

(1998) 10 GUJ CK 0025
In the Gujarat High Court

Case No : Civil Application No 6231 of 1998 in First Appeal No 1493 of 1997,
Civil Application No.6234 of 1998 in First Appeal No. 3083 of 1997,
Civil Application No.6236 of 1998 in First Appeal No. 456 of 1997,
Civil Application No.6238 of 1998 in First Appeal No.

United India Insurance Co. Ltd.

APPELLANT

Vs

Sharifaben Razakbhai

RESPONDENT

Date of Decision : 09-10-1998

Acts Referred:

Gujarat Motor Vehicles Rules, 1989 — Order 41 Rule 27
Motor Vehicles Act, 1988 — Section 110C, 149(2), 165, 170, 173

Citation : (1998) 10 GUJ CK 0025

Hon'ble Judges : S.M. Soni, J;H.R. Shelat, J

Bench : Division Bench

Advocate : Darshan M Parikh, for the Appellant; Shakeel A Qureshi and U.I. Vyas, for the Respondent

Final Decision : Dismissed

Judgement

1. As all these applications raise common question of law and facts, they are disposed of by this common order and for the same, the learned Advocates have no objection.

2. We will refer to the facts of the first Civil Application no.6231/98 here in this order which is identical to the facts of all the other applications.

3. By this application, appellants-Insurance Company asks for a permission u/s 170 of the Motor Vehicles Act,1988 ("M.V. Act" for short) to contest the claim on its own on the grounds that the original owner, insurer and/or driver have not appeared before the Tribunal. Initially a practice prevailed before the Tribunal in the State of Gujarat of affording an opportunity to cross examine the witness and lead necessary evidence on all the defences inclusive of merits to the Insurance Company contended the learned Advocate, and also that permission u/s 170 of the M.V. Act was granted on oral request and to that extent there is a judgment

of the Division Bench in the case of Rupabhai Karsanbhai Iyer vs. United India Insurance Co.Ltd.in Civil Application no.1686 of 1992 in First Appeal no.411 of 1992. The Division Bench of this Court consisting of N.B. Patel & K.G.Shah, JJ. by its judgment and order of 30th April, 1992 granted the application of the Insurance Company filed on apprehension that they may be prevented to challenge the impugned award on all grounds holding that this is a case in which though permission was not formally asked for and was not formally granted, it was, for all practical purposes deemed to have been asked for and granted. The learned Judges thereafter considering Section 170 of the Motor Vehicles Act has held that permission can be said to have been impliedly asked for and can be said to have been impliedly granted on the ground of failure of the driver and the owner to contest the claim petition. Mr. Parikh, therefore, has contended that oral permission was sought and Insurance Company was permitted to cross-examine and contest the claim on all the defences including merits. However, now in view of the judgment in the case of Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, , it is necessary to file an application u/s 170 of the M.V. Act to obtain in writing necessary permission from the Tribunal and the same should be by a reasoned order of the Tribunal. In absence of that procedure being followed, the Insurance Company cannot have a wider defence on merits and the Supreme Court in Shankarayya's case has held that the Insurance Company was not entitled to file appeal on merits of the claim awarded by the Tribunal. As identical situation arises in the present appeals, the applicant-Insurance Company has filed an application u/s 170 of the M.V.Act in each case to permit them to contest the claim on merits. This application is given when the First Appeals are at the admission stage, and therefore, opponents-respondents are not available before the Court to assist the Court. However, their assistance can be dispensed with in the facts and circumstances and the position of law discussed hereinafter.

4. Section 170 of the Motor Vehicles Act 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 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 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."

