

31.1. 2024
item No.6
n.b.
ct. no. 551

FMA 1451 of 2022

The New India Assurance Co. Ltd.
Vs.
Mithu Sk. & Anr.
With
COT 23 of 2022
Mithu Sk.
Vs.
The New India Assurance Co. Ltd. & Anr.

Mr. Rajdeep Bhattacharya,
Mr. Debasish Benerjee,
Mr. Arpayan Mukherjee,
.....for the appellant.
Mr. Ashique Mondal,
..... for the claimant

The instant appeal has been preferred against the judgment and award dated November 29, 2021 passed by the learned Judge Motor Accident Claims Tribunal Cum Additional District Judge, Fast Track Court, 7th Court at Alipore, South 24 Parganas, in M.A.C. case No. 17 of 2018.

The brief fact of the case is that the present respondent no.1 being an injured preferred an application before the learned Tribunal under Section 166 of the Motor Vehicles Act for getting compensation from the Insurance Company on the ground that he suffered severe bodily injury in a road traffic accident due to rash and negligent driving of the driver of the offending vehicle duly insured under the policy of the insurance company. By such accident he became permanent disabled, so he prayed for just and proper compensation. The Insurance

Company initially appeared but did not contest the matter or never filed any written statement or any application under Section 170 of the M.V. Act. The learned Tribunal proceeded to hear the matter *ex parte* against the Insurance Company and against the owner of the offending vehicle.

After hearing the parties, the learned Tribunal has awarded a sum of Rs.25,97,529/- towards the compensation in favour of the claimant along with 7% interest per annum from the date of filing of the claim case. The learned Tribunal has directed the Insurance Company to pay the compensation.

Being aggrieved by and dissatisfied with the impugned award, the present application preferred by the Insurance Company on the ground that the learned advocate for the Insurance Company suffered Covid - 19 and he died within the span of time. Thus, he could not appear or take proper steps before the learned Tribunal.

Learned advocate appearing on behalf of the Insurance Company further submits that this is an appeal against an *ex parte* order; the same can be challenged in an appeal. He again argued if the learned advocate appearing on behalf of the Insurance Company could contest the matter; the order passed by the learned Tribunal may have otherwise. He further argued that the award passed by the learned Tribunal is exorbitant, so the

matter need be remanded back and an opportunity may be given to the Insurance Company to contest the matter.

In support of his submission he cited a decision of Hon'ble Allahabad High Court reported in **National Insurance Co. Ltd. Vs. Smt. Jairani & Ors** reported in **(2010) 4 SCC 252**. By citing the observation of the Division Bench of Allahabad High Court Mr. Bhattacharya learned advocate appearing on behalf of the Insurance Company submits that on the similar set of facts the Division Bench of Hon'ble Allahabad High Court has remanded the matter back before the learned Tribunal to re-hear the case in presence of the insurance Company. He referred the paragraphs 9,17 & 18 in support of his submission.

“9. The decision in Nicolletta Rohtagi’s case had been followed in National Insurance Co. Ltd. Vs. Mastan & Another,(2006) 2 SCC 641; Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others,(2006) 3 SCC 242; Sadhana Lodh Vs. National Insurance Company Ltd, and Another, (2003) 3 SCC 524 and United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others, (2003) 7 SCC 212. The Apex Court in Jyotsnaben Sudhirbhai Patel’s case has laid emphasis that the Tribunal while deciding application u/s 170 of the Act must record reasons. From these decisions the scope of Section 170 stands clearly explained. The Insurance Company can file appeal u/s 173(1) on all the grounds which are available to the owner of the vehicle and the grounds mentioned in Section 149(2) of the Act if the application u/s 170 had been allowed by the Tribunal. However, if the application u/s 170 had been rejected by the Tribunal then the insurance company can

maintain the appeal only on the grounds available u/s 149(2) of the Act.

