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

\+ CM(M) 1078/2016

ANIL SRIVASTAVA & ANR ..... Petitioners

Through : Ms.Aruna Mehta, Advocate

versus

ROHIT ARORA & ORS ..... Respondents

Through : Mr.Rajeev M Roy, Advocate.

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

<u>O R D E R</u>

% 29.11.2016

The impugned order of 02nd June, 2016 allows Insurer's application for reopening of evidence by summoning eye-witness *Nitin Kakar*.

In this petition, appellants/claimants challenges impugned order on the ground of incompetency of the respondent No.3/Insurer to file such an application.

Learned counsel for petitioners submits that respondent No.3/ Insurer is the only contesting respondent and rest of respondents are proforma. It is submitted by learned counsel for petitioners that respondent No.3/Insurer had not filed any application under Section 170 of the *Motor Vehicle Act, 1988* and so in view of the decision of Three Judge Bench of Supreme Court in *National Insurance Co Ltd vs. Nicolletta Rohtagi & Ors* (2002 ACJ 1950), respondent / Insurer cannot cross-examine the eye-witness on the negligence aspect and also not lead evidence on the negligence aspect.

Reliance is also placed by learned counsel for appellant upon the decision of Supreme Court in *Central Board of Dawoodi Bohra Community and Another vs. State of Maharashtra & Another* : (2005) 2 SCC 673 to submit that the law laid down in *Nicolletta Rohtagi (*supra*)* will prevail over the subsequent decision of Supreme Court in *United India Insurance Company Limited vs. Shila Datta & Ors* : (2011) 10 SCC 509. So, it is submitted that the impugned order deserves to be set aside.

Learned counsel for respondent / Insurer supports the impugned order and submits that the point for consideration in *Nicolletta Rohtagi (*supra*)* was whether the insurer could file an appeal and whereas in *Shila Datta (*supra*)* what was considered is, as to whether all the defences would be available to the insurer, if insurer is made a party in the claim petition. So, it is submitted that the decision in *Shila Datta (*supra*)* would apply to the instant case and the decision in *Nicolletta Rohtagi (*supra*)* does not have any application to facts of the instant case.

Upon hearing, on perusal of impugned order and the decisions cited, I find that Supreme Court in *Nicolletta Rohtagi (*supra*)* has clearly declared that the statutory defences which are available to the insurer as provided under sub-Section 2 of Section 149 of the *Motor Vehicle Act, 1988* alone would be available to the insurer.

The Supreme Court in a later decision in *Shila Datta (*supra*)* of equal strength has held to the contrary while drawing a distinction between the rights of a noticee insurer and the rights of a insurer being a party in the claim petition and has concluded that all the defences would be available to the insurer, where the insurer is made a party in the claim petition. In *Shila Datta (*supra*)* the matter has been referred to a Larger Bench.

Be that as it may.

In view of the decision of Supreme Court in *Central Board* (supra), the law laid down in an earlier decision would prevail over the divergent view taken by a subsequent Bench of equal strength. Resultantly, the legal position as declared in *Nicolletta Rohtagi (*supra*)* would prevail. Meaning thereby, the defences which are available to the insurer under sub-Section 2 of Section 149 of the *Motor Vehicle Act, 1988* alone are available to the insurer in the absence of resort to Section 170 of the *Motor Vehicle Act, 1988*.

In view of the aforesaid, the respondent / insurer is not entitled to get the evidence reopened by summoning the eye witness.

Consequentially, the impugned order is set aside with liberty to learned Tribunal to summon the eye-witness as a 'Court Witness', if the facts of instant case so warrant.

With the aforesaid observations, this petition is disposed of.

(SUNIL GAUR)
Judge

NOVEMBER 29, 2016
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