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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 22nd February, 2016

+ **MAC.APP. 165/2011**

ORIENTAL INSURANCE CO LTD

..... Appellant

Through: **Mr. L.K. Tyagi and Mr. A.K. Soni,**
Advocates

versus

SANGEETA DEVI & ORS

..... Respondents

Through: **Mr. N.K. Jha,** Advocate for R-1 to R-5

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Amarjeet Singh, aged 37 years, a driver by profession, died as a result of injuries suffered in a motor vehicular accident which took place on 02-05-2009 in the area of Paschim Vihar, New Delhi. At the time of the accident, he was driving a two wheeler scooter bearing registration no. DL 4S AQ 8595, which was hit by truck bearing registration no. PB 23F 9897 (the offending vehicle) statedly driven in negligent manner by Kulwinder Singh (the sixth respondent herein), who is also its owner, it having concededly been insured against third party risk with the appellant insurance company (insurer) for the period in question. The dependent family members of Amarjeet Singh (first to fifth respondent herein) brought a claim petition under sections 166 and 140 of Motor Vehicles Act, 1988 (MV Act) before

the Motor Accident Claims Tribunal (the tribunal) on 26-11-2009 whereupon it was registered as suit no. 52/10 (2009). In the said claim case, the appellant insurance company was impleaded as a party/respondent (second respondent) in addition to Kulwinder Singh (driver-cum-owner).

2. The driver-cum-owner (sixth respondent in the appeal), upon being served with the notice of the tribunal, filed his written statement denying involvement of his vehicle in the accident and claiming that the deceased himself was responsible on account of careless driving. He also pleaded that he was also holding a valid and genuine driving licence and referred to the insurance policy to claim that he could not be held liable. The appellant/insurance company, on the other hand, when served with the notice of the tribunal filed written statement, *inter-alia*, claiming that its liability would be subject to proof being adduced that the driver of the offending vehicle was holding a valid and effective driving licence and that there was no violation of any conditions of the insurance policy.

3. The tribunal held inquiry in the course of which the claimants examined three witnesses including the first respondent Sangeeta Devi (PW-1), Yudhvair Singh (PW-2) and Insan Ali (PW-3). Whilst the evidence of PW-3 was intended to prove the earnings from his employment as driver, PW-2 was produced as an eye witness to the occurrence to prove negligence on the part of the driver of the offending vehicle. PW-1 examined herself to prove the status, relation and the background facts relevant for calculating the compensation payable. No evidence was adduced by any of the respondents.

4. On conclusion of the inquiry, the tribunal, by judgment dated 22-11-2010, awarded compensation in the sum of ₹ 11 lacs with interest payable at

the rate of 7.5% per annum from the date of filing of the petition till realization. The apportionment of the compensation, thus awarded, was subjected to some modifications by a subsequent order dated 06-01-2011. The driver-cum-owner having been held liable to pay the compensation, the appellant company was directed to indemnify.

5. The insurance company has come up in appeal basically to question the quantum of compensation. The counsel for the claimants, however, raised preliminary objection that since the insurance policy was admitted and no proof of any of the defences available under section 149 of MV Act had been adduced nor any formal permission taken in terms of section 170 of MV Act, the insurance company could not be permitted to agitate any contentions having a bearing on the computation of compensation. In this context, he placed reliance on *Shankarayya & Anr. Vs. United India Insurance Co. Ltd. and another* 1998 (3) SCC 140; *Rita Devi Vs. New India Assurance Co. Ltd.* (2000) 5 SCC113; *Chinnama George & Ors. Vs. N.K. Raju & Another* (2000) 4 SCC 130 and *National Insurance Co. Ltd. Chandigarh Vs. Nicolleta Rohtagi & Ors.* (2002) 7 SCC 456.

6. On the other hand, it was submitted on behalf of the insurance company, on the strength of *United India Insurance Co. Ltd. Vs. Shila Datta & Ors.* (2011) 10 SCC 509, that it having been impleaded as a party respondent by the claimants in the claim case, the contest with regard to the computation of compensation, if it is found to be excessive, arbitrary or erroneous, can always be raised by it.