17. The question still is whether where no order is passed by the Tribunal on an application u/s 170, can it be challenged in an appeal u/s 173(1) of the Act? It is true that an appeal u/s 173(1) of the Act lies only against the award of the Motor Accident Claims Tribunal but if the award is a nullity it can be challenged in an appeal u/s 173(1) of the Act and the appeal would be maintainable. The decision of the Apex Court in Bhanu Kumar Jain Vs. Archana Kumar and Another, (2005) 1 SCC 787 would apply and the insurance company would not be estopped from raising the question that the award of the Tribunal is a nullity in an appeal u/s 173 of the Act.

18. Before parting with the case we may point out that Motor Accident Claims Tribunals in Uttar Pradesh are not following the mandate of Section 170 of the Act and the law declared by the Apex Court in Jyotsnaben Sudhirbhal Patel's case. While making the award the applications u/s 170 of the Act are not being decided. Due to this approach of the Tribunals the insurance companies who file an application u/s 170 are seriously prejudiced. Under the Act the only right an insurance company has to file an application u/s 170 to contest the claim on merits and also on the grounds which are available to the owner of the vehicle, if their application is allowed. The presiding officers of the Motor Accident Claims Tribunals are not performing their judicial duty to decide the application u/s 170 first and then pass an award within reasonable time, so that if the insurance company is desirous of challenging the order u/s 170 before a higher Court, it may have reasonable time. We do not propose to direct any action at this stage. However, we direct the Registrar General to issue a circular forthwith to all Motor Accident Claims Tribunals functioning in State of Uttar Pradesh to pass

appropriate orders by giving reasons on the applications filed u/s 170 of the Motor Vehicles Act, 1988.”

Learned advocate appearing on behalf of the claimant/respondent no.1 submits that the legal question involved in this matter has been specifically dealt with by the Hon’ble Supreme Court in **National Insurance Co. Ltd. Chandigarh Vs. Nicolletta Rohtagi & ors.** and **Josphine James Vs. United India Insurance Co. Ltd & Ors.** exception has raised in **United India Insurance Co. Ltd. Vs. Shila Datta & ors. Shila Datta** consequently it was referred to larger bench; but the proposition of law of **Nicolletta Rohtagi** has never be overruled, till today, by the larger bench. He argued that the proposition of law set out by the Hon’ble Supreme Court in **Nicolletta Rohtagi(supra)** as well as **Josphine James(supra)** held the field and appears to be good law till today. He argued by virtue of the decision of the Hon’ble Supreme Court in **Nicolletta Rohtagi(supra)** as well as **Josphine James(Supra)** it has been settled that since the Insurance Company has neither the contested claim application not take leave to contest the claim application on all merits under Section 170 of M.V. Act, hence the Insurance Company has no right of appeal to challenge the award on all merits.

Heard the learned advocates and perused the observation of the Hon’ble Supreme Court **in Nicolletta Rohtagi(Supra)** as well as **Josphine James(Supra)** the relevant portion is quoted below:

In **Nicolletta Rohtagi(supra)**, Hon'ble Apex Court held that-

“26. For the aforesaid reasons, an insurer if aggrieved against an award, may file an appeal only on those grounds and no other. However, by virtue of Section 170 of the 1988 Act, where in course of an enquiry the Claims Tribunal is satisfied that (a) there is a collusion between the person making a claim and the person against whom the claim has been made, or (b) the person against whom the claim has been made has failed to contest the claim, the Tribunal may, for reasons to be recorded in writing, implead the insurer and in that case it is permissible for the insurer to contest the claim also on the grounds which are available to the insured or to the person against whom the claim has been made.

In **Josphine James(Supra)** Hon'ble Apex Court held that-

“20. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs.4,20,000 from Rs 6,75,000 which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of

dependency of the appellant, was required to follow the decision rendered by three-Judge Bench of this Court in Nicolletta Rohtagi case and earlier decisions wherein this Court after interpreting Section 170 (b) of the MV Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three Judge Bench decision referred to supra though the correctness of the aforesaid decision is referred to larger Bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

21. In view of the aforesaid reasons, the Insurance Company is not entitled to file an appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the MV Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to Rs.4,20,000 under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs 5,000 and applying a multiplier of 14, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in

Sarla Verma v. DTC instead of applying the principle laid down in Baby Radhika Gupta case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the MV Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under Section 149(2) of the MV Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant.”

