
(2016) 09 KL CK 0028

In the High Court Of Kerala

Case No : M.A.C.A. No. 683 of 2016 (Against The Award In Opmv 2194/2013 of M.A.C.T.,Ernakulam Dated 26-11-2015)

United India Insurance Company Limited

APPELLANT

Vs

Beena Pathrose

RESPONDENT

Date of Decision : 28-09-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, Section 170

Citation : (2017) AAC 1160 : (2017) 2 ILRKerala 286 : (2017) 2 KerLJ 378 : (2017) 2 KLT 559

Hon'ble Judges : Mr. C.T. Ravikumar and Mr. K.P. Jyothindranath, JJ.

Bench : Division Bench

Advocate : Sri. Mathews Jacob (Sr.) Advocate and Sri. P. Jacob Mathew, Advocate, for the Petitioner; Sri. Rahul Sasi and Smt. Neethu Prem, Advocates, for the Respondent Nos. 1-4

Final Decision : Dismissed

Judgement

Ravikumar, J.—The captioned appeals carry conflicting contentions and prayers though both of them carry challenge against the judgment and award dated 26.11.2005 in O.P.(MV) No. 2195/2013 passed by the Motor Accidents Claims Tribunal, Ernakulam. The above mentioned claim petition was filed by the appellants in the latter appeal and the third respondent therein, the insurer of the alleged offending vehicle involved in the accident that led to its filing, is the appellant in the former appeal. While the appellant in the former appeal seeks for appellate interference with the award on the ground of exorbitancy of the quantum of compensation granted by the Tribunal, the appellants in the latter appeal seek for its enhancement contending that they were denied "just compensation". For the sake of convenience, the parties are referred to hereinafter in this judgment, in accordance with their respective status in the claim petition, unless otherwise specifically mentioned.

2. As noticed hereinbefore, the third respondent feels aggrieved by the award, as

according to the insurer, the quantum of compensation granted by the Tribunal is highly exorbitant. It is with the prayer to scale down the quantum of compensation that the former appeal has been filed. The learned counsel appearing for the petitioners/appellants in the latter appeal, however, takes up the contention that an insurer cannot maintain an appeal challenging the quantum of compensation if the claim petition was resisted by an insurer, without obtaining permission under Section 170 of the Motor Vehicles Act (for short "the M.V.Act"). Per contra, the learned Senior Counsel appearing for the third respondent/appellant in the former appeal contends that in the light of the decision of the Honourable Apex Court in *United India Insurance Co. Ltd. v. Shila Datta* [(2011) 4 KLT 378 (SC)], the objection raised is absolutely bereft of any basis and as such, absolutely untenable.

3. In the light of the rival contentions, we are of the considered view that before considering the question whether the quantum of compensation awarded by the Tribunal is exorbitant or inadequate the very maintainability of the former appeal filed by the insurer, in the light of the objection raised by the respondents therein viz., the petitioners, has to be considered.

4. We have heard the learned Senior Counsel Sri. Mathews Jacob appearing for the third respondent/appellant in the former appeal and also Smt. Neethu Prem, the learned counsel appearing for the petitioners/appellants in the latter appeal, who are the respondents in the former appeal. In the appeal filed by the insurer the petitioners before the Tribunal alone are the respondents. In the latter appeal filed by the petitioners in addition to the insurer the insured owner and the driver of the alleged offending vehicle are also made parties. However, it is submitted by the learned Senior Counsel for the third respondent insurer that the liability to indemnify the insured owner of the vehicle is not in dispute. Hence, issuance of notice to respondents 1 and 2 in the latter appeal is dispensed with. We will, now, proceed with the appeals and as stated earlier, we will firstly consider the maintainability of the former appeal.

5. As noticed hereinbefore, the question is whether an insurer can prefer an appeal under Section 173 of the M.V.Act against an award of a Claims Tribunal challenging the quantum of compensation awarded when the insurer had not obtained permission under Section 170 of the Motor Vehicles Act to contest the matter before the Tribunal on all or any of grounds that are available to the person against whom the claim has been made. While the learned Senior Counsel appearing for the third respondent contends that the said question is no more res integra in view of exposition of law on the said question in *Shila Datta's* case, the learned counsel appearing for the petitioners contends that question is not squarely covered thereunder and the position of law obtained on that issue in the light of the decision of the Honourable Apex Court in *National Insurance Company Ltd., Chandigarh v. Nicolletta Rohtagi* [(2002) 7 SCC 456] still holds the field. According to the learned counsel for the petitioners as per *Shila Datta's* case that question, now, stands referred to a larger Bench.