5. Section 170 of the Motor Vehicles Act permits the Tribunal to implead the Insurance Company as a party opponent to contest the claim on all or any of the

grounds that are available to the person aggrieved against whom the claim has been made, if the Tribunal is satisfied that there is a collusion between the person making the claim and the person against whom the claim is made or the person against whom the claim is made has failed to contest the claim. On being so satisfied, permission may be granted to implead the Insurance Company as party by a reasoned speaking order. Simply because the Insurance Company is a party in view of the provisions of subsection (2) of Section 149 by itself does not entitle the Insurance Company to exercise right of an Insurance Company impleaded u/s 170. u/s 149(2), it is a statutory requirement to issue a notice either through the Court or by the Claims Tribunal before the commencement of the proceeding in which the Judgement or award that may be given. Insurance Company is party opponent in a claim petition under subsection (2) of Section 149, to indemnify the sum that may be awarded. But that by itself does not make the Insurance Company a party opponent to contest the claim even on defences other than one available u/s. 149(2) of the M.V.Act. Under subsection (2) of Section 149 of the M.V.Act, Insurance Company when given notice of the proceedings for the claim under the Motor Vehicles Act, then, they have right to defend the action on any of the grounds mentioned in clause (a) or (b) of subsection (2) of Section 149. They have no right to defend the claim on merits which they would have in case they are joined as party opponents u/s 170 of the Motor Vehicles Act.

6. The question is whether an application u/s 170 can be entertained at this stage of appeal and our answer is in the negative. Appeal is a continuation of proceedings but it is not a fresh suit and the stages which have passed away in the suit cannot be restored back in the appeal. The rights which could be claimed and enforced before a suit was finally adjudicated by the first Court could not necessarily be pleaded for the first time as of right during the pendency of appeal. A right u/s 170 of the Motor Vehicles Act was required to be pleaded and established and on grant by the Court claimant to be impleaded as a party to defend the claim on merits. Unless a case is made out and granted to be impleaded as party with such rights, same could not now be revived or enforced at the appellate stage.

7. Code of Civil Procedure, 1908 as amended in 1976 is made applicable, to the Claim Tribunals established u/s 165, under Rule 229 of the Gujarat Motor Vehicles Rules, 1989. In view of the same, Order 41 of the CPC is applicable to the appeals preferred u/s 173 of the Motor Vehicles Act. Order 41 Rule 27 contemplates for production of additional evidence in appellate Court. The applicant Insurance Company was a party under subsection (2) of Section 149 of the Motor Vehicles Act and they in particular very well knew at that stage that there is a provision of Section 170 of the Motor Vehicles Act. They were, therefore, required to file an application u/s 170 of the Motor Vehicles Act to allow them to be impleaded as party to the proceeding and defend the claim.

8. To have a right to defend claim application on merit u/s 170 of the Motor

Vehicles Act, the Insurance Company is required to satisfy the Claims Tribunal that there is a collusion between the person making the claim and the person against whom the claim is made or the person against whom the claim is made has failed to contest the claim. On driver of the vehicle and insurer being served if they either do not appear before the Tribunal or if they appear before the Tribunal and do not file written statement and contest the claim or they appear before the Tribunal, file written statement and do not appear at the stage of evidence, then, these facts by themselves do not amount to collusion between them and the person making the claim or failure to contest the claim. If the insurer and his driver knowing full well that their vehicle is involved in the accident, there was a negligence on their part, the persons making the claim are really aggrieved persons and entitled to claim and if they think it fit not to contest the claim, in our opinion, it cannot necessarily be said that they have failed to contest the claim or have colluded with the claimant. So far as the quantum is concerned, on the data available the Tribunal has to pass a just award. Order 41 does not contemplate except in special circumstances as made out in O.41 R.27 of the Code for putting the clock back by allowing a party much less by impleading a party and send the matter to the Tribunal for a de novo trial, particularly, when the concerned party was on record in other capacity and failed to exercise their right. Such party cannot be permitted to make a grievance which they could have made at the trial stage. In our opinion, they will be estopped from asking for such permission, at this stage, to be impleaded as party u/s 170 of the Motor Vehicles Act. If such an application is allowed, then there are greater chances of it being abused than used in the interest of justice. This may encourage not only lethargy but also sluggishness with a result to delay the proceedings. Every time the Insurance Company may fail to file an application u/s 170 before the Tribunal and come before the Appellate Court to allow them to be impleaded as a party.