7. *Per contra*, the counsel for the claimants argued that since the view taken in *Shankarayya* (supra) by a bench of two Hon'ble Judges of the Supreme Court had been affirmed in the case of *Nicolleta Rohtagi* (supra),

by a bench of three Hon'ble Judges, it was not open to the coordinate bench of three Hon'ble Judges in the case of *Shila Datta* (supra) to take a contrary view on the issue and, thus, the law laid down in *Nicoletta Rohtagi* (supra) would prevail which, according to him, is the view taken by the other benches of the Supreme Court in *Josphine James Vs. United India Insurance Co. Ltd.* 2013 (139) DRJ 24 SC and *Rekha Jain Vs. National Insurance Co.* AIR 2013 SC 3429.

8. In view of the issues raised in this appeal, the other counsel representing various insurance companies were also requested to assist. Mr. A.K. Soni, Advocate also made submissions in addition to Mr. L.K. Tyagi, Advocate on behalf of insurance companies.

9. As argued by the learned counsel for the claimants himself, the earlier decisions of the Supreme Court including the ones reported as *Shankarayya* (supra), *Rita Devi* (supra) and *Chinnama George* (supra) on the issue raised here were duly noted by the Supreme Court in *Nicoletta Rohtagi* (supra). Certain observations of the Supreme Court in *Nicoletta Rohtagi* (supra), appearing in paras 18, 31 and 32 only need to be noted here. They read as under:

“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 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.

31. We have already held that unless the conditions precedent specified in Section 170 of 1988 Act is 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 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 sub-sections (2) of Section 149 of 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.

32. *For the aforesaid reasons, our answer to the question is that even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regards*

negligence or contributory negligence of the offending vehicle.” (emphasis supplied)

10. It is clear from the above observations that the insurer can seek to be impleaded as a party in case there are statutory defences available to it in terms of section 149 of the MV Act or if there is a collusion between the claimant and the insured or if the insured fails to contest the claim. In this context, the conditions precedent specified in section 170 of MV Act are to be satisfied. The insurer has no right of its own to challenge the award on merits including by way of appeal under section 173. But once it is impleaded as a party, whether on account of collusion between the claimant and the insured or on account of the insured failing to contest, even if on directions *suo motu* issued by the tribunal, it is open to the insurer to contest on all the grounds which would be available to the insured or the persons against whom claim is made. In (para 18 of) the judgment in *Nicolleta Rohtagi* (supra) it was made clear that upon being made a party, the insurer shall have all defences available to it.

11. In *Shila Datta* (supra), the matter had come up before a bench of three Hon’ble Judges of the Supreme Court upon a reference made for examination of the correctness of the decision in *Nicolleta Rohtagi* (supra). Though the two questions referred to the larger bench revolved around the permissibility of contest by the insurer to the claim on merits, particularly in regard to the quantum and the right to appeal under section 173 of MV Act so as to question the quantum of compensation awarded at its expense, the larger bench decided to examine the matter along the following lines:-

“(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 co-appellant 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 authorized 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."

12. The court noted at the end of para 12 that the issues nos. (i) and (ii), as delineated above, had not arisen for consideration nor were considered in *Nocolleta Rohtagi* (supra). On point no. (i), which concerns the "*position in cases where the claimants implead the insurer as a respondent in the claim petition*", the court took the following view:

"13. The scheme of the Motor Vehicles Act, 1988 as contained in Chapters XI (Insurance of Motor Vehicles against Third Party risks) and XII (Claim Tribunals) proceeds on the basis

that an insurer need not be impleaded as a party to the claim proceedings and it should only be issued a statutory notice under section 149(2) of the Act so that it can be made liable to pay the compensation awarded by the tribunal and also resist the claim on any one of the grounds mentioned in clauses (a) and (b) of sub-section (2) of section 149. Sub-sections (1), (2) and (7) of section 149 clearly refer to the insurer being merely a noticee and not a party. Similarly, sections 158(6), 166(4), 168(1) and 170 clearly provide for and contemplate insurer being merely a noticee for the purposes mentioned in the Act and not being a party- respondent. Section 170 specifically refers to impleading of insurer as a party to the claim proceedings.