6. In the light of the rival contentions advanced before us, the question is whether the Hon"ble Apex Court had settled the position of law on the aforesaid question, primarily posed for consideration by us, in Shila Datta's case or whether the said question was only referred to a larger Bench for resolution ? A mere perusal of the decision in Shila Datta's case would reveal that the said case came up before a three Judge Bench pursuant to an order of reference by a two Judge Bench. While considering the matter referred for consideration in the wake of the decision in Nicolletta Rohtagi's case and also the relevant provisions under the M.V. Act, the Hon"ble Apex Court formulated five points for consideration in Shila Datta's case. In paragraph 6 of the said decision, its earlier decision in Nicolletta Rohtagi's case was dealt with by the Apex Court and it reads thus :

"6. In National Insurance Co. Ltd v. Nicolletta Rohtagi (2003(1)KLT SN 32 (C.No.44)SC : (2002) 7 SCC 456), a three Judge Bench of this Court considered the following two questions :

(i) Non-filing of an appeal by the insured amounted to failure to contest the claim and that the right to contest included the right to file an appeal against the award of the Tribunal.

(ii) Where despite the existence of the facts postulated in Section 170 of the MV Act, 1988, the Tribunal does not implead the insurance company to contest the claim on grounds available to the insured or the persons against whom claim has been made, or in such a situation rejects the insurer's application for permission to contest the claim on merit or where the claimant has obtained an award by playing fraud, in such cases the insurer has a right of appeal to contest the award on merits. The three Judge Bench, after referring to the decisions in Shankarrayya v. United Insurance Co. Ltd. - (1998) (2) KLT SN 15 (C.No.18) SC = (1998) 3 SCC 140), Narendra Kumar v. Yarenissa ((1998) 9 SCC 202, Chinnamma George v. N. K. Raju (2000 (2) KLT 155 (SC) = (2000) 4 SCC 130, and Ritu Devi v. New Delhi Insurance Co. Ltd. - ((2000) 5 SCC 113), held as under :

"It was urged by learned counsel appearing for the insurance company that if an insured has not filed any appeal, it means he has failed to contest the claim and that the right to contest include the right to contest by filing an appeal against the award of the Tribunal as well, and in such a situation an appeal by the insurer questioning the quantum of compensation would be maintainable.

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 49(2) of the Act or where the condition precedent specified in Section

170 is satisfied. 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 172 of the 1988 Act, the same would go contrary to the scheme and object of the Act." A careful reading of the said decision shows that issues (i) and (ii) raised before us did not arise for consideration in Nicolletta Rohtagi, nor were they considered therein."

(emphasis added)

7. To know what were the issues referred to as (i) and (ii), as mentioned in Shila Datta's case which according to their Lordships did not arise for consideration in Nicolletta Rohtagi's case and which were not considered therein it is only apposite to refer to paragraph 3 in Shila Datta's case and it reads as hereunder :

"(i) There is a significant difference between insurer as a 'noticee' (a person to whom a notice is served as required by section 149(2) of the Act) in a claim proceedings and an insurer as a party respondent in a claim proceedings. Where an insurer is impleaded by the claimants as a party, it can contest the claim on all grounds, as there are no restrictions or limitations in regard to contest. But where an insurer is not impleaded by the claimant as a party, but is only issued a statutory notice under Section 149 (2) of the Act by the Tribunal requiring it to meet the liability, it is entitled to be made a party to deny the liability on the grounds mentioned in Section 149(2).

(ii) When the owner of the vehicle (insured) and the insurer are aggrieved by the award of the Tribunal, and jointly file an appeal challenging the quantum, the mere presence of the insurer as a coappellant will not render the appeal, as not maintainable. When insurer is the person to pay the compensation, any interpretation to say that it is not a 'person aggrieved' by the quantum of

compensation determined, would be absurd and anomalous.

(iii) When an insurer is aggrieved by the quantum of compensation, it is not seeking to avoid or exclude its liability, but merely wants determination of the extent of its liability. The restrictions imposed upon the insurers to defend the action by the claimant or file an appeal against the judgment and award of the Tribunal will apply, only if it wants to file an appeal to avoid liability and not when it admits its liability to pay the amount awarded, but only seeks proper determination of the quantum of compensation to be paid.

(iv) Appeal is a continuation of the original claim proceedings. Section 170 provides that if the person against whom the claim is made, fails to contest the claim, the insurer may be permitted to resist the claim on merits. If and when an award is made by the Tribunal which is excessive, arbitrary or erroneous, the owner of the vehicle has to challenge the same by filing an appeal before the High Court. If the insured (owner of the vehicle) fails to challenge an award even when it is erroneous or arbitrary or fanciful, it can be considered that the insured has failed to contest the same and consequently under Section 170, the High Court or the tribunal may permit the insurer to file an appeal and contest the award on merits.

(v) The Motor Vehicles Act, 1988 ('Act' for short) creates a liability upon the insurer to satisfy the judgments and awards against the insured. The Act expressly restricts the right of the insurer to avoid the liability as insurer, only to the grounds specified in Section 149(2) of the Act. Though it is impermissible to add to the grounds mentioned in the statute, the insurer has a right, if it has reserved such a right in the policy, to defend the action in the name of the insured. If it opts to step into the shoes of the insured, it can defend the action in the name of the insured and all defences open to the insured will be available to it and can be urged by it. Its position contesting a claim under Section 149(2) of the Act is distinct and different, when it is contesting the claim in the name of or on behalf of the insured owner of the vehicle. In cases, where it is authorised by the policy to defend any claim in the name of the insured, and the insurer does so, it can not be restricted to the grounds mentioned in Section 149(2) of the Act, as the defence is on behalf of the owner of the vehicle."

