making every possible effort to win the case. The contest should be real and merely filing of written statement or leading some oral or documentary evidence or cross examination of some witnesses would not be sufficient. The Tribunal must come to a definite conclusion that the owner of the vehicle is making every possible effort to succeed in getting the claim petition dismissed. In absence of finding by Tribunal about the genuineness of contest by owner supported by cogent reasons the application under Section 170 of the Act filed by the Insurance Company cannot be rejected. Further the petitioner had crossexamined the witnesses produced by the claimants and as such the petitioner has contested the case on merits i.e. on the grounds which are available to the owner as well as to the Insurance Company and if the permission under Section 170 of the Act is not granted, then in appeal the petitioner cannot challenge the award on the grounds of negligence and the quantum of compensation. But the Tribunal without considering this aspect of the matter and without recording any cogent reason therefor has passed the impugned order rejecting the said application of the petitioner.

7. In order to appreciate arguments advanced by learned counsel for the petitioner visavis question in controversy involved in the case, it would be useful to have a survey of statutes having material bearings thereon. Section 149 of the Act casts duty upon insurers to satisfy judgments and awards against persons insured in respect of third party risks which reads as under:

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.(1)If, after a certificate of insurance has been issued under subsection (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of subsection (1) of Section 147 (being a liability covered by the terms of the policy) {or under the provisions of section 163A} is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under subsection (1) in respect of an judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court

or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

or for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without sidecar being attached where the vehicle is a motorcycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving license during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in subsection (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in subsection (1), as if the judgment were given by a Court of India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in subsection (2).

(4)

(5)

(6)

(7) No insurer to whom the notice referred to in subsection (2) or subsection (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in subsection (1) or in such judgment as is referred to in subsection (3) otherwise than in the manner provided for in subsection (2) or in the corresponding law of the reciprocating country, as the case may be."

8. Section 170 of the Act deals with impleading insurer in certain cases and Section 173 provides provisions for appeal by any person aggrieved by an award of a claims tribunal, which reads 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 reason 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 subsection (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.

173. Appeals.(1) Subject to the provisions of subsection (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court, unless he has deposited with it twenty five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court:

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2)No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."

9. From mere reading of provisions of Section 149 (1) of the Act, it is clear that if after a certificate of Insurance has been issued under subsection (3) of Section 147 in favour of person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of subsection (1) of Section 147 (being a liability covered by terms of

policy or under the provisions of Section 163A) is obtained against any person insured by the policy, the insurer shall subject to provisions of Section 149 pay to the person entitled to the benefit of decree any sum not exceeding the sum assured payable thereunder as if he was the judgment debtor in respect of the liability together with any amount payable in respect of cost and any sum payable in respect of interest. However, subsection (2) of Section 149 provides that no sum shall be payable by the insurer under subsection (1) in respect of any judgment or award unless before the commencement of proceeding in which the judgment or award is given the insurer had notice through the court or as the case may be, the tribunal of bringing of proceeding and an insurer to whom notice of bringing of any such proceeding is so given shall be entitled to be made a party thereto and to defend the action on any of the grounds namely breach of a specified condition of the policy of insurance. It implies that the insurer is not entitled to contest the claim set up by victim or legal heirs of deceased of motor accident except the grounds enumerated in subsection (2) of Section 149 of the Act. The insurer is not allowed to contest the claim of injured or heirs of the deceased of motor accident on that ground which is available to insured or breach of any other conditions of policy which do not find place in subsection (2) of Section 149 of the Act.

10. The aforesaid view is also fortified by provisions of subsection (7) of Section 149 of the Act which clearly indicates the manner in which the provisions of subsection (2) of Section 149 has to be interpreted, which provides that no insurer to whom the notices referred to in subsection (2) or subsection (3) has been given, shall be entitled to avoid the liability to any person entitled to the benefit of any such judgment or award as is referred to in subsection (1) or in such judgement as is referred to in subsection (3) otherwise than in the manner provided for in subsection (2). The expression "manner" employed in subsection (7) of Section 149 of the Act is very significant, which means an insurer can avoid its liability only in accordance with what has been provided for in subsection (2) of Section 149. It therefore, follows that an insurer can avoid its liability only on the statutory defences expressly provided in subsection (2) of Section 149 of the Act and insurer cannot avoid its liability on any other grounds except those mentioned in subsection (2) of Section 149 of the Act. It is also significant to mention that while enacting the provisions of subsection (2) of Section 149 of the Act the Parliament has specified only some of the defences which are based on breach of some specified conditions of the policy and therefore, breach of any other conditions of policy by the insured which does not find place in subsection (2) of Section 149 cannot be taken as defence by the insurer. If the Parliament had intended to include the breach of other conditions of policy as defence, it could have easily included breach of any other conditions of insurance policy also in subsection (2) of Section 149 or provisions would have been enacted otherwise to include breach of such other conditions of insurance policy.

