

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 70 OF 2012

Bajaj Allianz General Insurance Co. Ltd.,
Through its manager
having its Branch Office at
Shop No. 5/F1 No. 2,
Garden Centre Phase II,
Opposite Police Station,
Mapusa Goa 403 507.

... Appellant

V e r s u s

1. Smt. Vaibhava Ulhas Kubal
wife of late Ulhas Kubal
housewife, 45 years of age,
2. Ms. Supriya Ulhas Kubal
Daughter of late Ulhas Kubal
18 years of age, student
3. Ms. Shardha Ulhas Kubal
Daughter of late Ulhas Kubal
14 years of age, student,
Respondent no.3 being a
minor is represented by
mother and natural guardian
Respondent no.1 Smt. Vaibhava Ulhas Kubal,
All the above are residing at
H.No. 29, Thorli Chandai,
Pirna, Bardez Goa.
4. Mr. Ayub Khan
son of Anwar Khan,
36 years of age,
married, driver,
resident of H.No.100/1 (a),
Auchut Vaddo, Hanuman Temple,
Tivim, Bardez Goa.
(Driver of rickshaw)
5. Mr. Jamshed Khan Harihar
son of Harim Khan Harihar
major, residing at Canca, Parra,
417-A, Bardez Goa.
(Owner of the rickshaw)

.... Respondents

Mr. Vaman Ganesh Kuttikar with Mr. Narayan Govekar, Advocates for the appellant.

Mr. J. J. Mulgaonkar, Advocate for respondent nos. 1 to 3.

CORAM : K. L. WADANE, J

JUDGMENT RESERVED ON : 06.08.2015

JUDGMENT PRONOUNCED ON : 14.08.2015

J U D G M E N T :

The present appeal is presented by the original respondent no.3 Insurance Company against the judgment and award passed by the Presiding Officer of the Motor Accident Claims Tribunal, Mapusa in Claim Petition No. 57/2010 by which the claim of claimants/respondent nos. 1 to 3 is allowed and the original respondents are directed to pay compensation of Rs.16,33,300/- together with interest at the rate of 9% per annum.

2. The parties are referred to their original status.
3. The brief facts of the case may be stated as follows :

On 01.07.2009 the husband of the claimant no.1 and father of the claimant nos.2 and 3 was proceeding on a Bajaj pulsar from Pirna towards Cansa Thivim and when he reached at the spot of the accident at Keli Pirna, at about 12.35 p.m., the respondent no.1 drove

rickshaw in a rash and negligent manner. Consequently, there was dash between the rickshaw and motorcycle and in the accident the deceased received serious injuries and succumbed. The deceased was the sole bread earner of the claimants and he was earning Rs.30,000/- per month. He was aged about 41 years and was doing business of transport. The respondent nos. 1 and 2 i.e. the driver and the owner of the vehicle have contested the claim and it was their defence that at the time of the accident, it was raining heavily and the deceased was riding the motor cycle facing the ground on account of the heavy rain. The deceased was also wearing a helmet. He was facing the difficulty in riding the motor cycle. The respondent no.1 – driver seeing the condition of the deceased stopped his rickshaw to the extreme left of the road. The deceased came on the wrong side and dashed against the stationary vehicle. Therefore, they are not responsible to pay any compensation.

4. The appellant/respondent no.3 also contested the claim petition on the ground that the driver of the vehicle was not holding a valid driving licence. The respondent no.2 has not complied with the mandatory provisions of law and the deceased contributed to the accident. Therefore, the claimants/respondent nos. 1 to 3 are not entitled for the compensation.

5. In order to prove the claim, the claimant no.1 and other

four witnesses have deposed in the matter. As against this, no oral evidence has been adduced on behalf of the respondents. Considering the evidence on record and upon hearing both the sides, the learned Tribunal has awarded compensation as referred to above.

6. During the course of the arguments, Mr. J. J. Mulgaonkar, learned counsel appearing for the claimants/respondent nos. 1 to 3 has raised objection regarding the maintainability of the appeal in absence of permission under Section 170(b) of the Motor Vehicles Act.

7. I have heard the arguments of Mr. V. Kuttikar, learned counsel appearing for the appellant and Mr. J. J. Mulgaonkar, learned counsel appearing for the respondent nos. 1 to 3 at length.

8. Considering the arguments advanced by both the sides, the following point arises for my determination :

	<u>POINT FOR DETERMINATION</u>	<u>FINDING</u>
1	Whether the appeal of the appellant/ insurance company is maintainable in absence of the permission under the provisions of Section 170(b) of the Motor Vehicles Act ?	No
2	What Order ?	Appeal is dismissed.

9. During the course of the arguments, Mr. Kuttikar, learned counsel appearing for the appellant has argued that for obtaining permission to contest the petition on all grounds in view of the

provisions of Section 170(b) of the Motor Vehicles Act, no written application is required. Therefore, according to Mr. Kuttikar, the relevant contents to that effect in the written statement are sufficient. He has drawn my attention to the contents of the written statement in para 21 of the insurance company/appellant which read as follows :

"This opponent craves leave of this Hon'ble Court to take all defences available to the opponent no.2 under Section 170 of the Motor Vehicles Act and contest the case on all the grounds apart from those specified under Section 149(2) of the Motor Vehicles Act."

10. So according to Mr. Kuttikar, these averments in the written statement deemed to be an application under the provisions of Section 170 of the Motor Vehicles Act. Therefore, it is necessary to see the provisions of Section 170 of the Motor Vehicles Act which read thus :

"170. Impleading insurer in certain cases.—

Where in the course of any inquiry, the Claims Tribunal is satisfied that—

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer

who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.”