14. When an insurer is impleaded as a party - respondent to the claim petition, as contrasted from merely being a noticee under section 149(2) of the Act, its rights are significantly different. If the insurer is only a noticee, it can only raise such of those grounds as are permissible in law under section 149(2). But if he is a party-respondent, it can raise, not only those grounds which are available under section 149(2), but also all other grounds that are available to a person against whom a claim is made. It therefore follows that if a claimant impleads the insurer as a party-respondent, for whatever reason, then as such respondent, the insurer will be entitled to urge all contentions and grounds which may be available to it.

15. The Act does not require the claimants to implead the insurer as a party respondent. But if the claimants choose to implead the insurer as a party, not being a noticee under section 149(2), the insurer can urge all grounds and not necessarily the limited grounds mentioned in section 149(2) of the Act. If the insurer is already a respondent (having been impleaded as a party respondent), it need not seek the permission of the Tribunal under section 170 of the Act to raise grounds other than those mentioned in section 149(2) of the Act.

16. *The entire scheme and structure of Chapters XI and XII is that the claimant files a claim petition only against the owner and driver and the tribunal issues notice to the insurer under section 149(2) so that it can be made liable to pay the amount awarded against the insurer and if necessary, deny liability under the policy of insurance, on any of the grounds mentioned in section 149(2). If an insurer is only a noticee and not a party- respondent, having regard to the decision in Nicolletta Rohtagi, it can defend the claim only on the grounds mentioned in section 149(2) and not any of the other grounds relating to merits available to the insured-respondent. This is the position even where the claim proceedings are initiated suo moto under sections 149(7) and 158(6) of the Act, without any formal application by the claimants, as the insurer is only a noticee under section 149(2) of the Act.*

17. *Section 170 of the Act does not contemplate an insurer making an application for impleadment. Nor does it contemplate the insurer, if he is already impleaded as a party respondent by the claimants, making any application seeking permission to contest the matter on merits. Section 170 proceeds on the assumption that a claim petition is filed by the claimants, or is registered suo moto by the tribunal, with only the owner and driver of the vehicle as the respondents. It also proceeds on the basis that in such a proceeding, a statutory notice would have been issued by the tribunal to the insurer so that the insurer may know about its future liability in the claim petition and also resist the claim, on any of the grounds mentioned in section 149(2).*

18. *Section 170 of the Act also assumes that the tribunal will hold an inquiry into the claim, where only the claimants and the owner and driver will be the parties. Section 170 provides that if during the course of such inquiry, the tribunal finds and satisfies itself that there is any collusion between the claimant and the owner/driver or where the owner/driver has failed to contest the claim, the tribunal may suo moto, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of the claim, who was till then only a notice, shall be*

treated as a party to the proceedings. The insurer so impleaded, without prejudice to the provisions of section 149(2), will have the right to contest the claim on all or any of the grounds that are available to the driver/owner.

19. Therefore, where the insurer is a party- respondent, either on account of being impleaded as a party by the tribunal under section 170 or being impleaded as a party-respondent by the claimants in the claim petition voluntarily, it will be entitled to contest the matter by raising all grounds, without being restricted to the grounds available under section 149(2) of the Act. The claim petition is maintainable against the owner and driver without impleading the insurer as a party.

20. When a statutory notice is issued under section 149(2) by the tribunal, it is clear that such notice is issued not to implead the insurer as a party-respondent but merely to put it on notice that a claim has been made in regard to a policy issued by it and that it will have to bear the liability as and when an award is made in regard to such claim. Therefore, it cannot, as of right, require that it should be impleaded as a party-respondent. But it can however be made a party-respondent either by the claimants voluntarily in the claim petition or by the direction of the Tribunal under section 170 of the Act. Whatever be the reason or ground for the insurer being impleaded as a party, once it is a party-respondent, it can raise all contentions that are available to resist the claim.”