11. The view taken hereinbefore also finds support from the decision of Hon''ble

Apex Court rendered in National Insurance Company Ltd. Vs. Nicolletta Rohtagi and others AIR 2002 SC 3350, wherein in paras 14, 15 and 16 of the decision it was held that " If we permit the insurer to take any other defence other than those specified in subsection (2) of Section 149 of the Act, it would mean we are adding more defences to insurer in the statute, which is neither found in the Act nor was intended to be included. For that reason the statutory defences available to the insurer to contest a claim are confined to what are provided in subsection 2 of Section 149 of the Act and not more and for that reason, if an insurer is to file an appeal, the challenge in appeal would confine to only those grounds."

12. Now coming to the provisions of Section 170 of the Act, which provides that in course of an inquiry of a claim if the tribunal is satisfied that there is a collusion between the claimant and person against whom the claim is made/the insured or person against whom the claim is made has failed to contest the claim, the tribunal for the reasons to be recorded in writing direct that the insurer who may be liable in respect of such claim shall be impleaded as party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in subsection (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 is made. Thus from a joint reading of the provisions of Sections 149 and 170 of the Act, it is clear that insurer has no right to contest the claim of injured or heirs of deceased of motor accident on the grounds which are available to the owner and driver of the motor vehicle except the grounds/defences available to it under Section 149 (2) of the Act, but where the tribunal is of the view that there is collusion between the claimant and the insured or the insured does not contest the claim the insurer shall be made party and on such impleadment the insurer shall have all the defences available to it, which are available to the insurer as well as owner/insured of the motor vehicle, in such situation the defences of the insurer shall not be confined to the grounds enumerated under Section 149 (2) of the Act alone.

13. Then comes the provisions of Section 173 of the Act which provides for an appeal against the award given by the tribunal. Under Section 173 any person aggrieved by an award is entitled to prefer an appeal to the High Court. Now question arises for consideration as to when the insurer would be held to be "aggrieved person" so as to enable him to challenge the award of the Claims Tribunal in appeal before the High Court under Section 173 of the Act. This question has been incidentally under consideration before the Hon"ble Apex Court in Chinnama George and others Vs. N.K. Raju and another AIR 2000 SC 1565, wherein it was held that if none of the conditions as contained in subsection (2) of Section 149 exists for the insurer to avoid the liability, the insurer is legally bound to satisfy the award and the insurer cannot be "a person aggrieved" by the award. In such a case, the insurer will be barred from filing an appeal against the award of the Tribunal. It was also held that the insurer cannot maintain a joint appeal along with the owner or driver if defence of any ground under Section 149(2) is not available to it.

14. Now further question arises for consideration as to whether an insurer is entitled to file an appeal on the grounds available to the insured when there is collusion between the claimants and insured or when insured has not filed an appeal before the High Court questioning the quantum of compensation. The consistent view of the Apex Court is that the insurer has no right to file an appeal to challenge the quantum of compensation or finding of Tribunal as regards the negligence or contributory negligence of offending vehicle. In *Shankarayya and another v. United India Insurance Co. Ltd. and another*, 1998 (3) SCC 140 = AIR 1998 SC 2968 it was held that an insurance company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent 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 which should be a reasoned order by the Tribunal. Unless this procedure is followed, the insurance company cannot have a wider defence on merits than what is available to it by way of statutory defences. In absence of the existence of the conditions precedent mentioned in Section 170, the insurance company is not entitled to file an appeal on merits questioning the quantum of compensation.

15. In *Rita Devi (Smt.) v. New India Assurance Co. Ltd.*, 2000 (5) SCC 113 = AIR 2000 SC 1930 it was held that the insurer having not obtained permission under Section 170 of 1988 Act, is not entitled to prefer any appeal to the High Court against the award given by the Tribunal on merits.