(underline supplied)

8. After making such an observation essentially, after a detailed discussion with respect to its earlier decision in Nocolletta Rohtagi's case and on arriving at the conclusion that issue Nos. (i) and (ii) posed for consideration in Shila Datta's case did not arise for consideration in Nocolletta Rohtagi's case and moreover, they were not considered in Nocolletta Rohtagi's case, the Honourable Apex Court in Shila Datta's case went on to consider those two points. For the purpose of disposal of these appeals, we need only to look into the discussion and the decision of the Honourable Apex Court in respect of point No.1 as admittedly, in the claim petition the insurer was impleaded as a respondent. It reads thus :

" Re:Point No.(i) : The position in cases where the claimants implead the insurer as a respondent in the claim petition."

9. After referring to the scheme of the Motor Vehicles Act as contained in Chapter XI (Insurance of motor vehicles against third party risk) and chapter XII (Claims Tribunal), the Apex Court held that an insurer need not be impleaded as a party to the claim proceedings and going by the scheme it should only be issued with a statutory notice under Section 149(2) of the Act so that the insurer could be made liable to pay the compensation awarded by the Tribunal and also to resist the claim on any one of the grounds mentioned in clauses (a) and (b) of Sub Section (2) of Section 149. Evidently, on a careful evaluation of the provisions, the Apex Court held that in terms of sub sections (1), (2) and (7) of Section 149, it is evident that they clearly referred the insurer merely as a noticee and not as a party. That apart, it was held that Sections 158(6), 166(4), 168(1) and 170 also provide for and contemplate insurer merely a noticee for the purposes mentioned in the Act and not as a party respondent. After referring to those provisions and observing that such provisions contemplate the insurer only as a noticee, the Hon''ble Apex Court held that the status of the insurer is different when an insurer is impleaded in a claim petition. The Hon''ble Apex Court then referred to Section 170 of the Motor Vehicles Act and held that when an insurer is impleaded as a party respondent to a claim petition in contrast from merely being a noticee under Section 149(2) of the Act, its rights are significantly different. In that context, paragraph 8 of the decision in Shila Datta's case assumes relevance. The Apex Court evidently held that if the insurer is only a noticee, it could only raise such of those grounds as are permissible in law under Section 149(2) of the Motor Vehicles Act. Further, it was held that when the insurer is a party respondent, it could raise not only those grounds which are available to be raised in the light of Section 149(2), but also all other grounds that are available to a person against whom a claim is made. After making such a distinction with respect to the status of the insurer while being a mere noticee and when being a party respondent, the Apex Court held that when a claimant impleads the insurer as a party respondent, for whatever reason, then as a respondent, the insurer would be entitled to urge all contentions and grounds which may be available to a person against whom a claim was made.

10. At this juncture, it is apposite to take note of the contention taken up by the learned counsel appearing for the respondents in the former appeal who are petitioners/appellants in the latter appeal. The learned counsel for the respondents initially attempted to canvass the position that the decision in Shila Datta's case is only an order of reference sans any binding value on any aspect. However, it needs no arguments to understand that the Hon''ble Apex Court had only referred point Nos. (iii) to (v), formulated thereunder, to a Larger Bench. In fact, point Nos. (i) and (iii) were decided firstly in Shila Datta's case. Whether as regards the question posed for consideration viz., regarding the maintainability of the former appeal by the insurer challenging the quantum of compensation even

after contesting the claim petition without obtaining permission under Section 170 of the M.V.Act, can be answered in the light of the decisions either on point No.(i) or point No.(ii) in Shila Datta's case, is now to be considered. We have found that in Shila Datta's case the Hon''ble Apex Court made out the nice distinction between the insurer as a noticee and on being made a party respondent by the claimant himself. It was also in unambiguous terms held therein that this issue was not posed for consideration in Nocolletta Rohtagi's case and therefore, not gone into. Further it was held therein that unlike in the case of an insurer with the status of a mere noticee the insurer on being impleaded as a party respondent by the claimant himself would be having the right to contest the claim petition on all grounds. The contention is that the said finding is confined to the right of the insurer to contest the matter before the Tribunal and the position is different while considering the rights of the insurer to prefer an appeal when it failed to obtain permission in terms of the provisions under Section 170 of the Motor Vehicles Act and in such eventuality, there would not be any right of appeal. In short, the contention is that the expression "right to contest" cannot be said to be the same as the right to appeal in terms of the provisions under Section 173 of the Motor Vehicles Act and in other words, right to contest would not include right to prefer an appeal. It is the further contention that the right of appeal has been specifically dealt with by the Honourable Apex Court under point Nos. 3 and 4 in Shila Datta's case (supra). The learned counsel further submitted that a bare perusal of the decision in Shila Datta's case would reveal that point Nos. 3 to 5 were not virtually decided in Shila Datta's case and in fact they were referred for consideration by a larger Bench. In such circumstances, it is further contended that since those points were only referred for consideration by a larger Bench, the decision on Point Nos. 3 to 5 more particularly Point Nos. 3 and 4 dealing with the right to appeal of an insurer is still governed by the decision of the Hon''ble Apex Court in Nocolletta Rohtagi's case. In the light of the decision in Nocolletta Rohtagi's case, an insurer who contested the claim petition before the Tribunal without obtaining permission under Section 170 of the Motor Vehicles Act shall not be having the right to appeal except on grounds which are available under Section 149(2) of the Act. In short, in view of the fact that point Nos. 3 to 5 were only referred to a Larger Bench going by the said position obtained from Shila Datta's case and in the light of the decision of the Apex Court in Nocolletta Rohtagi's case, the insurer is not entitled to maintain an appeal challenging the quantum of compensation in case it had not obtained permission under Section 170 of the Motor Vehicles Act to contest on all matters before the Tribunal. In short, M.A.C.A. Nos. 683/2016 is not maintainable, is the nub of the said contentions.