9. It was contended by Mr. Parikh that it was not necessary to remand the matter back if such an application was allowed and the Insurance Company was allowed to be impleaded as a party. This contention is advanced on the premises that the Tribunal has already permitted the Insurance Company to cross-examine the claimant and witnesses, if any. The question is whether any evidence brought on record by such cross-examination be admissible in law. In our opinion, it is not admissible in law as it is by a person not a party to the proceeding. Any evidence which is brought on record by a person who is not a party to the proceeding is not admissible in law and is required to be ignored. If necessary permission u/s 170 was obtained and further evidence was brought on record, then, it was again open for the person making the claim to dispute it or test its veracity by way of re-examination. However, it be noted that irrelevant and inadmissible evidence is not required to be refuted, except to ignore it.

10. The judgment cited by the learned Advocate Mr. Parikh in the case of Rupa(Supra) stands overruled by the Supreme Court in the case of Shankarayya (Supra). In the case of Shankarayya, the Supreme Court has observed in

paragraph (4) as under:

"4. It clearly shows that the 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 the section are found to be satisfied and for that purpose the Insurance Company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. 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. It is true that the claimants themselves had joined respondent no.1 Insurance Company in the claim petition but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of the insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Section 170."(Emphasis supplied).

11. If we refer to those two conditions (a) and (b) of Section 170 they are the questions of fact required to be pleaded, established and proved by the Insurance Company. There are no presumptions in law that if a party does not appear in response to the notice of the Court it can be said that he has failed to contest the claim either for some improper purpose or to prejudice the right of some third party. Collusion between the parties also cannot be inferred. Collusion and/or a failure to contest are required to be pleaded and proved by necessary evidence. As we have referred earlier simply because the person against whom the claim is made did not appear and/or if appeared and did not file written statement and or appeared and filed written statement but did not remain present at the time of evidence by itself does not amount to failure to contest the claim to prejudice the right of some third party. It must appear from the record that there is something to be disputed and decided or the claim is ex facie such which requires to be contested and the party has failed. So far as collusion is concerned, it is necessary to know what is collusion. Collusion is a deceitful agreement or a contract between two or more persons to do some act or abstain from doing something in order to prejudice a third person or for some improper purpose. The facts to constitute collusion by the deceitful agreement or a contract is an act or abstinence from the act and by such act or abstinence a third party may be prejudiced or such an agreement or contract was for some improper purpose. In absence of any such pleading, there cannot be a satisfaction of the Tribunal as required u/s 170 of the Motor Vehicle Act. Such factual aspect cannot be orally pleaded, orally decided giving oral reasons to be inferred from the conclusion that an Insurance Company is permitted to cross examine the claimant or his witness.

12. A question may arise when a practice is prevailing before the Tribunal to allow the Insurance Company to cross examine the claimant or his witnesses on merits of the claim in addition to the statutory defence be it on oral request. A practice may assume the effect and force of law if the practice is consistent and

continuous but not contrary to any provision of law. A practice may assume the force of law in absence of any such or contrary provision of law. In the instant case there is a specific provision u/s 170 which was there in the old Act vide Section 110C, and therefore any practice contrary to the statutory provisions neither can be recognized nor can be considered to have effect and force of law. The same practice is or was contrary to specific provisions of law and therefore has not assumed the force of law.

13. Then the question is when there is a judgment of the Division bench of this Court and based on it , the practice to ask for oral permission and grant it orally till date prevailed atleast till the judgment in the case of Shankarayya(Supra) that judgment being a good law, that practice ought be accepted. In our opinion, that judgment does not remain a good law in any case when the Supreme Court decided Shankarayya"s case. So cases which are decided need not be reopened, but, cases which come for consideration can only be decided in the light of Supreme Court judgment. In that view of the matter also, the legal position as on today while considering the appeal is required to be considered. In view of this fact these applications are liable to be dismissed and are hereby dismissed.

FURTHER ORDER IN FIRST APPEAL NO.1493/97

14. At the time of pronouncement of the judgment, it is stated by the learned Advocate that the award amount is deposited with this Court. The registry is directed to transmit the said amount to the concerned Tribunal at the earliest.