
(1999) 08 MP CK 0057

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 1138 of 1999

United India Insurance Co. Ltd.

APPELLANT

Vs

Ramdas Patil and Others

RESPONDENT

Date of Decision : 09-08-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Constitution of India, 1950 — Article 227

Motor Vehicles Act, 1988 — Section 149, 149(2), 163A, 168, 170

Citation : (2000) ACJ 275 : AIR 2000 MP 63 : (2000) 1 JLJ 255 : (2000) 2 MPHT 278 : (2000) 1 MPLJ 442

Hon'ble Judges : Usha Shukla, J; D.M. Dharmadhikari, J

Bench : Division Bench

Advocate : N.S. Ruprah, for the Appellant; Kishore Shrivastava, for the Respondent

Final Decision : Dismissed

Judgement

D.M. Dharmadhikari, J.

This appeal is by the Insurance Company against the award dated 5-3-1999 of the Claims Tribunal, Durg, awarding a sum of Rs. 4,42,000/-with 12% Interest, as compensation for the death of Sanjay Patil who was found to be 28 years of age on the date of motor accident which took place on 19-5-1996.

On the question of maintainability of the appeal by the Insurance Company on the 2000 M. P./5 III G-39 grounds of quantum and alleged contributory negligence of the other vehicle which collided with the vehicle in which the deceased was travelling, learned counsel sought permission of this Court to address the Court generally on the question as to under what circumstances the Insurance Company can be allowed to appeal against the award of the Claims Tribunal. Since the question of maintainability of the appeal arose in number of other cases filed by the Insurance Company, such as; M.A. 1143/ 99, 520/99, 1139/99. 363/97, 913/98 and M.A. 1195/95, this Court allowed all the counsel

appearing for the Insurance Companies in all the above mentioned cases to address this Court in the question of maintainability of the appeal by the insurer alone. We are thankful that on our request Shri Alok Aradhe, Shri Sanjay K. Agarwal, and Shri Kishore Shri vastava, Advocates addressed this Court on the legal question, as amicus curiae.

On behalf of the counsel appearing in different cases for the Insurance Company, the contentions mainly advanced are that the insurer should not be denied opportunity of appeal in cases where the compensation awarded by the Claims Tribunal is shockingly excessive and disproportionate to the age and income of the deceased or injured person. It is submitted that there are larger number of Instances in claim cases where the claimants and insured join hands in the course of proceedings to obtain exorbitant awards against the Insurance Company and in such cases fraud or collusion are discovered only after passing of the award.

In one of the cases in which the compensation was awarded on no fault liability under the amended provision of Section 163A with computation provided in second Schedule of the Act, the contention advanced on behalf of the Insurance Company is that where the provisions of the Schedule indicating the manner of computation of compensation are disregarded, the Insurer should have an opportunity of preferring an appeal on the ground that the quantum of compensation determined in a claim u/s 163A is not in accordance with the second Schedule of the Act.

In some of the cases, as in the present one, it is submitted that the accident took place due to collision of the Tempo in which the deceased was travelling with the truck coming from opposite direction. The owner and the driver of the offending truck were not make parties to the claim petition and the entire liability has been fastened on the insurer of the Tempo. It is submitted that in such cases the Insurance Company should be allowed to urge that there was contributory negligence on that part of the driver of the other vehicle i.e. the truck and by impleading the owner, driver and insurer of the Truck finding of contributory negligence should have been reached so that liability proportionate to the extent of negligence on the part of driver of the Truck could have been imposed on the insurer and owner and driver of the truck.

Learned counsel appearing in this case submitted that in the policy of Insurance Company, the insurer has reserved a right to take defenses for and on behalf of the insured and. therefore, this Court should allow the Insurance Company as insurer of the vehicle Tempo to raise grounds of contributory negligence and consequent thereupon to challenge quantum of compensation awarded against the insurer.

We have also heard the other counsel appearing for the Insurance Company in the batch of cases mentioned above and the learned Advocates who appeared as amicus curiae.

After hearing the counsel and considering several views projected by them on behalf of several parties interested in the claim cases we have formulated certain question to be answered for deciding the scope of right for appeal of an insurer of vehicle. Before discussing and answering the questions formulated as mentioned in the subsequent paragraphs, it is necessary to examine the relevant provisions of Section 149(2) and Section 170 of the Act of 1988 (analogous to Section 96(2) and Section 110-C(2) of the Act of 1939). The relevant section reads as under :

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

(1)

(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 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 :-

(1) 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 or by any person who is not duly licensed, or by a 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 non-disclosure of a material fact or by a representation of fact which was false in some material particular."