11. The learned Senior Counsel appearing for the third respondent/the appellant in the former appeal resisted the aforesaid contentions raised on behalf of the petitioners/the respondents in the former appeal and submitted that they would be nothing, but a misconstruction of the dictum laid down by the Apex Court in Shila Dattas's case in respect of Point Nos. 1 and 2. It is submitted that a careful

scrutiny of the decision of the Apex Court in Shila Datta's case would reveal that after drawing a nice distinction between the status and consequential rights of an insurer while being a noticee and a party respondent in a claim petition before the Tribunal, the Hon"ble Apex Court held that in a case where an insurer is impleaded in a claim petition as a party respondent, it could contest the matter on all grounds as has been available to any other person against whom a claim was made including the grounds available under Section 149(2) of the M.V.Act. It is the contention that in such circumstances a careful reading of the decision as against point No.1 would make it clear that it is not only dealing with the right to contest before the Tribunal, it would also take in the right to appeal which is essentially nothing, but an extension of the right to contest and therefore there is no merit in the contention that the insurer who was permitted to contest the matter on all grounds before the Tribunal would not be entitled to prefer an appeal even if the insurer is aggrieved by any of the findings in respect of any of the issues. In other words, the contention is that when in a case where the insurer is impleaded as a party respondent and contested the matter on all grounds including the ground available under Section 149(2), its right to prefer an appeal would not and could not confine to grievances against the findings on any of the grounds available under Section 149(2) and it would include findings under any other grounds by the Tribunal including a grievance against the quantum of compensation, as has been available for challenge to any other party.

12. In view of the question crops up based on the aforementioned conflicting contentions it is worthwhile to refer to paragraph 17 in Shila Datta's case with emphasis to the opening sentence. It reads thus:-

"17. We may next consider the case where the insurer is only a noticee under Section 149(2) and has not been impleaded as a party to the claim proceedings. The basic premises in Nicoletta Rohtagi is that the insurer can contest a motor accident claim for compensation only on the grounds mentioned in Section 149(2) of the Act. The contention of Insurance Companies is that an Insurer can deny liability under the policy only on the grounds mentioned in Section 149(2) of the Act (even though several other grounds may be available under the terms of the policy); and where it does not deny liability or avoid liability under policy of insurance, it can certainly assist the Tribunal in arriving at the just compensation, by contesting any unjust or illegal or erroneous claim by the claimants. We find considerable for in the contention that where a notice is issued under Section 149(2) of the Act, the insurer as "noticee" (as contrasted from from a "party" cannot "deny" its liability as an insurer on grounds other than those mentioned in Section 149(2)(a)(b) of the Act, but nothing prevents it as a person liable to pay the compensation, from assisting the Tribunal in arriving at the "just" compensation. In this context, we may rely upon the observation of this Court in National Insurance Co. Ltd. v. Jugal Kishore, 1988 (1) SCC 626, referring to Section 96(6) of the old Act (Motor Vehicles Act, 1939):

"...Secondly, from the words "to avoid his liability" used in sub-section (6) of

Section 96 it is apparent that the restrictions placed with regard to defences available to the insurer specified in sub-section (2) of Section 96 are applicable to a case where the insurer wants to avoid his liability. In the instant case, the appellant is not seeking to avoid its liability but wants a determination of the extent of its liability which is to be determined, in the absence of any contract too the contrary, in accordance with the statutory provision contained in this behalf in Clause (b) of sub-section (2) of Section 95 of the Act..."

The assumption that as a noticee under Section 149 (2), the insurer cannot raise any contention other than those mentioned in clauses (a) and (b) of Section 149(2) is correct in so far as denial of liability under the policy is concerned. This is because sub-section (1) of Section 149 of the Act clearly provides that "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.." . Therefore, an insurer, without seeking to avoid or exclude its liability under the policy, on grounds other than those mentioned in Section 149 (2)(a) and (b), can contest the claim, in regard to the quantum. All that Section 149(2) says is that insurer cannot raise all kinds of contentions based on the terms of policy to avoid the contract of indemnity. But it does not require the insurer to condone wrong claims or false claims or not challenge erroneous determination of compensation."

