

IN THE HIGH COURT OF DELHI AT NEW DELHI

MAC APP. 33/2008

Judgment delivered on: January 18, 2008

The New India Assurance Co.Ltd. Appellant.

Through: Mr. Jos Chiramel, Advocate.

versus

Roopa Arora & Ors. Respondents

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR,

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J. Oral:

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The appellant, New India Assurance Co.Ltd., insurer of the offending vehicle has preferred the present appeal challenging the impugned order dated 05.10.2007 passed by the learned

MACT. The impugned award has arisen out of the claim petition filed by respondent Nos.1 to 5 against the appellant as well as against respondent No. 6 claiming compensation for the death of Shri Rajender Kumar Arora.

The brief facts which are necessary for deciding the present appeal inter alia are that respondent Nos.1 to 5 are the legal heirs of deceased Shri Rajender Kumar Arora who had died on 07.11.2001. On 07/11/2001 at about 12:15 a.m. deceased Shri Rajender Kumar Arora was plying his TSR bearing registration no. DL 1 RD 5448 from IGI Airport towards Munirka via Olof Palema Road. He reached T-point intersection of Major Somnath Marg near Swami Malai Mandir opposite Vasant Vihar and while he was crossing the said intersection, suddenly a Matador bearing registration no. DL 3CJ 2072 driven in a rash and negligent manner by Sh. Harish Saxena hit the TSR of the deceased. Due to the impact he fell on the road and sustained fatal injuries. From the accident site he was rushed to Safdarjung Hospital, where he succumbed to his injuries.

The Tribunal after taking into consideration the facts of the case as well as evidence led by the parties had passed an award

in the sum of Rs.7,29,660/- along with interest at the rate of 7% per annum payable from the date of the institution of the petition till the realization of the award. The said order passed by the Tribunal is now under challenge in the present appeal.

I have heard learned counsel for the appellant at considerable length.

The appeal is liable to be dismissed at the admission stage itself as the very maintainability of the appeal is in dispute.

The appellant cannot assail the findings of the Tribunal on the quantum of compensation as determined by the Tribunal. The appellant had not been granted leave by the tribunal to take over the defence of the owner and driver as envisaged under Section 170 of the Motor Vehicles Act and, therefore, it is debarred from challenging the impugned award so as to assail the findings of the Tribunal on the quantum of compensation.

Mr. Jos Chiramel, counsel for the appellant contends that the application under Section 170 of the Motor Vehicles Act was moved before the Tribunal, but specific order was not passed by the Tribunal. The contention of counsel for the appellant is that

there is no fault on the part of the appellant if no speaking order was passed by the Tribunal and, therefore, the appellant cannot be deprived of the remedy of appeal to challenge the award even on the grounds of quantum and negligence. Counsel further contends that there is a deemed permission in favour of the appellant as the appellant did move an application before the Tribunal under Section 170 of the Motor Vehicles Act but the Court did not pass any order thereto and, therefore, it cannot be assumed that permission under Section 170 of the Motor Vehicles Act was not granted by the Tribunal. Counsel for the appellant has placed reliance on the judgment of the Supreme Court reported in **2007 (9) Scale 216, New India Assurance Company Ltd. Vs. Smt. Shanti Pathak & Ors.** to contend that the Apex Court had interfered to lower down the compensation amount even in a case where the insurer had not taken any permission from the Court under Section 170 of the Motor Vehicles Act. The counsel for the appellant also contends that the Hon'ble Supreme Court has already referred the said issue of lack of competence of the insurer to assail the findings of the Tribunal on the ground of quantum of compensation and negligence to a

larger Bench and, therefore, this Court may await the decision of the Supreme Court in this regard.

Counsel for the appellant further contends that remedy of the appellant to assail the impugned order is otherwise available under Section 105 of the CPC. Counsel for the appellant sought to urge that the right of the appellant to file an appeal cannot be taken away simply due to the lapse on the part of the Tribunal in not passing any order although the requisite application under Section 170 of the M.V. Act was filed by the appellant. It is failure on the part of the Tribunal to exercise its jurisdiction and due to such failure on the part of the Tribunal the right to challenge the award by way of filing an appeal cannot be taken away, contends counsel for the appellant.

Motor vehicle accident claim is a tortious claim directed against tortfeasors who are the insured/owner and the driver of the vehicle, the insurer comes in to the picture as a result of the statutory liability created under the Motor Vehicles Act. The legislature intended and has ensured by enacting

Section 149 of the Act that the victims of motor vehicle are fully compensated and protected. It is for that reason the insurer cannot escape from its liability to pay compensation on any exclusionary clause in the insurance policy except those specified in Section 149(2) of the Act or where the condition enshrined in Section 170 is satisfied.

