

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.203 OF 2009

The New India Assurance Co. Ltd.
Kaustubh, 1st Floor,
Above Godrej Showroom,
Manpada Road, Dombivali (E),
Dist: Thana – 421201.

... Appellants

V e r s u s

1. Mr. Vijay Priyolkar,
S/o late S. G. S. Priyolkar,
major, businessman,
r/o. Poorvi, 622/D, Alto Nagali,
Dona Paula, Goa.

2. Mr. Santosh Sudhakar Parulekar,
r/o. Aradhana Bungalow,
Sant Namdev Path,
Road No.2, Dombivali (E)
Dist : Thana-421201.

... Respondents

Shri U. R. Timble and Ms. Y. Mandrekar, Advocates for the
appellant.

Shri R. G. Ramani, Advocate for the respondent no.1.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Judgment on : 31 July 2018
Judgment Pronounced on : 9 August 2018

JUDGMENT

1. This is an appeal by the insurer challenging the
judgment and award passed by the learned MACT, North Goa,

Panaji, dated 18.11.2008 pursuant to which the respondent no.1/original claimant was partly secured with the relief of compensation of ₹62,000/- holding the respondents therein i.e. the present appellant with the owner and driver jointly and severally liable to pay the amount with interest at the rate of 9% per annum from the date of filing of the petition till the final payment.

2. The parties would be referred to as the insurer and the claimant for brevity's sake hereinafter.

3. The insurer aggrieved by the said judgment and award, has challenged the same in this appeal on grounds that the Claims Tribunal erred in law as well as on facts while passing the impugned judgment. The Claims Tribunal failed to appreciate that the claimant had raised a claim with his insurance company under his policy and the claim was settled and therefore the claimant was not entitled to any further amount from them. The Claims Tribunal failed to appreciate that the claim was settled at ₹50,400/- by the insurer of the claimant as the value of the damage caused to his vehicle was assessed in the same amount and there was no question of granting any additional compensation to the claimant. The Claims Tribunal failed to appreciate that the amount accepted

by the claimant from his insurance company was in full and final settlement of his claim and therefore he was not entitled to any further compensation.

4. The Claims Tribunal erred in distinguishing and discarding the decision of this Court in **Nitin Transport vs. Maharashtra State Road Transport Corporation & Ors.** [2002 ACJ 1383]. The Claims Tribunal failed to appreciate that the claimant had failed to examine his insurer to prove the reason why only an amount of ₹50,400/- was settled against the claim raised by him. The Claims Tribunal erred in allowing an amount of ₹17,500/- towards the expenses. The impugned award was therefore liable to be interfered with on such and similar grounds which may be raised at the time of hearing of the appeal and therefore the award had to be quashed and set aside against them.

5. Heard Shri U. R. Timble, learned Advocate appearing for the insurer who submitted at the outset that the claimant had two remedies either to claim from his insurer or from the insurer in the present appeal. He could not avail the benefit from both the insurance companies on any premise. Moreover, he had to issue a notice to the other party in respect of the damages caused to his vehicle and which could have been

evaluated by the insurer in case such a notice was given soon after the accident. The claimant had not given any such notice and instead raised a claim against his own insurer. The insurer had no opportunity to assess the damages and to ascertain the cost of repairs. The claimant had obtained the compensation from his own insurer and there was no plea raised at his instance that it was obtained without prejudice. He relied in *Nitin Transport (supra)* in support of his contention. He next adverted to the affidavit of the claimant and submitted that there was no material at his instance to show that material parts were replaced. The issuance of notice to the insurer and the owner were inconsequential when the car was ready for delivery after repairs.

6. Shri Timble, learned Advocate for the insurer next adverted to the evidence of Deepak (Cw.2) and submitted that his testimony was unbelievable and there was no basis for the learned Tribunal to award the compensation on the head of expenses towards travelling. The testimony of Raghunath (Cw.3) also did not indicate that the repairs carried out were towards the damages caused to the car in the course of the accident and that it was absolutely necessary to carry out these repairs to make the vehicle roadworthy. The claimant also had not examined any witness on behalf of his own

insurer to establish why the total claim was not allowed. The impugned award had therefore to be quashed and set aside against them.