"S. 170 Impleading insurer in certain 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 provision 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."

We propose to deal with each one of the questions framed by us which contemplates different eventualities in which a right of appeal may be claimed by Insurance Company alone.

QUESTION No. 1 -Whether the insurer can prefer an appeal on the ground of quantum of compensation awarded ?

So far as question No. 1 is concerned, it is concluded against the Insurance Company by decision of Supreme Court as back as of the year 1959 in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, . While dealing with almost identical provisions contained in Section 92(2)(6) of the Motor Vehicles Act, 1939 (analogous to Section 149(2)(7)) it was observed as under :-

"5. To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore, is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that sub-section (2) makes available to an insurer ? That clearly is a question of interpretation of the subsection."

"6. Now the language of sub-section (2) seems to us to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action has been given "shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified they cannot be added to. To do that would be adding words to the statute."

"7. Sub-section (6) also indicates clearly how sub-section (2) should be read, It says that no insurer to whom the notice of the action has been given shall be entitled to avoid his liability under sub-section (1) "otherwise than in the manner provided for in sub-section (2)". Now the only manner of avoiding liability

provided for in sub-section (2) is by successfully raising any of the defences therein mentioned. It comes then to this that the insurer cannot avoid his liability except by establishing such defences. Therefore sub-section (6) clearly contemplates that he cannot take any defence not mentioned in sub-section (2). If he could, then he would have been in a position to avoid his liability in a manner other than that provided for in sub-section (2). That is prohibited by sub-section (6)."

"8. We therefore think that sub-section (2) clearly provides that an insurer made a defendant to the action is not entitled to take any defence which is not specified in it."

A Division Bench of this Court in the case of United India Insurance Co. Ltd. v. Pratibha Rathi 1995 Acc CJ 819 : (1995 AIHC 3377) relying on the aforesaid decision on the question of right of appeal available to the Insurance Company held as under:-

"11. It is true that Section 96(2) and Section 110-C(2-A) in terms do not refer to the appellate stage. That does not mean that the insurer can be by filing an appeal or contesting an appeal raise contentions which are foreign to the scope of Section 96 (2) and which have not been attempted to be invoked before the Tribunal u/s 110-C(2-A) or in respect of which the insurer had not make reservation in the policy or had not invoked the reservation before the Tribunal. An appeal is continuation of the original proceedings. Statutory restrictions imposed on a party in raising defences before the Tribunal will lose all efficacy if those restrictions are to be confined to the original proceedings and not to the stage of an appeal which is only the continuation of original proceedings. If a party has a right to raise a particular contention before the original forum, that right must subsist in the appellate forum also. If a party is statutorily prevented from raising a particular contention in the original forum that disability will operate at the appellate stage also. There is no provision in the Act which expressly or by necessary Implication confines the restrictions of Section 96(2) only to the forum of the Tribunal in the circumstances, it must follow that the restrictions contained in Section 96(2) will apply in the appellate forum also."

Without making reference to the earliest decision of the Supreme Court in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, , the Supreme Court in the case of Narendra Kumar and Another Vs. Yarenissa and Others, in considering the question of maintainability of joint appeal against the award of the Claims Tribunal by the insurer and the insured has construed the provisions of Sections 110-D, 96(2) and 110-C(2-A) of the Act of 1939 (analogous to Section, 173, 149(2) and Section 170 of the Act of 1988). By resolving the cleavage of opinion expressed by different High Courts on the question of maintainability of Joint appeals by the Insurer and the insured, it was held that under the scheme of the provisions contained in the Act, the Policy of the Insurance is a contract of Indemnity and the Insurer is not a necessary party to the claim case. It has a right to be impleaded as a party only on being noticed

by the Tribunal and has a right to raise defences limited to the terms of the Policy. It has no right to raise any defences or grounds against the claim which fall outside the terms of the Policy. In construing the analogous provisions of 1939 Act, it is observed as under :-

"5. It is a different matter that claimants normally make the insurance company a party to the claim application. That by itself cannot confer a right of appeal on the insurer. The grounds on which the Insurer can defend the action commenced against the tortfeasors are limited and unless one or more of those grounds is/are available the insurance company is not and cannot be treated as a party to the proceedings. That is the reason why the Courts have consistently taken the view that insurance company has no right to prefer an appeal u/s 110-D of the Act unless it has been impleaded and allowed to defend on one or more of the grounds set out in sub-section (2) of Section 96 or in the situation envisaged by subsection (2-A) of Section 110-C of the Act. If then the insurer and the owner of the off ending vehicle file a joint appeal and if the Court comes to the conclusion that the insurer had no right to prefer an appeal u/s 110-D of the Act because none of the defences mentioned in sub-section (2) of Section 96 were available to him nor had a situation of the type envisaged by sub-section (2-A) of Section 110-C arisen, it cannot be permitted to file an appeal whether on its own or in association with one or more of the tortfeasors against whom the award is made which the insurer is liable to answer as if a Judgment-debtor."