16. However, in *United India Insurance Co. Ltd. v. Bhushan Sachdeva*, 2002 (2) SCC 265 = AIR 2002 SC 662 it was held that where the insured fails to file an appeal to the High Court against the quantum of compensation awarded by the Tribunal, the insurer is entitled to file an appeal as the insured has failed to contest the claim and in that view of the matter, the insurer could be a person aggrieved. But in *National Insurance Company Ltd. Vs. Nicolletta Rohtagi and others* case (supra) the aforesaid decision of Hon"ble Apex Court has been overruled by larger Bench of Hon"ble Apex Court.

17. The pertinent observations made by Hon"ble Apex Court in paras 25, 26 and 27 of decision in *Nicolletta Rohtagi's* case are extracted as under:

"25. We have earlier noticed that motor vehicle accident claim is a tortious claim directed against tortfeasors who are the insured and the driver of the vehicle and the insurer comes to the scene as a result of statutory liability created under the Motor Vehicles Act. The legislature 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 precedent specified in Section 170 is satisfied.

26. 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. Thus where conditions precedent embodied in Section 170 is satisfied and 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. Sections 149, 170 and 173 are part of one Scheme and if we give any different interpretation to Section 173 of the 1988 Act, the same would go contrary to the scheme and object of the Act.

27. 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 has not filed any appeal. Section 149(2) of 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 other plea other than those provided in Section 149(2) of 1988 Act. The view taken in *United India Insurance Co. Ltd. v. Bhushan Sachdeva*, (supra) that a right to contest would also include the right to file an appeal is contrary to well established law that creation of a right to appeal is an act which requires legislative authority and no Court or tribunal can confer such right, it being one of limitation or extension of jurisdiction."

18. Thus, in view of aforesaid legal position it is clear that unless the conditions precedent embodied in Section 170 are satisfied and award is adverse to the interest of the insurer, the insurer has no right to file an appeal challenging the quantum of compensation or findings of tribunal as regards to negligence or contributory negligence of offending vehicle even if the insured has not filed any appeal against the quantum of compensation. Otherwise the insurer's appeal has to be confined only on those grounds which are enumerated under Section 149 (2) of the Act. It is only where the permission under Section 170 of the Act is granted, the insurer can contest the claim set up by injured or heirs of deceased of motor accident on the grounds available to the insured/ owner of the offending vehicle and insurer both and can also prefer appeal on

such grounds, otherwise it is not open for him to enlarge the grounds of appeal merely because of the reason that the insured has not filed any appeal against the award of Claims Tribunal before the High Court.

19. It is no doubt true that though the questions dealt with herein before are not necessarily and directly involved for disposal of the case in hand yet they have certainly some legal impact and implication upon the question in controversy involved in the case but before coming to the questions involved in the case, it is essential to consider another question as to whether existence of either of two conditions enumerated in Section 170 of the Act would make the insurer ipso facto/automatically entitle to take the defences available to the insured or against whom the claim is made or it would require any formal order of the Claims Tribunal? In this connection it is necessary to point out that from a plain reading of Section 170 of the Act it is clear that where in the course of any inquiry the Claims Tribunal is satisfied that: (a) there is collusion between the person making the claim and 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 the reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in subsection(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.

20. Thus, from the aforesaid provisions of Section 170 of the Act it is clear that the right of insurer to contest the claim on merit setup by victim/heirs of deceased of motor accident is no doubt dependant upon the existence of either of the two conditions indicated therein, and it is essential element for the satisfaction of claims tribunal for directing the insurer to be impleaded as necessary party but the existence of either of the two conditions does not ipso facto entitle the insurer to contest the claim on merit. It is only on such impleadment, the insurer would be entitled to contest the claim on the grounds available to the insurer and insured both but in my opinion, on existence of either of aforesaid two conditions it is obligatory upon the claims tribunal to direct that the insurer shall be impleaded as a party in the claim petition. The expression "may" used in the phrase "It "may" for reason to be recorded in writing, direct that insurer shall be impleaded as a party to the proceeding" should be treated to be mandatory provision and should be read as "shall" and not merely as a directory provision so as to leave any discretion to the claims tribunal to implead insurer as a party or not in the claim petition. The imperative effect of the expression "may" is also fortified by the phrase "the insurer shall be impleaded as a party". Therefore, on existence of either of the two conditions enumerated in Section 170 of the Act, the claims tribunal is bound to direct the insurer to be impleaded as a party in claim petition to contest the claim on merits also, besides, the statutory defences available to it under Section 149 (2) of the Act. But unless formal order is passed by claims tribunal by

following the procedure prescribed under Section 170 of the Act as indicated in the cases referred hereinbefore granting permission to the insurer to contest the claim on merit, it is not open for the insurer to contest the claims setup by the injured/victim/heirs of deceased of motor accident on merits merely because claimant has already impleaded the insurer as necessary party in the claim petition.