(emphasis supplied)

13. It is noted that even on the second point concerning “*maintainability of a joint appeal by the owner of the vehicle (insured) and insurer*” it was, *inter-alia*, held that so long as the owner is an appellant and he is a ‘person aggrieved’ in law, within the meaning of section 173 of MV Act, the question whether he is independently filing the appeal or whether he is doing so at the instance of the insurer becomes irrelevant.

14. On the other point taken up for consideration, the bench of three Hon'ble Judges of the Supreme Court in *Shila Datta* (supra) held the view which is in conflict with *Nicolleta Rohtagi* (supra) and, thus, recommended that the same be referred to a larger bench. On the first issue, with which the present case is concerned, the court authoritatively held that the insurance company having been impleaded as a party respondent, as contrasted by a case where it may be only a noticee, it can defend the claim on all grounds as may be available to other party – respondent.

15. A bench of three Hon'ble Judges of the Supreme Court in a batch of several similarly placed matters led by *United India Insurance Company Vs. Sudha Rani* bearing Civil Appeal no. 8654/13 decided on 24-09-2013 had set aside the order of a learned single judge of this court rejecting the appeal of the insurance company questioning the computation of compensation for reasons identical to those being urged by the claimants in the matter at hand, holding that in view of the decision of the Supreme Court in *Shila Datta* (supra), the said issues were not *res integra*.

16. In above facts and circumstances, it cannot be said, as is being contended, that the view taken in *Shila Datta* (supra) cannot hold the field or that on the basis of ratio in *Nicolleta Rohtagi* (supra) the appeal of the insurance company ought to be held to be not maintainable.

17. Since the appellant insurance company was party – respondent to the claim petition before the tribunal it not only was entitled to raise all defences available to other respondents but may also bring in challenge to the decision of the tribunal in exercise of remedy of appeal under section 173 of MV Act.

18. The preliminary objection to the maintainability of the appeal of the insurance company having been repelled, as above, its contentions on merits are taken up.

19. It was argued by the counsel for the insurance company that the computation of compensation by adding the element of future prospects to the extent of 50% was incorrect. In this context, the following state of law needs to be kept in mind.

20. In the case reported as *Sarla Verma & Ors. vs. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121, Supreme Court, *inter-alia*, ruled that the element of future prospects of increase in income will not be granted in cases where the deceased was “self employed” or was working on a “fixed salary”. Though this view was affirmed by a bench of three Hon’ble Judges in *Reshma Kumari & Ors. Vs. Madan Mohan & Anr.*, (2013) 9 SCC 65, on account of divergence of views, as arising from the ruling in *Rajesh & Ors. vs. Rajbir & Ors.*, (2013) 9 SCC 54, the issue was later referred to a larger bench, *inter-alia*, by order dated 02.07.2014 in *National Insurance Company Ltd. vs. Pushpa & Ors.*, (2015) 9 SCC 166.

21. Against the above backdrop, by judgment dated 22.01.2016 passed in MAC Appeal No. 956/2012 (*Sunil Kumar v. Pyar Mohd.*), this Court has found it proper to follow the view taken earlier by a learned single judge in MAC Appeal No. 189/2014 (*HDFC Ergo General Insurance Co. Ltd. v. Smt. Lalita Devi & Ors.*) decided on 12.1.2015, presently taking the decision in *Reshma Kumari (Supra)* as the binding precedent, till such time the law on the subject of future prospects for those who are “self-employed” or engaged in gainful employment at a “fixed salary” is clarified by a larger bench of the Supreme Court. This applies to the matter at hand because the

claimant here pleaded about gainful employment at a fixed salary and has not led any evidence showing the salary was subject to any periodic increase.