(emphasis added)

13. "We may next consider the cases where the insurer is only a noticee under Section 149(2) and has not impleaded as a party to the claim proceedings". The above extracted opening sentence itself would undoubtedly reveal that point No.3 which was actually referred to the larger Bench is regarding the right of an insurer as a noticee under Section 149(2) who fails to take permission under Section 170 of the Motor Vehicles Act, 1988 (for short, "the M.V.Act") and not that of an insurer who is impleaded as a party respondent by the party respondent himself, to file an appeal. It is evident from Shila Datta's case (Supra) the Apex Court has drawn a nice distinction between the status of the insurer as a noticee and a party respondent and then categorically held that in the case of a party respondent, it is absolutely unnecessary to seek permission under Section 170 of the M.V. Act to contest on all matters. In other words, in the light of the said decision even without seeking and obtaining such permission under Section 170 of the M.V. Act, an insurer who was impleaded as a party respondent in a claim proceedings, by the claimant would be having "the right to contest" the matters on all grounds. To appreciate the contention in a more appropriate manner, it will not be inapposite to refer to paragraph 31 in Nicolletta Rohtagi's case (Supra) itself. It reads as follows:

"We have already held that unless the conditions precedent specified in Section 170 of the 1988 Act are satisfied, an insurance company has no right of appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not contest

the claim and, further, the Tribunal does not implead the insurance company to contest the claim, in such cases it is open to an insurer to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits, in that case it is open to the insurer to file an appeal against an award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenge only that part of the order while filing appeal on grounds specified in subsection (2) of Section 149 of the 1988 Act. But such application for permission has to be bona fide and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is concerned, it is no longer *res integra* that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award."

(emphasis added)

14. It is evident from paragraph 31 of Nicolletta Rohtagi's case (Supra) that the Apex Court held that unless the conditions precedent specified under Section 170 of the Act are satisfied, an insurance company has no right of appeal to challenge the award on merits. Further, it was held therein that if permission is granted and the insurer is allowed to contest the claim on merits, in that case it will be open to the insurer to file an appeal against the award on merits, if aggrieved. In the light of the decision of the Apex Court in Shila Datta's case (Supra) in the case of an insurer who is a party respondent in the claim petition, the insurer need not file an application under Section 170 of the M.V. Act to get permission to contest the matter on all grounds and going by the dictum being a party made as a respondent by the applicant himself even without filing an application under Section 140 of the M.V. Act the insurer could contest the proceedings before the Tribunal on all grounds. Going by the dictum in Nicolittas Rohtagi's case (Supra) if permission is granted under Section 170 of the M.V. Act and the insurer is allowed to contest the claim on merits on all grounds it could prefer an appeal against an award on merits on all grounds available to any other party. Going by the said decision the "right to contest on merits on all grounds" would embrace in it the right to file appeal against the award of the Claims Tribunal. Therefore, when permission is not required to be obtained under Section 170 of the M.V. Act, for an insurer who was made as a party respondent, "by the claimant" to contest the claim petition on merits on all grounds without any restrictions or limitations then necessarily, it should take in the right to file an appeal, as well. How can the "right to appeal" be different in the aforesaid twin situations? Essentially, whether "the right to contest on merits on all grounds" was available as a right to the insurer before the Tribunal, is the decisive factor as relates the right of appeal available under Section 173 of the M.V. Act. A perusal of Section 170 of the M.V. Act would reveal that it confers power to the Tribunal, on recording its satisfaction to collusion between the person making the claim and

the person against whom the claim is made or failure of the person against whom the claim is made to contest the claim, to issue a direction to implead the insurer as a party respondent. Certainly, in a case where the twin situations are satisfied, but the Tribunal does not order for the impleadment of the insurance company to contest the claim, it would be open to an insurer to seek permission of the Tribunal to contest the claim on merits, on all grounds. Obviously, under both circumstances, as a matter of right the insurer would be getting a right to contest the claim, on merits on all or any of the grounds that are available to the person against whom the claim has been made. In such eventuality, if the insurer is aggrieved of the Claims Tribunal, an insurer can file an appeal without any rider, on the right to appeal. Now when the claimant himself impleaded the insurer as a party respondent, in the light of Shila datta's case (Supra), he need not seek for permission of the Tribunal to contest the matter on all grounds and in other words, he could contest the matter on merits, on all grounds. As already noticed the right to contest on merits on all grounds would take in and confer a right to file an appeal against the award of the Tribunal, going by Nicolittas Rohtagi's case (Supra). Therefore, it can be safely said even going by the decision in that case the question is whether the insurer was having "right to contest on merit on all grounds" before the Tribunal. Therefore, an insurer who is a party respondent, impleaded as such by the claimant and then contested the claim on all grounds cannot be denuded of the right to file an appeal against the award of the Claims Tribunal if the insurer is aggrieved by any of its findings, including on the question of quantum of compensation.