21. It is also necessary to make it clear that impleadment of the insurer as party in claim petition under Section 170 of the Act should not be confused with the impleadment of insurer as party under Section 149 (2) of the said Act. The impleadment of insurer in a claim petition under Section 149(2) of the Act is made only for limited purpose and meant to enable the insurer to contest the claim on the grounds available to the insurer under said section, whereas the impleadment of insurer as party in the claim petition under Section 170 of the Act enlarges his right to contest the claim petition on merits also besides the defences available to the insurer under Section 149(2) of the said Act. Virtually the impleadment of insurer under Section 170 of the Act is grant of permission by the Claims Tribunal to the insurer to contest the claim petition on merits. Therefore, the expression "impleadment" of insurer as party in the claim petition employed under both the sections should be understood in context of which it has been used in respective sections.

22. So far as the necessity of recording the reasons by the claims tribunal is concerned, in Shankarayya's case (supra) it was held that an Insurance Company can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in Section 170 of the Act are found to be satisfied and for that purpose Insurance Company has to obtain an order in writing from the tribunal and which should be a reasoned order by the tribunal. However, in a subsequent decision rendered in United India Insurance Co. Ltd. v. Jyotsnaben Sudhirbhai Patel and others AIR 2003 SC 3127, the Hon'ble Apex Court held that failure to record the reasons by tribunal while allowing the application of Insurance company under Section 170 of the Act is not fatal for the reason that Insurance company was not found to be prejudiced on account of omission to record reasons by claims tribunal while permitting the insurer to contest the claim on merits. In the said case ownercumdriver did not file written statement in claim petition and has failed to contest the case. The claims tribunal allowed the application of insurer under Section 170 of the Act holding that permission is granted as prayed for. Therefore, in my opinion, from the aforesaid decision it follows that while allowing the application of Insurance company for grant of permission to contest the claim on merit under Section 170 of the Act it is not essential for the claims tribunal to record reasons therefor, for the reasons that it would not be prejudicial to the interest of insurer despite clear mandate of Section 170 of the Act for recording the reasons. However, the tribunal is certainly bound to record the reasons in case the application of Insurance company/insurer under Section 170 of the Act is to be rejected by the tribunal because of the simple reason that in such eventuality order of the claims tribunal

would adversely affect the interest of insurer.

23. Now next question arises for consideration as to whether if the owner has filed his written statement or has examined some witnesses or cross-examined some witnesses, can it be said that he is contesting the claim? In this connection it is necessary to point out that the existence of element of the collusion between the claimants and the person against whom the claim is made and failure of person to contest the claim against whom the claim is made depends upon the facts and circumstances of each individual case, and can be found out by the claims tribunal on the basis of material available on record and from the attending circumstances during the course of inquiry in claim petition. Therefore, no formula can be prescribed in this regard.

24. However, in *Darshan Singh Vs. Rampal Singh and another*, 1992 Supp (1) SCC 191, Hon''ble Apex Court has occasion to consider the content/import and meaning of expression "contest" in para 34 of the decision as under:

"34. The meaning of the word "contest" is, according to Black's Law Dictionary, to make defence to an adverse claim in a court of law; to oppose, resist or dispute; to strive to win or hold; to controvert, litigate, call in question, challenge, to defend. The contest continues right up to the final decision or, in other words the right to contest comes to an end only when a final decision is given one way or the other putting an end to the litigation between the parties with regard to the alienation. It is well settled proposition of law that appeal is a continuation of suit and any change in law, which has taken place between the date of decree and the decision of the appeal, has to be taken into consideration. When a suit filed by the reversioner is dismissed and he files an appeal before the appellate Court also he is contesting the alienation. If he does not contest the alienation, then he cannot achieve success. Therefore, when the axe has fallen before the contest was over, let the axe lie where it falls."

25. A Division Bench of this Court in *National Insurance Company Ltd. Vs. Smt. Jairani and others* 2009 (1) ADJ 209, while placing reliance upon the aforesaid decision of Hon''ble Apex Court in para 16 of the decision has held as under:

"16. The contest of the claim on merits by the owner must be such as if he is trying to defeat the claim and is making every possible effort to win the case. The contest should be real and merely filing of written statement or leading some oral and documentary evidence or cross-examination of some witnesses, would not be sufficient. The tribunal must come to a definite conclusion that the owner of the vehicle is making every possible effort to succeed in getting the claim petition dismissed. Only then the application of the insurance company under Section 170 of the Act can be rejected. In absence of finding by the tribunal about genuineness of contest by the owner supported by cogent reasons the application under Section 170 of the Act filed by the insurance company should not be rejected."