The Supreme Court came to the conclusion that in case of a joint appeal preferred by the insured and the insurer If the appeal of the insurer is found to be incompetent because it has no defences available in terms of the Policy and there has been neither collusion nor fraud between the parties, for which the permission of the Tribunal was sought by the insurer to raise all defences, the appeal of the Insurer has to be dismissed, but the appeal of the insured will have to be decided on merits by deleting If necessary, the name of the insurer from the cause title of the appeal jointly preferred by them.

In view of the binding decisions of the Supreme Court in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, and Narendra Kumar (1998 Ace CJ 244) (supra) as also the Division Bench decision of this Court in the case of United India Insurance Co. Ltd. v. Pratlba Rathl (1995 AIHC 3377) (supra), it has to be held that the insurer has no right to prefer an appeal only on the quantum of compensation.

QUESTION No. 2 - Whether an appeal on quantum of compensation by the insurer can be entertained where the ground urged is that the compensation awarded by the Tribunal is shockingly excessive and disproportionate to the age and income of the victim ?

On behalf of the Insurance Company learned counsel appearing contends that there are several instances where the Claims Tribunal pass awards in heavy amounts against the principles laid down for determining compensation by this

Court and the Apex Court. It is submitted that instances are not wanting where regardless of the age of the dependants, a very high multiplier is applied by ignoring the age and income of the victim. It is argued that in such cases the Insurer should be allowed to have a remedy of appeal to get relieved of such burdensome awards.

We have given our thoughtful consideration to the above argument advanced on behalf of the Insurance Company. As we have found above, the provisions of the Act, as interpreted by this Court and the Apex Court, do not permit any right of appeal to the Insurer on quantum of compensation awarded. In cases where the Tribunal has passed shockingly excessive awards of compensation throwing all settled principles to the wind or the quantum of compensation awarded is arbitrary, in our considered opinion, the insurer is not without remedy. It can then instead of resorting to the remedy of appeal which is not available to him under the Act, invoke revisional jurisdiction of this Court u/s 115 of the CPC or its supervisory jurisdiction under Art. 227 of the Constitution.

This Court has held in a series of cases, one of such is reported in *Sarjubai v. Gurudip Singh* 1994 Ace CJ 997, that Tribunal constituted under the Motor Vehicles Act is a "Court Subordinate to the High Court" within the meaning of Section 115 of the CPC and is, therefore, amenable to revisional jurisdiction. The Constitutional power of this Court under Art. 227, of exercising superintendence over all subordinate Courts and Tribunals can also be invoked in cases where by awarding extremely high amount of compensation the Tribunal has acted arbitrarily in exercise of its jurisdiction.

QUESTION No. 3 - Whether right of appeal can be claimed by the Insurer when the claim is based u/s 163A of the Act of 1988 and determination of compensation is sought on the basis of structured formula contained in the second Schedule of the Act.?

Section 163A of the Act is a new provision which was not to be found in the original Act or the repealed Act of 1939. The provisions of Section 163A are distinguishable in its scope and content from Section 140. In accordance with Section 140 interim compensation can be claimed without proof of any negligence for the death or serious Injury. The fixed minimum interim compensation awarded u/s 140 of the Act on "no fault" merges in the final award to be made on the "fault liability" in accordance with Section 141 of the Act of 1988. Compared with it, Section 163A allows victim of the accident to approach the Tribunal for obtaining a final award of compensation based on a structured formula contained in the Second Schedule and such compensation may be claimed without the claimant being required to plead or establish that the injury or death was due to any wrongful act or neglect or default of the vehicle or vehicles concerned. For a proper appreciation Section 163A may be quoted as under :-

"S. 163A Special provisions as to payment of compensation on structured

formula basis -

(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or Instrument having the force of law, the owner of the motor vehicle or the authorised Insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs of the victim, as the case may be.