15. The right to prefer an appeal has to be looked into in the light of the provisions in Section 173 of the M.V. Act. In the light of Section 173 of the M.V. Act, any person aggrieved by an award of the Claims Tribunal, could prefer an appeal subject to the conditions under the proviso therein. When a party respondent in a claim petition, be it the insurer who contested the matter on all grounds or any other person against whom the claim was made, feels aggrieved by an award it or he would definitely fall under the expression "an aggrieved party" and in which event especially in the light of the provisions under Section 173 of the M.V. Act, the right to prefer an appeal cannot be taken away from such a party. In a case where the insurer is not a noticee, but a party respondent and if an award is passed in favour of the claimant, if ultimately it is found that the insurer is bound to indemnify the insured, necessarily the award is to be satisfied by the insurer. If such an insurer feels that what is awarded by the Tribunal is exorbitant, how can it be said that he would be having no right to challenge the quantum and without mounting challenge against the same in the appeal it has to satisfy the award? The right to challenge the quantum of compensation, in such circumstances, cannot be denuded of from the insurer, in the light of the decision in Shila datta's case (Supra) if it was a party respondent to the proceedings with right to contest matter on merits on all grounds, in case it feels aggrieved by the award. Thus, obviously, in the light of Shila Datta's case (Supra) where the Apex Court decided point Nos.1 and 2 the position of law is

that the right to prefer an appeal is available to an insurer who is a party respondent, in case it is aggrieved by the award. We are also of the view that in such a situation being the party who is to satisfy the award, it would be a blatant violation of the principles of natural justice to deprive a right to the insurer to prefer an appeal challenging the quantum of compensation and to make it to satisfy the award when it feels that what is granted is exorbitant, even without affording an opportunity to prefer an appeal, in accordance with law. Therefore, we are of the considered view that an insurer can maintain an appeal on the ground of exorbitancy of quantum of compensation, as well. When once it is found that the objection raised as above by the petitioners who are respondents in M.A.C.A. No.683 of 2016 regarding the right of the appellant insurance company to maintain the appeal challenging the quantum of compensation is bereft of any merit, we will have to consider the appeals on merits.

16. As noticed hereinbefore, both the appeals carry conflicting prayers. In the former appeal, the ground of challenge is that the quantum of compensation is exorbitant, whereas in the latter appeal the contention is that it is too inadequate and therefore not a just compensation. In this context, it is only proper to consider the factual backdrop of the cases. On 15.09.2013 at about 11 pm, the deceased "Pathrose John" was pedalling his bicycle alongside Chavady-Pallithode road. He was then knocked down by the motor cycle bearing Reg. No. KL-04/W 4410, ridden by the 2nd respondent. Enroute to the hospital "Pathrose John" succumbed to the grievous injuries sustained in the accident. He was a fish vendor aged 46 years. The legal heirs viz., his wife and three unmarried daughters filed the Claim Petition under Section 166 of the M.V. Act, seeking a total compensation of Rs. 15,00,000/- and the Tribunal as per the impugned order granted a total compensation of Rs. 17,56,675/- with interest at the rate of 9% per annum from the date of petition till realisation. It is against the said award that the aforesaid conflicting contentions have been raised. Since the issue is whether the quantum of compensation granted is exorbitant or inadequate we are of the view that it is only proper to consider the contentions raised in the appeals raised to support the respective contentions, jointly. According to the learned Senior Counsel appearing for the appellants therein the Tribunal erred in granting compensation of Rs. 4,00,000/- under the head compensation for love and affection, to the appellants, viz., Rs. 1,00,000/- each to the appellants. The learned Senior Counsel submits and it is obvious from the evidence on record itself that the appellants are the widow and daughters of the deceased "Pathrose John" and in the case of the widow, the Tribunal has granted an amount of Rs. 1,00,000/- towards consortium, as well. Even though no evidence on record is available regarding the question whether the deceased left any estate, the Tribunal unreasonably granted an amount of Rs. 1,00,000/- instead of granting a conventional amount. That apart, it is contended that granting compensation for mental agony, that too an amount of Rs. 2,00,000/- after granting compensation for loss of dependency, love and affection etc., is impermissible. The learned counsel for the respondents-claimants in the former appeal submitted that it

