

(2001) 03 OHC CK 0032
In the Orissa High Court
Case No : Misc. Appeal No. 521 of 1997

The New India Assurance Co. Ltd.

APPELLANT

Vs

Surendra Chandra Nayak and others

RESPONDENT

Date of Decision : 20-03-2001

Acts Referred:

Motor Vehicles Act, 1939 — Section 110, 96(2)
Motor Vehicles Act, 1988 — Section 149(2), 170

Citation : (2002) 2 ACC 282 : (2002) 1 ACC 461 : (2002) ACJ 461 : (2001) 91 CLT 630

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : M/s Ashwini Kumar Mishra 2, S.K. Bal and G.P. Gupta, for the Appellant; Mr. M.S. Panda, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanty, J.—The appellant, Insurance Company in this appeal has challenged the award of the Second Motor Accident Claims Tribunal, Cuttack allowing compensation of Rs. 2,00,000/- in favour of the claimant - respondent Nos, 1 to 5 on merits and quantum.

2. Shri M. S. Panda, learned counsel appearing for the claimant - respondents has raised the question of maintainability of the appeal on merits at the instance of the Insurance Company in absence of the order of the Tribunal u/s 170 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act", in short) to contest the award on merits. It is his submission that the appellant, Insurance Company having not moved the learned Tribunal u/s 170 of the Act for contesting the proceeding, it cannot challenge the award on merits only because it was impleaded as a party to the claim proceeding for effective and early disposal of the same. It is contended that the insurer can challenge the award only on the ground as are available to it under sub-section (2) of section 149 of the Act. In support of his contentions, Sri Panda has placed reliance on the Full

Bench decision of this Court in National Insurance Co. Vs. Magikhaia Das (After him) Mst. Laxmi Dibya and Others, the decision in Divisional Manager, United India Insurance Co. Ltd. Vs. Smt. Labanga Sahu and Others, The Divisional Manager, New India Assurance Company Ltd. v. Sulochana Jena and others : 87 (1999) CLT 831 and the decision of the Apex Court in Shankarayya and another v. United India Insurance Co, Ltd. : AIR 1958 SC 2968. Learned counsel for the appellant however submits that since the appellant - insurer was a party to the proceeding before the Tribunal and had contested the case and that the owner of the offending vehicle did not contest the case, it is entitled to contest the case on merits. Learned counsel has placed reliance on a decision of this Court in United India Insurance Co. Ltd. v. Sarat Kumar Sahoo and another : 1995 A. C 1120.

3. In order to appreciate the submissions of the learned counsel for the parties, the relevant provisions of the statute may be considered, section 170 of the Act reads thus :

"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.

4. On a reading of the aforesaid provision. It is clear that insurer when impleaded as a party by the Tribunal can be permitted to contest the proceeding on merits only if the conditions precedent are satisfied and for that purpose, the Insurance company is required to obtain an order in writing from the Tribunal. However, in absence of any such permission or order, the Insurance Company can always defend the action in any of the grounds as stipulated in sub-section (2) of section 149 of the Act. Section 149(2) may be quoted hereunder :

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party

(1) xx xx xx

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any 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 in 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

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

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons who has been disqualified for holding or obtaining a driving licence 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 non-disclosure of a material fact or by a representation of fact which was false in some material particular."

5. In *National Insurance Co. (supra)*, the Full Bench of this Court while considering such a question under the 1939 Act held that under the statutory provision as contemplated u/s 96(2) of the Motor Vehicles Act, 1939 (which is similar to sub section (2) of section 149 of the Act) the insurer who has been made a party to the proceeding for recovery of compensation can resist the claim only on those grounds mentioned in sub-section (2) of section 96 and it is not open to it to raise any other plea. The power u/s 110-C (2-A) can be exercised even when the insured has entered contest and, while giving an appearance of contest is actually colluding with the claimant. But where the insured had entered contest and there is allegation of collusion and the insured and insurer simultaneously want to defend, the clause in the policy bond authorising the insurer to defend in the name of the insured cannot provide shelter to the insurer. In the other decisions referred to by the learned counsel for the appellant more or less this Court has taken a similar view.

6. In *Shankarayya's case (supra)* the Apex Court has taken a view that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceeding 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 inasmuch as the orders should be

a reasoned one by the Tribunal. It has been further held that unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. Even when the claimants themselves impleaded the Insurance Company in the claim petition and it participated in the claim proceeding, it cannot be construed as an order of the Tribunal permitting the Insurance Company to avail of a larger defence on merits. Learned counsel for the appellant has only relied on a decision of this Court in *United India Insurance Co. Ltd. v. Sarat Kumar Sahoo and another* : 1995 A. C. 5- 1120 in support of his contention that where there is allegation of collusion between the insured and the claimant and the Insurance Company is a party to the proceeding even otherwise than as contemplated u/s 170 of the Act, it can challenge the award on merits by filing an appeal. The contention of the learned counsel for the appellant has to be rejected outright, in view of the pronouncement of this Court and of the Apex Court in the aforesaid decisions inasmuch as the decision in the aforesaid *United India Insurance Co. Ltd. Vs. Sarat Kumar Sahoo and Another*, has to be viewed as impliedly overruled.

7. In the case at hand, it is not in dispute that the Insurance Company was impleaded by the claimants as a party for effective and early adjudication and payment of compensation. Admittedly, the Insurance Company has not taken recourse to any filing of application u/s 170 of the Act for getting the order or right to contest the proceeding on merits. There is no order permitting the appellant Insurance Company to be impleaded as a party to the proceeding or an order that the insurer shall without prejudice to the provisions contained in subsection (2) of section 149 of the Act shall obtain a right to contest the claim on all available grounds, as are available to a person against whom claim has been made.

8. In that view of the matter, the present case is squarely covered by the latest decision of the Apex Court in *Shankarayya's* case (supra) and it is to be held that the present appeal at the instance of the insurer is not maintainable in absence of the order of the Tribunal as contemplated u/s 170 of the Act. Thus, this appeal having been held to be not maintainable at the instance of the appellant-Insurance Company on merits, it is dismissed on that count alone. No costs.

9. Appeal dismissed.