Explanation - For the purpose of this sub-section, "Permanent disability" shall have the same meaning, and extent as in the Workman's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1). the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or any other person.

(3) The Central Government may keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule".

The final compensation payable u/s 163A is different from the minimum prescribed compensation payable u/s 140. Although under both the above provisions proof of negligence for happening of the accident is not necessary. The Act gives an option to the claimant to obtain interim compensation u/s 140 being the minimum prescribed until adjudication of his claim for final award in which the interim compensation would get merged. The other option to the claimant is to obtain a final award of compensation on the basis of structured formula in the Second Schedule u/s 163A of the Act. The provisions contained u/s 163A quoted above in the underlined portion indicate that the compensation determined on the basis of structured formula contained in the Second Schedule is required to be paid by the "owner of the vehicle" or the "authorised insurer". It is thus clear that such compensation is payable without any contest on the question of negligence or quantum. The liability has to be satisfied by the owner and in case of vehicle being insured, by the insurer. Prima facie there does not appear any prohibition under any of the provisions of the Act for the Insurer which has to make the payment of the award u/s 163A of the Act to prefer appeal on the limited ground that in determining the amount of compensation, the computation made is not in accordance with the Second Schedule of the Act. For the purpose of challenging such an award as being not in accordance with the Second Schedule of the Act. the insurer which has to pay the amount in relation to the insured vehicle is definitely "an aggrieved person" within the meaning of Section 173 of the Act of 1988. The right of appeal to the insurer against an award u/s 163A on the above ground cannot be denied. Our conclusion, therefore, is that against the award passed u/s 163A, the insurer can avail remedy of appeal u/s 173 of the Act on the ground that the of compensation is not in accordance with the Second Schedule of the Act. We are supported in our above view by the

Division Bench decision of the Calcutta High Court in National Insurance Co. Ltd. v. Sandhya Rani Singla 1998 Ace CJ 543.

QUESTION No. 4 - Whether an insurer can have right of appeal on all grounds where it has reserved a right in the terms of the Insurance Policy to raise all defences for and on behalf of the insured ?

Learned counsel Shri Alok Aradhe appearing as amicus curiae in reply to the claim of Insurance Company of a right of appeal where a specific term reserved in the Insurance Policy allows it to raise all defences on behalf of the insured, contends that by an agreed term of the Policy the provisions of the Act cannot be allowed to be breached. It is contended that if the provisions of the Act provide only limited defence to the insurer, it cannot enlarge its right to take all defences on all grounds by reserving such a right through a term included in the policy.

So far as the above argument advanced by the amicus curiae is concerned, we find that the right of insurer to appeal on grounds based on a term reserved in the policy have been recognised by the Supreme Court and the Division Bench of this Court in the cases (supra). Incorporation in the Insurance Policy a term to enable the insurer to contest the claim for and on behalf of the insured, is not prohibited by any express or implied provision of the Act. Section 170 of the Act requiring the insurer to seek permission of the Tribunal to raise all defences on behalf of the insured in case of non-contest or in case of collusion between the insured and the claimant cannot be read as a provision restricting or in any manner curtailing the right of the insurer to reserve right of defences on all grounds on behalf of the insured in the terms of its policy. The Division Bench of this Court in the case of United India Insurance Co. Ltd. v. Pratibha Rathi 1995 Acc CJ 819 : (1995 AIHC 3377) relying on the decision of the Supreme Court in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, has recognised such a right to the insurer to raise all defences where a specific term in the policy permits it so. We would only like to add a rider that where the insurer has reserved such right in the terms of the policy to raise all defences on behalf of the Insured, it should exercise that right in the Tribunal effectively by taking a plea in its written statement, leading evidence, examining and cross-examining the witnesses. If such right to raise all defences on behalf of the Insured is not exercised by the insurer in the Claims Tribunal it cannot be allowed for the first time in the appeal to raise defences other than those permissible to it u/s 149 of the new Act (analogous to Sections 96(2) and 110-C(2-A) of the old Act, of 1939). We are supported in our conclusion by the decision of Supreme Court in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, and particularly the following observations therein: "16. The Statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and, therefore, to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the Insurer has the right

provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so. all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any. by providing for a right to defend the action in the name of the assured and this he has full liberty to do. Secondly, if he has been made to pay something which on the contract of the Policy he was not bound to pay, he can under the proviso to sub-section (33) and under subsection (4) recover it from the assured. It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries. The loss had to fall on someone and the statute has thought fit that it shall be borne by the insurer. That also seems to us to be equitable for the loss carrying on his business a business out of which he makes profit and he could so arrange his business that in the net result he would never suffer a loss. On the other hand, if the loss fell on the injured person, it would be due to no fault of his; it would have been a loss suffered by him arising out of an incident in the happening of which he had no hand at all."