26. Not only this but same view has also been taken by Hon''ble Single Judge of

Kerala High Court in Oriental Insurance Co. Ltd. Vs. Narayanan Nair and others (supra).

17. In view of the legal position stated hereinbefore, there can be no scope for doubt to hold that contest of claim should be genuine and effective and it should not be a mere eyewash as contended by the learned counsel for the petitioner. In my opinion, mere filing of written statement or examining some witnesses by the owner of the offending motor vehicle should not be treated to be sufficient for genuine and effective contest of the claim, unless claims tribunal comes to a definite conclusion with cogent reasons therefor in writing in this regard on the basis of materials on records and from the other attending circumstances during the course of inquiry of a claim.

28. In this connection, I may refer as illustration that where the owner and driver of the offending motor vehicle in their written statements admit all material contention of the claimant merely by saying that the offending vehicle was insured and driver had valid driving license and vehicle was not used in breach of conditions of insurance policy at the time of accident without contesting the claim on merits, like on the question of negligence or contributory negligence and quantum of compensation claimed in the petition or even after filing of written statement, he has taken defence in claim petition merely for shifting his liability upon the insurer/indemnifier and has adduced the oral and documentary evidences only for his limited purposes and no serious attempt has been made to defeat the claim of claimants on merit, by adducing relevant evidence on record, in such a situation it can be easily inferred that the owner has failed to contest the claim on merits and the application of insurer under Section 170 of the Act should be easily allowed by the claims tribunal.

29. Similarly where claims tribunal allowed the insurer to cross examine the witness of claimants and also allowed to adduce the defence evidences on merits, though unconsciously without passing any order upon the application of insurer under Section 170 of the Act as shown in instant case, in such situation it can be assumed that claims tribunal has impliedly allowed the insurer to contest the claim on merits as contended by the learned counsel for the petitioner but in my considered opinion that can not be held to be correct legal position in the wake of clear mandate of Section 170 of the Act, which requires that claims tribunal shall pass formal order in writing with cogent reasons therefor. However, these circumstances are merely illustrative in nature and cannot be held to be exhaustive under which claims tribunal should grant permission to the insurer under Section 170 of the Act to contest the claim on merit. There may be varieties of situations under which the tribunal has to reach a definite conclusion while deciding the application of insurer under Section 170 of the Act, therefore, before rejecting the application of insurer, the claims tribunal has to examine all the relevant and possible aspects of the matter and only then, if it is found that owner is genuinely and effectively contesting the claim, in that situation alone the application of insurer can be rejected by the claims tribunal with cogent

reasons, otherwise since the insurer is ultimately liable to make payment of compensation to the claimants of the motor accident, therefore, the application of insurer should not be lightly rejected without any cogent reasons therefor.

30. Now coming to the facts of the case and from perusal of the impugned order dated 07.02.2009 it is clear that the tribunal has rejected the application of the petitioner/insurer moved under Section 170 of the Act, merely for the reason that the owner of the offending vehicle has filed written statement in the claim petition without examining the other relevant aspects of the matter as indicated hereinbefore and without recording any reasons for rejection of the said application, therefore, in my opinion, the impugned order passed by the tribunal cannot be sustained and the same is accordingly hereby quashed. The tribunal is directed to reconsider the matter afresh and pass appropriate order on the said application of the petitioner after examining all the relevant aspects of the matter as indicated hereinbefore and only then proceed further with the claim petition on the basis of fresh decision taken on the application of petitioner.

31. Before parting with the case, it is necessary to mention that experiences have shown that the tribunals dealing with the claim petitions under the Act are either not deciding the application of insurer/insurance company moved under Section 170 of the Act or they are rejecting the said application without proper application of mind upon all the relevant aspects of the matter for disposal of such application as indicated hereinbefore. In such situation, it would be appropriate that the Registrar General of this Court shall communicate this order to all the District Judges of subordinate judiciary of this Court forthwith, who shall thereupon communicate the same to all the claims tribunal dealing with motor accident claim cases indicating therein that they should take guidance from the order passed by this Court while coming across with such application under Section 170 of the Act.

32. With the aforesaid observations and direction, writ petition succeeds and stands allowed.