22. Though the claimants had examined PW-3 in an effort to prove that the deceased was in regular employment, in absence of records of such employment including salary register, attendance register, etc, the oral word of PW-3 was not believed. The tribunal instead decided to adopt the minimum wages (₹ 4,358/- per month) payable to a skilled worker as the bench mark. In absence of proof that the income of the deceased was subject to any progressive increase, the factor of future prospects could not have been added. Thus, the loss of dependency needs to be recomputed.

23. The number of dependents being five, personal and living expenses have been correctly discounted to the extent of one-fourth. Therefore, the loss of monthly dependency comes to $(4,358 \times \frac{3}{4})$ ₹ 3,268.50 rounded off to ₹ 3,270/- on the multiplier of 15, the total loss of dependency comes to $(3,270 \times 12 \times 15)$ ₹ 5,88,600 rounded off to ₹ 5,89,000/-.

24. It is noted, however, that the matter relating to non-pecuniary heads of damages has been vaguely dealt with by the tribunal by awarding a consolidated sum of ₹ 2,05,000/-. Following the view taken in *Rajesh & Ors. v. Rajbir Singh & Ors.*, (2013) 9 SCC 54 and *Shashikala V. Gangalakshamma* (2015) 9 SCC 150, compensation in the sum of rupees one lac on account of loss of consortium and rupees one lac towards love & affection, ₹ 25,000/- towards loss of estate and ₹ 25,000/- towards funeral expenses must be awarded. Therefore, the total compensation awarded in the case is calculated as $(₹ 5,89,000/- + ₹ 2,50,000/-)$ ₹ 8,39,000/-.

25. The award of compensation in the case is modified accordingly.

26. There is no reason why the awarded compensation should carry interest only at 7.5% per annum. It has been consistent view of Supreme Court in a series of cases that such award shall carry interest at 9% per annum. [*Kaushnuma Begum vs New India Assurance Co. Ltd.* (2001) 2 SCC 9; *Supe Dei vs National Insurance Co. Ltd.* (2009) 4 SCC 513; *Municipal Corporation of Delhi, Delhi vs Association of Victims of Uphaar Tragedy and Ors.* (2011) 14 SCC 481; *Basappa vs T. Ramesh* (2014) 10 SCC 789; *Syed Sadiq etc. vs Divisional Manager, United India Ins. Company* (2014) 2 SCC 735; *Surti Gupta vs United India Insurance Company and Ors.* 2015 (3) SCALE 795; *Kumari Kiran vs Sajjan Singh* (2015) 1 SCC 539]. Thus, the directions of the impugned award are modified to enhance the rate of interest to nine percent (9%) per annum.

27. The tribunal by the impugned judgment and the subsequent order dated 06-01-2011 apportioned the compensation by specifying the amounts payable to the claimants. This may not be a correct approach. It is directed that the widow (the first respondent/claimant) shall be entitled to sixty percent (60%) of the awarded amount whilst the other respondents/claimants shall get ten percent (10%) each of the awarded compensation with proportionate interest. The entire share of second and fifth respondent shall be put in Fixed Deposit Receipts in their respective names in a nationalized bank till the time they attain majority. Eighty percent (80%) of the award in favour of the first respondent shall be similarly put in Fixed Deposit Receipt in a nationalized bank in her name for a period of seven years with right to draw monthly interest.

28. By order dated 22-02-2011, the insurance company had been directed to deposit the entire awarded amount with upto date interest with the

Registrar General of this court. By order dated 22-11-2011, 60% of the said awarded amount was allowed to be released in terms of the order of the tribunal. The Registrar General shall now calculate the amounts payable to the claimants in terms of the award modified as above and release the same to the respective claimants in terms of the directions given above. The balance deposited in excess of its liability shall be refunded to the insurance company with the statutory deposit, if made.

29. The appeal is disposed of in above terms.

FEBRUARY 22, 2016

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**R.K. GAUBA
(JUDGE)**