7. Shri R. G. Ramani, learned Advocate appearing for the claimant submitted at the outset that the grounds available to the insurer to challenge the judgment were limited to those under Section 149 of the Motor Vehicles Act, (Act, for short). It was for the insurer to show collusion between the owner and the claimant and in the absence of any appeal by the owner, the appeal at the instance of the insurer was not tenable. It was also his contention that the insurer had not sought leave before the Tribunal to take all the defences on behalf of the owner and therefore the owner could not question the quantum of compensation awarded in favour of the respondent. He placed reliance in **Sadhana Lodh vs National Insurance Co. Ltd & anr.** [(2003) 3 SCC 524]. The grounds urged by the insurer were beyond the scope of section 149(2) of the Act.

8. Shri R. G. Ramani, the learned Advocate for the claimant next contented that there was no necessity to issue a notice to the insurer before carrying out the repairs since it was not a statutory requirement and even otherwise it was within the

knowledge of the insurer that their vehicle had met with an accident. He adverted to the defence filed by the driver cum owner and that of the insurer and submitted that the claimants had issued a notice to the insurer. The insurer had not given any reply that they had any intention to inspect the vehicle. The insurer had also not pleaded the "knock to knock" agreement. There was no basis to disbelieve the case of Deepak whose vehicle was used by the claimant for his transportation during the non-availability of his own vehicle. At the highest, the said Deepak would be liable to suffer penal consequences for non-compliance with the statutory provisions but there was no bar to use a private vehicle for transportation purpose. In so far as the evidence of Raghunath was concerned, it was the contention of Shri R. G. Ramani, learned Advocate appearing for the claimant that there was no cross examination at the instance of the insurer. The evidence brought on record by the insurer did not substantiate their case. He next adverted to the impugned judgment and submitted that the contention on behalf of the insurer that the plea of placing new parts or carrying out additional repairs which were not attributable to the accident was not available to the insurer and submitted further that there was no basis to interfere with the judgment under challenge. He placed reliance in **Shri A. P. Braganza vs Shri**

Sagar R. Chauhan & ors. [FA No.215/2004] and that in **National Insurance Company Ltd., vs Sebastian K. Jacob** [(2009) 4 SCC 778] before closing his argument that no interference was called for with the judgment under challenge.

9. i would consider their submissions and deal with the same appropriately apart from the judgments relied upon on behalf of the claimant.

10. Section 149 of the Act deals with the duty of the insurer to satisfy the judgments and awards against persons insured in respect of third party risks. Sub-section (2) contemplates and reads as below :

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled

to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

—

(i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

In other words, the grounds available to the insurer to challenge the award are those contemplated under sub-section(2)(a)(i)(a-d)(ii)(iii) and (b) thereof and no other.

11. In **Sadana Lodh** (supra), a Three Judge Bench of the Apex Court held at para 4 that it is not disputed that under Section 173 of the Act, an insurer has a right to file an appeal before the High Court on the limited grounds available under Section 149(2) of the Act. However, in a situation where there

is a collusion between the claimant and the insurer or the insurer does not contest the claim and further if the Tribunal does not implead the insurance company to contest the claim; in such a situation 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 the award of the Tribunal on merits. Thus, in such a situation, the insurer can question the quantum of compensation awarded by the Tribunal.

12. Sadana Lodh (supra), further held that a right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Articles 226 and 227 of the Constitution of India under the premise that the insurer had limited grounds for challenging the award given by the Tribunal. Under Section 173 of the Act, an insurer has a right to file an appeal before the High Court on limited grounds available under Section 149(2) of the Act. The appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act. This judgment clearly supports the contention of Shri R.

G. Ramani, learned Advocate for the claimant that the insurer cannot question the quantum of compensation when admittedly it had not shown any collusion between the owner and the claimant and it had not sought leave before the Tribunal to take all the defences on behalf of the owner.

13. The claimant had maintained the petition claiming compensation on account of the damages caused to his vehicle in the course of a vehicular accident caused due to the rash and negligent driving of the respondent no.1 and in the amount of ₹94,877/-, not pursuing his claim towards any personal injuries suffered by him. The owner had denied the case of the claimant that his car was badly damaged on the front side requiring replacement and denied that the wife of the claimant was present alongwith him and sustained injuries in the course of the accident and denied his entitlement to the sum claimed towards the repairs. Besides, the claim of the claimant in respect of the damages to his car were fully and finally settled by his insurance company and he could not file any petition on the same cause of action and pressed for the dismissal of the petition while seeking to shift the burden of paying any compensation to the claimant on his insurer in the event, it was held that the claimant was entitled to any compensation.