See also the observations of Division Bench of this Court in the case of United India Insurance Co. Ltd. v. Pratibha Rathi 1995 Ace CJ 819 : (1995 1 All 3377) (para 7 of AIHC) :-

There can be only two ways of overcoming the restrictions imposed by Section 96 (2). The contract of insurance may stipulate that the insurer would be at liberty to raise defences on behalf of the insured. In such a case, the insurer can raise all defences which are available to the insured without reference to the restrictions in Section 96 (2). The restrictions will not apply because the defences are raised on behalf of the insured."

QUESTION No. 5 - Whether the Insurer can prefer appeal on discovery of fraud or collusion between the claimants and the insured after passing of the award?

On behalf of the Insurance Company it is urged that several false claim cases are instituted in the name of fictitious persons and sometime by impersonating the rightful claimants, awards are obtained from the . Tribunal by leading false evidence. Despite best efforts sometimes the fraud and collusion between the claimant, owner and driver of the vehicle involved do not come to light in the course of proceedings before the Tribunal and are discovered only after passing of the award. In such cases, the Insurance Company should not be denied a right of appeal.

As has been seen above to meet the eventualities of such fraud and collusion in the course of proceedings before the Tribunal, there is a specific provision contained in Section 170 of the Act permitting the insurer to seek permission of the Tribunal to contest the claim on all grounds. If such fraud or collusion is

discovered during the course of proceedings before the Tribunal, the remedy is provided to the Insurer u/s 170 of the Act itself. If such fraud or collusion is discovered after passing of the award and which could not be discovered with due diligence in the course of proceedings before the Tribunal, such a plea or ground can be urged before the Tribunal itself by invoking its inherent powers of review as an established Court or Tribunal conferred with powers of Civil Court u/s 169 of the Act. Learned single Judge of this Court had occasion to consider the question of inherent powers of review of the Claims Tribunal in the case of National Insurance Company Ltd., Jabalpur Vs. Lachhibai Urf Laxmibai and Others, . Examining the provisions of the Act and the Rules framed therein, the learned single Judge by relying on the decision of the Supreme Court in the case of Satnam Verma Vs. Union of India (UOI), and Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , held "that the Tribunal is endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties". In a case where review is sought on the ground of discovery of fraud and collusion, the Tribunal has inherent right to correct it ex debito justitiae to prevent the abuse of its process and such power to prevent abuse of its process is inherent in every Court and statutory Tribunal.

See the following observations of the Supreme Court in the case of Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., :-

"Since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court and also amounts to an abuse of the process of Court, the Courts have been held to have inherent power to set aside an order obtained by fraud practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order."

The decision in Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., was relied on by the Supreme Court in the case of Budhia Swain and Others Vs. Gopinath Deb and Others, and it was held that such a power to recall an order on the ground of discovery of fraud and collusion exists in every Tribunal and Court subject, of course, to the restriction that the Tribunal/Court has not to invoke such power of review where the order or judgment could be made subject of an appeal or revision but the same was not availed of. See the following observations in the case Budhia Swain (supra) :-

"8. In our opinion a tribunal or a Court may recall an order earlier made by it if,

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) . there exists fraud or collusion in obtaining the Judgment,

(iii) there has been a mistake of the Court prejudicing a party, or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had

not been served at all or had died and the estate was not represented.

The power to recall a judgment will not be exercised when the ground for reopening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.""

QUESTION NO. 5 :- Whether the insurer can urge a ground in appeal of contributory negligence in case of accident between two motor vehicles?

On behalf of the Insurance Company it is contended that where the accident took place because of the contributory negligence of the drivers of vehicles involved, the Insurer of one of the vehicles should be allowed to urge that liability proportionate to the extent of the negligence of the other vehicle be imposed on the owner, driver and insurer of that vehicle.