cannot be said that the Tribunal has granted exorbitant compensation under the head loss of love and affection. The 1st respondent is the widow of deceased "Pathrose John" and she became a widow at the age of 41 years. As regards petitioners 2 to 4, they are the daughters of the deceased aged respectively 20, 18 and 15 years. It is submitted that in similar circumstances, the Apex Court in *Jiju Kuruvila and Others v. Kunjumma Mohan and Others* [(2013) 9 SCC 166] granted Rs. 1,00,000/- each to two minor children. The learned Senior Counsel appearing for the appellants submitted that the decision in *Jiju Kuruvila's* case (Supra) is decided in the light of the decision in *Rajesh and Others v. Rajbir Singh and Others* [2013 (3) KHC 212 (SC)] and *Rajesh's* case (Supra) the Apex Court granted only Rs. 1,00,000/- towards loss of love and affection to two minor children and in that case, the wife who was granted an amount of Rs. 1,00,000/- was not granted any amount towards loss of love and affection as evidently, it is also component element of the head "loss of consortium". We have carefully gone through the judgment in *Jiju Kuruvila's* case (Supra) as also in *Rajesh's* case (Supra). It is to be stated that a close scrutiny of the decision in *Rajesh's* case (Supra) would reveal that on the question of grant of compensation under the head loss of love and affection, no dictum as such was laid down therein as in the case of compensation, under the head "loss of consortium" and grant of funeral expenses. Therefore, the question is merely because the Apex Court granted compensation at the aforesaid rate can be a reason for the High Courts to take it as a binding precedent, in the matter of granting compensation for loss of love and affection and grant compensation accordingly. In the light of the decision of the Apex Court in *State of Punjab v. Surender Singh* [AIR 1992 SC 1593], we are of the considered view that merely because the Apex Court granted such an order, it would not be open to the Highs Court to issue such a similar order, as long as no dictum on the question has been laid down by the Apex Court in *Rajesh's* case (Supra) in that regard, without assigning proper reasons for granting the same amount or higher amount as compensation under that head. Invoking the power under Article 142 of the Constitution of India, to do complete justice between the parties, on the factual matrix obtained in a particular case, the Apex Court may pass appropriate orders even in excess of the amount granted in *Rajesh's* case (Supra). But High Court cannot pass orders on the same lines as the power under Article 142 of the Constitution of India is not available to High Court. It is this position that was made clear in *Surender Singh's* case (Supra). In such circumstances, we have no hesitation to hold that the fact that the Apex Court granted compensation at a particular rate by itself cannot be a reason for this Court to grant compensation at the same rate unless there is such a declaration or law in that regard was laid down. When that be so, how can Claims Tribunal grant such an amount as compensation under the head "loss and love and affection" without assigning reasons therefor. That apart, even a perusal of the decision of the Apex Court in *Rajesh's* case (Supra) and *Jijo Kuruvila's* case (Supra) would reveal that the Hon"ble Apex Court had not laid down any dictum to the effect that on the death of either of the parents in a motor vehicle accident each of the surviving children is entitled to a minimum

compensation of Rs. 1,00,000/- under the head loss of love and affection. As noticed hereinbefore, while the Apex Court granted Rs. 1,00,000/- each in Jiju Kuruvilas" case (Supra) the Apex Court granted only a total of Rs. 1,00,000/- to two minor children in Rajesh"s case (Supra). The contention of the learned Senior Counsel regarding the grant of exorbitant compensation under the head loss of love and affection is also to be appreciated on another score. In the light of the decision of the Apex Court in Sarala Verma v. Delhi Transport Corporation [2010 (2) KLT 802] and Rajesh"s case (Supra) as far as the surviving spouse is concerned, in a claim under Section 166 of the M.V. Act, his/her right is to get compensation under the head loss of consortium and not under the head "loss of love and affection". True that in this case, no amount was granted to the 1st respondent, the widow under the head loss of consortium. In Hartinder Kaut v. Harmander Singh Choudhry, reported in [AIR 1984 Del 66] the High Court of Delhi held that "consortium" means companionship, love, affection, comfort, mutual services, sexual intercourse. All these things belong to the married stage and taken together, they make up consortium, it was further held. The case dealt with by the Delhi High Court was one under the provisions of the Hindu Marriage Act, 1955. We are also of the considered view that it is all those elements, as aforesaid, that constitute consortium. Since the factor of loss of love and affection is also an element that constitutes consortium a grantee of compensation under the head "loss of consortium", viz., a surviving spouse, cannot claim or can be granted compensation under the head loss of consortium and then, under the head "loss of love and affection". The grant of compensation due under "loss of consortium" cannot be linked up with the status of victim in the society or his capability of earning and the sum should not vary from person to person. This is because irrespective status or earning capacity what is lost is the consortium and compensation is paid for that loss. Since the 1st respondent was not given compensation under the head loss of consortium and in the light of the decision of the Apex Court in Rajesh"s case (Supra) a minimum of Rs. 1,00,000/- shall be granted under the head loss of consortium we are inclined to adjust the amount granted to the 1st respondent under the head loss of love and affection as compensation granted under the heard loss of consortium.

17. Then, the question is whether the grant of Rs. 3,00,000/- to the three daughters, who are aged 20 years, 18 years and 15 years invites interference in view of the discussion as above. We have already found that there is no binding decision mandating grant of Rs. 1,00,000/- each as compensation under the head loss of love and affection to the surviving children on the death of either of the parents. We have also found that in Rajesh"s case (Supra) even in the case two minor children a total of Rs. 1,00,000/- only was given by the Hon"ble Apex Court. Hence, we are of the view that granting Rs. 1,00,000/- each to all the children especially without assigning any particular reason is on the higher side. We will deal with the matter further a little later. True that loss of life of a dear or near especially that of father or mother is not ransomable as regards the children. Such is the case of the surviving spouse. Certainly, as far as possible

they have to be compensated bearing in mind in principle "restitutio in integrum". But at the same time, while granting compensation the Tribunal cannot lose sight of the decisions of the Apex Court holding that no one can be permitted to create fortune out of misfortune or to turn such an unfortunate situation as a source of profit. The point is that even while making the endeavour to restore the position in such circumstances, by granting compensation, the Tribunal has to see that its bounden duty is to grant just compensation. In short, the Tribunal has to strike a balance taking into account such aspects while arriving at the "just compensation" in a particular case.