14. The insurer had in their written statement in defence taken a specific plea that the owner cum driver of their vehicle was not holding a valid and effective driving licence at the time of the accident constituting a breach of the policy terms and seeking to be absolved from the liability to indemnify the owner. It was also their plea that the claimant had claimed and received payment from his insurance company regarding the alleged damages to his vehicle and that he was not entitled to any further compensation from them. Besides, the insurance policy was subject to "knock for knock" agreement and therefore the claimant should recover the damages from his own insurance company which was a necessary party to the petition. The claimant had also not given any notice of his intention to claim compensation from them and therefore they had no opportunity to get the loss, if any, assessed through a Surveyor and the claim against them was not at all justified.

15. The parties went to trial and the claimant reiterated his case on oath about the accident, the damages to his vehicle in particular, the replacement of the parts, the amounts spent by him in that direction and the amount received by him from his insurer in part settlement of his claim. Moreover, he had hired a vehicle of one Deepak and negated the expenditure of ₹17,500/- towards the hire charges. The claimant had also

affirmed on oath that he had issued legal notices to the owner and the insurer but they had failed to reply nor complied with the legal notices and the same were produced on record alongwith the AD cards. He was materially not shaken on his claim that there were extensive damages to his vehicle and that the vehicle had to be towed to the workshop for carrying out repairs where it lay about three to four weeks.

16. The claimant (Aw.1) had categorically maintained in his cross examination particularly at the instance of the insurer that he had given an intimation of the accident by registered post not only to his insurance company but to the insurer and they had not replied nor informed him that they wanted to inspect the vehicle. It had otherwise come on record that his vehicle was surveyed by an insurance Surveyor and an initial estimate was given of ₹1,37,000/- and the final bill for ₹97,000/- and odd from which only ₹50,400/- was paid by his insurance company after allowing depreciation. He had categorically denied the case of the insurer that his insurance company had paid him in full and final settlement of his claim or that he was not entitled to any compensation from the insurer. Therefore, the insurer was not entitled to raise a plea that the claimant had not issued a notice to them when it was clearly established that the claimant had issued a notice by

registered post AD despite which the insurer had not responded by seeking to carry out the survey/assessment to the damages to the vehicle. Hence, it is not now available to the insurer to take a plea that they had no opportunity to evaluate the extent of damages and therefore they were not bound to pay any compensation to the claimant.

17. The claimant had besides examined Deepak (Cw.2) who stated that his father in law was owning the car bearing registration no,GA-02/J-1169. The claimant had hired his car for five weeks on payment of hire charges of ₹3,500/- per week and made the payment in cash for which he had issued the receipts. He maintained during his cross examination that he was duly authorised by his father in law by a Power of Attorney executed in his favour to do acts on his behalf. No doubt, he had admitted that he had not taken permission from any authorities to give the car on hire which at the highest may expose him to penal consequence but that does not negate the case of the claimant that he had hired his vehicle and used it during the time when his own vehicle was damaged and in the garage for four to five weeks for repairs.

18. Raghunath (Cw.3), was the Assistant General Manager of Millennium Auto who corroborated the version of the

claimant that he had brought his car for repairs and at which time it was estimated at ₹1,37,687/-. They had carried out the repairs of the car, issued an invoice for ₹94,877/- and received the said amount from the claimant by cheque no.218424 dated 30.07.2004. He gave the break up of the cost of ₹75,262/- and the labour charges of ₹17,700/-. He maintained during his cross examination that the price of the spare parts mentioned in the estimate were recommended by Fiat India Limited and denied the suggestion to the contrary. In any event, there was not even a suggestion put to him that the vehicle was not damaged extensively or that there was no necessity of carrying out the repairs and the replacement of the parts as shown in the estimate. Therefore, the contention on behalf of the respondents is untenable that there was no statement forthcoming from Raghunath that the repairs were towards the damages and absolutely necessary to make it roadworthy when his statement indicates otherwise. His other contention that the non-examination of the claimant's insurer was fatal to his case, cannot be countenanced merely on the basis that the claimant had not accounted why the total claim was not settled by his insurer. There was a clear statement at the instance of the claimant that he had been paid a part of the amount by his insurance company and that too after

allowing depreciation. Therefore, non-examination of his vehicle insurer would not damage his case.