From the provisions quoted and discussed above, we have held that the defences of Insurance Company are limited to those mentioned in Section 149(2) of the Act. The defences available to Insured can be allowed to be urged by the insurer only if such right is reserved in the terms of the Insurance Policy or in the eventualities and with the permission of the Tribunal as provided in Section 170 of the Act. The plea of contributory negligence is in fact a plea based on law of tort, It is available only to the driver and owner of the vehicle or vehicles involved. Such a plea on behalf of the insured can be allowed to be urged only in accordance with Section 170 of the Act. Where such permission to raise plea of contributory negligence is neither reserved in the Policy nor sought and granted by the Tribunal u/s 170 of the Act, the Insurer cannot be allowed to urge that ground in appeal preferred by It alone. Our answer to such question, therefore, is that without recourse to the terms of the Policy or Section 170 of the Act before the Tribunal, the insurer has no right to appeal on the ground of contributory negligence.

Our answer to the questions formulated are, therefore, as under :-

QUESTIONS

ANSWERS

Q1. Whether the insurer can prefer an appeal on the ground of quantum of compensation awarded ?

The insurer can claim no such right of appeal unless it has reserved right in terms of Policy to raise all defences on behalf of the insured and has invoked such a right effectively In the Claims Tribunal by raising specific pleas and leading evidence. Such right of appeal on the question of quantum will also be available to the insurer If it has sought written permission u/S. 170 of the Act from the Tribunal in case of non-contest by the other parties to the claim on

fraud or collusion of the contesting parties.

Q2. Whether an appeal on quantum of compensation by the insurer can be entertained where the ground urged is that the compensation awarded by the Tribunal is shockingly excessive and disproportionate to the age and Income of the victim ?

The Insurer can claim no right of appeal under the Act. In such case it may invoke revisional Jurisdiction of this Court under S. 115 of CPC or supervisory Jurisdiction of this Court under Article 227 of the Constitution.

Q3. Whether right of appeal can be claimed by the insurer when the claim is based u/S. 163A of the Act of 1988 and determination of compensation is sought on the basis of structured formula contained in the second Schedule-of the Act ?

The insurer can have a right of appeal only on the ground that In awarding the compensation, the provisions contained in Second Schedule of the Act have not been correctly followed.

Q4. Whether an Insurer can have right of appeal on all grounds where it has reserved a right in the terms of the Insurance Policy to raise all defences for and on behalf of the insured ?

Where the right to raise all defences on behalf of the Insured has been reserved by the insurer in the Insurance Policy It will have a right of appeal only if such right reserved in the Policy was effectively exercised by the Insurer before the Tribunal by specific plea and leading evidence in that behalf. Where the Insurer has failed to Invoke its right reserved in the Policy, in the Tribunal. it cannot be allowed, for the first time, to Invoke such right in appeal.

Q5. Whether the insurer can prefer an appeal on discovery of fraud or collusion between the claimants and the insured after passing of the award ?

In such case the Tribunal has inherent right of review to prevent abuse of its process and the Tribunal itself can be approached for review.

Q6. Whether the insurer can urge a ground in appeal of contributory negligence in case of accident between two or more Motor vehicles ?

Our answer to said question is the same as our answers to the questions No.1 and 4. Even the plea of contributory negligence and right of appeal is available to the insurer only if such right is reserved in the terms of the Insurance Policy to be raised for and on behalf of the insured, or in accordance with S. 170 of the Act, permission from the Tribunal is sought to raise such plea because of the non-contest and fraud or collusion between the parties. In all other eventualities It has no right to appeal on the ground of contributory negligence of the claimant or the driver of the other vehicle or vehicles Involved.

29A. Having thus answered the legal questions raised before us by the counsel appearing for the parties and with the assistance of the amicus curiae, we now

proceed to consider whether the Insurance Company should be allowed to prefer an appeal in this case. In the instant case the accident occurred because of collision between the Tempo in which the deceased was travelling, and another vehicle which was a Truck. The owner and driver were exparte in the Tribunal. From the contents of the award It does not appear that the Insurance Company Invoked any of its rights under the terms of the Policy or u/s 170 of the Act by seeking permission from the Tribunal in writing to take all defences for and on behalf of the insured.

The grounds urged in this appeal Inter alia are that the owner and driver of the Truck were necessary parties for proof of the alleged contributory negligence on the part of that vehicle and for apportioning the liability for compensation.

The other ground urged is that the compensation in the sum of Rs. 4,42,000/- awarded to the parents for death of their son Sanjay Patil who was employed as Electrician in a private industry and was aged 28 years, is excessive.

As has been held by us above, since the Insurance Company failed to seek permission from the Tribunal to contest the claim on all grounds, the Insurance Company cannot be allowed to prefer an appeal only on contributory negligence and quantum which are not the defences available to it under the provisions of the Act. This appeal, therefore, is not maintainable and is accordingly dismissed.