18. In this case, the deceased was a fish vendor. The Tribunal fixed the monthly income of the deceased even in the absence of documentary evidence in that regard. It is to be noted that the petitioner has produced only Ext. A10 which is a passbook issued by the "Kerala Mathsyathozhilali Shemanidhi Board". True that it would reveal that he is a fish vendor and a member of the said Board. But at the same time, it would not reveal the actual monthly income of the deceased. Despite the absence of any evidence establishing the income of the deceased, the Tribunal took the monthly income as Rs. 6,750/- and then, made an addition to the said income by 30%, for the purpose of calculating compensation for loss of dependency. The accident occurred in the year 2013. As stated earlier, the deceased was aged 46 years and the Tribunal correctly identified the multipliers with reference to the age of the deceased. Deduction towards personal expense was also made taking into account the number of dependants. Thus, taking into account all the relevant factors the Tribunal granted Rs. 10,26,675/- ($8775 \times 12 \times 13 \times 3/4$). According to us, compensation under the aforesaid was correctly assessed by the Tribunal.

19. We have already found that except one the other children were not minors at the time of death of Pathrose John and at any rate, we are of the view that granting compensation at the rate of Rs. 1,00,000/- to each of them is on the higher side. But at the same time, taking note of the age of petitioners 2 to 4 and also of the fact that two of them had, by now, attained marriageable age, and further of the fact that under certain other heads erroneous estimation of compensation was scaled down we are of the view that further interference with the award would lead to deprivation of just compensation. Hence, even while holding that granting Rs. 1,00,000/- each is on the higher side we do not propose to make any further deduction from the quantum of compensation awarded. But at the same time, we are of the view that granting compensation of Rs. 2,00,000/- for mental agony is not sustainable for loss of dependency. True that loss of father or husband would be painful. But, there is absolute absence of any evidence to the effect that anyone among them had actually witnessed the accident in which deceased "Pathrose John" lost his life. No reason whatsoever was assigned to grant such an amount separately. The preponderating view is that in cases of fatal accidents compensation is not claimable on account of mental suffering or shock and similar sentimental considerations. In *Lachman Singh v. Gurmit Kaur* [1979 ACJ 170 P&H] the High Court of Punjab & Haryana

held that in such cases solatium to relatives for mental shock is alien to the concept of compensation. In the decision in *State of Orissa v. Gaya Janardan Behra* reported in [1977 ACJ 459] the High Court of Orissa held that no compensation could be granted by way of solatium to relieve mental shock and suffering and distress. We are of the considered view that if in a given case a nervous shock, that is to say, a recognisable psychiatric illness had manifested by the sight of the accident, damages are recoverable. But, no damages are awardable for the mere mental shock, agony, grief or sorrow caused by the death of relative, however close the relation is. In short, to claim compensation on the ground of mental agony or shock and suffering there must be positive evidence establishing that there is something more than mere sorrow or grief and that additional element in the form of perceivable psychiatric illness wholly attributable to the misfortune of having witnessed the accident. In this case there is absolutely no such case for the applicants. No reason was also given by the Tribunal. In such circumstances, we do not find any special reason for the grant of compensation under the head mental agony. It is not awardable. Hence, grant of Rs. 2,00,000/- thereunder is set aside. Usually, while considering the question of grant of compensation for loss of estate only a conventional amount will be granted in the absence of any cogent evidence in that regard. Certainly, granting an amount of Rs. 1,00,000/- cannot be said to be a conventional amount. In such circumstances, we are of the view that an interference with the quantum of compensation under the head loss of estate is also required in the absolute absence of evidence, in that regard. We are inclined to grant an amount of Rs. 20,000/- under the head compensation for loss of estate in the absence of cogent evidence.

20. The learned counsel appearing for the claimants/respondents in the latter appeal submitted that no amount was granted under the head "pain and suffering". True that "Pathrose John" succumbed to the injury sustained in the accident on the same day itself. The averment that "Pathrose John" succumbed to the injuries on the way to the hospital has not been disputed. Thus, it is obvious that he had to endure pain for some. Therefore, we are of the view that an amount of Rs. 10,000/- can be granted under the head pain and suffering. It is granted.

21. In the result:

M.A.C.A. No. 683 of 2016 is allowed. The compensation granted by the impugned award is modified by scaling down the quantum of compensation from Rs. 17,56,675/- to Rs. 14,86,675/-. The said amount is awarded. We make it clear that we have not interfered the rate of interest granted by the Tribunal.

In view of the judgment in M.A.C.A. No. 683 of 2016, M.A.C.A. No. 1722/2016 is dismissed. There will be no order as to costs in both the Appeals.