19. The insurer had examined the owner in support of its case who stated on oath that a false claim was raised by the claimant to get his old vehicle renovated and modified at his cost and as it was old, damaged and not in a roadworthy condition. However, contrary to the plea of the insurer, the owner of the vehicle admitted that he had received the notice issued by the claimant which he had handed over to his Advocate apart from contacting the insurer but was never told by his Advocate whether any reply was given to the notice or not. The other witness examined by the insurer was its Officer Borkar who stated that the claimant having received ₹50,400/- from his insurer being in full and final settlement of his claim, he was not entitled to raise any claim against them. Besides there was a "knock to knock" agreement pursuant to which another claim was made and settled under one insurance policy, the said insurance company had to pay and no claim could be raised qua the said losses against any other insurance company and therefore the insurer was not liable to pay any compensation to him. At the outset, she admitted that there was no statement made by the claimant that the amount received by him from his insurer was in full and final

settlement of the claim and what was stated was only the amount being received by him from his insurer. She had also not categorically denied that a notice was issued to the insurer. Therefore, the insurer was not entitled to raise any plea that they had no option to assess the extent of damages to the car and thus the claim raised by the claimant was not sustainable.

20. In view thereof, the argument that the claimant had admitted to replace new parts and carry out additional repairs to his vehicle which were not required to make it roadworthy after the accident would not be available to the insurer. The learned Claims Tribunal on an appraisal of the evidence led by the claimant and the insurer partly allowed the petition on the damages and also on the amount incurred by the claimants towards hiring of a vehicle thereby holding him entitled to the amount of ₹62,000/- with interest thereon. The findings rendered by the learned Tribunal therefore cannot be interfered with on any premise.

21. A. P. Braganza (supra), had challenged the award passed by the learned MACT, Mapusa in First Appeal. He had filed the petition claiming compensation towards the damages to his vehicle in the amount of ₹61,465/- on account of the

rash and negligent driving of the respondent no.1. He alleged that he had received a sum of ₹48,206/- from his insurer and filed the above petition to claim the balance amount towards the damages to the tune of ₹13,259/- alongwith interest and not only towards the damages but also on account of the inability to use his own vehicle for about two weeks on account of mental torture and inconvenience which he had qualified damages to the tune of ₹21,741/-. The respondent no.3 i.e. the insurer had taken a plea that as the claim of the appellant was settled by his insurance company, the appellant was not entitled to maintain the petition and further that the insurance policy as issued was subject to "knock for knock" agreement and the appellant having recovered the damages from the insurance company, no further claim would lie against them. The learned Presiding Officer as usual then had dismissed the petition of the appellant giving rise to the appeal at his instance.

22. In **A.P. Braganza** (supra), the learned Single Judge held that though some amount had been received from his insurance company it would not create any estoppel against the appellant to recover the balance amount actually spent for the repairs of the damaged vehicle from the respondent. Besides, the insurance company had not established the

“knock for knock” agreement by any evidence and therefore the learned Tribunal was in error to hold that the appellant was not entitled to claim the balance amount from the respondent and ultimately allowed the appeal.

23. In **Sebastian Jacob** (supra), the insurer filed an appeal before the Kerala High Court considering the judgment of the Motor Accident Claims Tribunal, Thalassery, allowing him to realise a sum of ₹24,033/- with interest with proportionate costs from the driver, owner and the appellant jointly and severally payable by the appellant. According to the appellant, the insurer was not liable to make the payment since the claimant was already compensated by another insurance company by paying ₹21,700/- for the same cause of action consequent to the same accident. The High Court did not accept the plea and upheld the order of the Tribunal. In the facts of that case, the claimant accepted that he had settled his claim with the insurer of the jeep but according to them that was of no consequence and did not debar him from making a claim under the statutory liability against the tortfeasor.

24. In **Sebastian Jacob** (supra), the claimant had accepted that he had settled the matter and received the money in

respect of the jeep in question and there was no scope for granting a further relief. In the factual matrix it was observed that the claimant had claimed the whole amount and not disputed the claim. The High Court did not appear to have considered this aspect in the proper perspective and therefore set aside the order of the High Court and remitted the matter for a fresh consideration. It however supports the contention of Shri R. G. Ramani, learned Counsel for the claimant that having raised a claim against his insurer, the claimant was not debarred from making a claim under the statutory liability against the tortfeasor, i.e. the insurer of the offending vehicle in question.

25. Therefore, contrary to the contention of Shri Timble, learned Counsel for the appellant, there is no basis to justify interference with the impugned judgment and in view thereof, i pass the following :

ORDER

The appeal is dismissed and the impugned judgment dated 18.11.2008 is confirmed pursuant to which the learned Tribunal held the claimant entitled to the compensation of ₹62,000/- with interest

at the rate of 9% p.a. from the date of the filing of the petition till the date of the final payment.

NUTAN D. SARDESSAI J.

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