11. On perusal of the above, it appears that if the learned Tribunal is satisfied that there is 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 have right to contest the claim on all or any of the grounds available. On bare perusal of the above provisions, it appears that nowhere it is contemplated that the application for permission under Section 170 should be in writing. However, what is contemplated is that the satisfaction of the Tribunal on two grounds, firstly there is collusion between the parties and secondly, the owner or driver have failed to contest the claim petition. In that event, the Claims Tribunal by reasons to be recorded in writing permit the insurance company to contest the claim petition on all grounds. In the present case, admittedly, no separate application was submitted by the insurance company. Even assuming for the time being the contents in the written statement at para 21 are deemed to be an application for permitting to take all available defences then also there is no reasoned order passed by the learned Tribunal in writing. Therefore, it cannot be said that the insurance company was allowed to contest the claim petition on all

grounds. Besides the above situation, the respondent nos. 1 and 2 i.e. the driver and the owner of the motor vehicle have contested the claim petition. In such circumstances, it cannot be said that there was collusion between the claimants and the respondent nos. 1 and 2. Therefore, on this ground the insurance company is not entitled to contest the claim petition. Secondly, the respondent no.1 and 2 have contested and cross examined the witnesses. Therefore, it cannot be said that the person against whom the claim is made has failed to contest the claim petition. Therefore, grounds mentioned in the sub-section (a) and (b) of Section 170 of the Motor Vehicles Act are not available to the insurance company. Besides that there is no reasoned order to that effect passed by the learned Tribunal.

12. Mr. Mulgaonkar, learned counsel appearing for the respondent nos. 1 to 3 therefore has rightly relied upon the observations at para 18 in the case of **National Insurance Co. Ltd. Chandigarh V/s Nicolletta Rohtagi and others**, reported in **(2002) 7 SCC 456** which read thus :

“**18.** The aforesaid provisions show two aspects. Firstly, that the insurer has only statutory defences available as provided in sub-section (2) of Section 149 of the 1988 Act and, secondly, where the Tribunal is of the view that there is a collusion between the claimant and the insured,

or the insured does not contest the claim, the insurer can be made a party and on such impleadment the insurer shall have all defenses available to it. Then comes the provisions of Section 173 which provides for an appeal against the award given by the Tribunal. Under Section 173, any person aggrieved by an award is entitled to prefer an appeal to the High Court. Very often the question has arisen as to whether an insurer is entitled to file an appeal on the grounds available to the insured when either there is a collusion between the claimants and the insured or when the insured has not filed an appeal before the High Court questioning the quantum of compensation. The consistent view of this Court had been that the insurer has no right to file an appeal to challenge the quantum of compensation or finding of the Tribunal as regards the negligence or contributory negligence of offending vehicle.”

13. I have gone through the observations of the above cited authority and the observations of the Apex Court are squarely applicable to the facts of the present case as in the present case also

the respondent nos. 1 and 2 have contested the claim petition and cross examined all the witnesses and the Advocate of the insurance company has merely adopted the cross examination made by respondent nos. 1 and 2. Therefore, it cannot be said that there was collusion between the claimants and respondent nos. 1 and 2. Further, Mr. Mulgaonkar, learned counsel appearing for the respondent nos. 1 to 3 has relied upon the observations at para 10 in the case of **Josphine James V/s United India Insurance Company Limited and another**, reported in **(2013)16 SCC 711** which read thus :

“**10.** Aggrieved by the impugned judgment and award passed by the High Court in United India Insurance Co. Ltd. V/s Josphine James, and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi’s case and instead, placing reliance upon the Bhushan Sachdeva’s case. Nicolletta Rohtagi’s case was exhaustively discussed by a three Judge Bench in United India Insurance Company Ltd., Vs. Shila Datta. Though the Court has expressed its reservations against the

correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of the appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside."

14. I have gone through the facts and observations of the above cited authority and the Hon'ble Apex Court relying upon the observations in the case of Nicolletta Rohtagi's held that the appeal of the insurance company challenging the quantum of compensation in the absence of permission under Section 170(b) of the Motor Vehicles Act is not maintainable. In view of the observations of the above cited authority, the appeal of the appellant/ insurance company being continuation of the original proceedings is not maintainable in absence of the reasoned order under Section 170(b) of the Motor Vehicles Act permitting the insurance company/appellant to contest the

claim on all grounds. Consequently, the insurance company/appellant is not entitled to contest the appeal on all grounds.

15. The learned counsel appearing for the appellant has relied upon the following authorities :

- 1) Suresh alias Sudesh Foll Dessai V/s Suresh and other, reported in 2011(1) TAC 110
- 2) Sk. Kalu V/s Kumar Bohera and another, reported in AIR 1997 Orissa 197.
- 3) Pukh Raj Bumb V/s Jagannath Atchut Naik and others, reported in 2014(2) T.A.C. 879 (Bom.)
- 4) Nalini Ramesh Satarkar V/s Shri Shivappa Shidappa Halli and anr., reported in 2011(1) ALL MR 100.
- 5) Narayan Kalangutkar and anr., V/s The New India Insurance Company Ltd., & Ors., reported in 2012(2) ALL MR 244
- 6) New India Assurance Co. Ltd., V/s Yogesh Devi and others, reported in (2012) Acci.C.R. 390(S.C.)
- 7) Surender Kumar Arora and another V/s Dr. Manoj Bisla and others, reported in (2012) Acci. C.R. 491(S.C.).

The above authorities relied by the learned counsel appearing for the appellant are not taken into consideration as the same pertains to the quantum of compensation.

16. For the reasons recorded above, I am of the opinion that the appeal of the insurance company is not maintainable. Therefore, the appeal is dismissed with costs.

K. L. WADANE, J

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