Right of appeal is a creature of statute. The Parliament, while enacting Sub-section (2) of Section 149 only specified some of the defences which are based on conditions of the policy and, therefore, any other breach of conditions of the policy by the insured which does not fall under Sub-section (2) of Section 149 cannot be taken as a defence by the insurer. Had it been the intention of the Parliament to include the breach of other conditions of the policy as a defence, it could have easily provided for 'any breach of conditions of insurance policy' in Sub-section (2) of Section 149. But it is not the case, since the legislator has enumerated specifically the grounds of defences available to the insurer. If the insurer is permitted to take any other defence other than those specified in Sub-section (2) of Section 149, it would mean we are adding more defences to

insurer in the statute which is neither found in the Act nor was intended to be included.

After having given my thoughtful and conscious consideration to the issue involved in the present case, I am of the view that the issue is no more res integra as in catena of judgments the Hon'ble Supreme Court has authoritatively held that right to file an appeal is a statutory right and the insurer can assail the findings of the Tribunal under Section 173 of the Motor Vehicles Act, only in a case where insurer had taken permission of the Court to take over the defence of the owner or driver as the case may be as envisaged under Section 170 of the Motor Vehicles Act. No such permission was granted to the appellant under Section 170 of the Motor Vehicles Act by the Tribunal and, therefore, in the absence of the same, the appellant being the insurer of the offending vehicle cannot maintain the present appeal on grounds other than those available to it under Section 149(2) of the Motor Vehicles Act.

It would be appropriate to refer Section 170 of the Motor Vehicles Act 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 sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.”

Admittedly, no such permission under Section 170 of the Motor Vehicles Act was obtained by the appellant which clearly meant that the circumstances as envisaged under Section 170 of the Motor Vehicles Act were not in existence for the Court to grant such permission. In the judgment of the Supreme Court reported in **(1998) 3 SCC 140, Shankarayya Vs. United India**

Insurance Co. Ltd., the Supreme Court has held 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 mentioned in Section 170 are found to be satisfied and for that purpose the insurance company has to obtain an order in writing from the Tribunal and such an order should be a reasoned order of the Tribunal. In such circumstances unless the said procedure is followed, the appellant insurer cannot have a wider defence on merits than what is available to it by way of a statutory defence. Relevant part of Para 4 of the said judgment in this regard is referred 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. ”

In view of the said legal position, I cannot appreciate the argument of counsel for the appellant that there is a deemed permission in favour of the appellant. Once the application under Section 170 of the Motor Vehicles Act was preferred by the appellant before the Tribunal for taking over the defence of an owner or driver, the Tribunal is required to pass a specific order and that too a reasoned order as per the observations of the Supreme Court referred above and, therefore, the argument of counsel for the appellant cannot be appreciated that filing of an application under Section 170 of the Motor Vehicles Act by the appellant in this regard was a sufficient compliance of the said statutory requirement.

The other contention of the counsel for the appellant is that even in the absence of any order passed by the Tribunal under Section 170 of the M.V. Act, still the appellant can challenge the findings of the Tribunal on the quantum and negligence deriving its right under Section 105 of the CPC. For better appreciation of the contention of the counsel for the appellant, Section 105 of the CPC is reproduced as under:

“105. Other orders .—(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand 1[* * *] from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.”

Although it is a settled legal position that provision of CPC and Evidence Act do not strictly apply to the motor accidents claim cases under the M.V. Act as resort to procedural technicalities contemplated in the CPC and Evidence Act, would not only hamper but would also defeat the summary enquiry as envisaged under Section 168 of the M.V. Act yet counsel for the appellant has failed to satisfy this Court as to how the provision of Section 105 of the CPC can come to the rescue of the appellant. The words 'in any order' in sub-section 1 of Section 105 envisage a case where the order though appealable is not appealed therefrom and such an order affects the decision of the case, then the same can be challenged in an appeal even

from the final decree. An interlocutory order which has not been appealed because no appeal lie or even though appeal lies but, appeal was not taken, then the grievance of such an order can still be challenged in an appeal from the final decree. The facts of the present case does not warrant such a situation. In the present case the appellant had moved an application under Section 170 of the M.V. Act, but no order on such an application was ever passed by the Tribunal. So, it cannot be maintained that there was any interlocutory order passed by the Tribunal which was not challenged by the appellant prior to challenging the final order in appeal. Therefore, the argument of the counsel for the appellant in the backdrop of the above discussion fails.

Even the proceedings before the Tribunal would reveal that the appellant had never taken care of calling upon the Tribunal to decide its application moved under Section 170 of the M.V. Act although kept on participating in the proceedings which would clearly show that the appellant was not serious enough to invite an order on the said application.

In the light of the above discussion, I do not find any merit in the submission of counsel for the appellant. In the

judgment cited by the counsel in **Shanti Pathak's** case (supra) the Hon'ble Apex Court has not dealt with the said legal proposition and, therefore, the same is not applicable in the facts and circumstances of the present case.

There is no merit in the appeal and the same is dismissed.

January 18, 2008

KAILASH GAMBHIR, J.