Thus, unless an order is passed by the Tribunal permitting the insurer to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds which are available to the insured or to a person against whom a claim has been made. Thus where conditions precedent embodied in Section 170 are satisfied and award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or contributory negligence of the offending vehicle even if the insured has not filed any appeal against the quantum of

compensation. Sections 149, 170 and 173 are part of one Scheme and 8 if we give any different interpretation to Section 173 of the 1988 Act, the same would go contrary to the scheme and object of the Act.”

In this present case it is true that the Insurance Company was not re-presented before the learned Tribunal. The ground as mentioned by the learned advocate for the Insurance Company is appears to be justified but at the same time, the Insurance Company has the responsibilities to appoint another penal advocate to conduct this matter. But they have not done so. Moreover, the Insurance Company not filed any application for setting aside the *ex parte* decree under Order 9 Rule 13 of the Code of Civil Procedure. This is a proper appeal wherein entire merits has been challenged by the Insurance Company. By virtue of decision of Hon’ble Supreme Court passed in **Nicolletta Rohtagi (supra)** as well as the **Josphine James(Supra)**, the Insurance Company is barred to raise such point in the instant appeal. Accordingly, the appeal appears to me no meritorious at all.

The observation of the Hon’ble Supreme Court and Division Bench of the Allahabad High Court may have fit to the facts and circumstances of this case but the decision of Hon’ble Supreme Court holds the field as a acceptable propositions of law. Considering the same, I find no justification to entertain the grounds of the appeal.

In considering the cross objection filed on behalf of the respondent, it appears that the respondent has raised the point in cross Appeal that the future prospect was given to be 30% towards the admitted income of the deceased by virtue of decision of the Hon'ble Supreme Court in **Pranay Shetti**. The claimant is below the age of 40 years, so he is entitled to get 40% of the future prospect upon his established income. The proposition of law enumerated by the Hon'ble Supreme Court in **Pranay Shetti** as well accepted on several occasions. Accordingly, in this case the claimant is entitled to get future prospect to the tune of 40% of his admitted income.

Learned advocate for the respondent submits that due to such accident the claimant has loss of his leg. Admittedly, he was a carpenter by losing his leg he actually lost his entire income capabilities. The carpenter have to travel to other places to attain his job but due to loss of his leg it is not possible for him to perform the job. So, in this case the functional disability of the claimant would be at least 100% instead of 65 % as asses by the learned Tribunal by virtue of disability certificate issue by the doctors.

Heard the learned advocates and perused the exhibit 15, it appears that there was amputation at the leg of the claimant and the disability was assessed by the doctor as 65%. The profession of the claimant was stated to be carpenter. The learned Tribunal has also accepted

the occupation of the claimant. However, considering the fact it appears to me that the doctor has opined the physical disability of the claimant to be 65%. The claimant to be a carpenter has to perform his duty towards the occupation as a carpenter through his hands. The loss of his leg actually do not suffer the entire work capacity of the claimant but, he must have suffered some difficulties to perform his duties. So, I am of the view the functional disability as assessed by the learned Tribunal is not correct, it should be at least 70%. The two hands of the carpenter is the necessary body part which requires to be most valuable for performance the job as a carpenter.

In considering the prayer for the claimant towards the non-pecuniary head, it appears to me that the learned Tribunal has awarded Rs.1,00,000/- towards the pain and suffering and after Rs.1,00,000/- towards the future medical expenses in addition to other compensation.

Considering the fact, I find no justification to enhance towards the non-pecuniary head. The award passed by the learned Tribunal needs be modified by virtue of prayer of the claim in cross appeal.

The total compensation is recusted below:

1. Monthly income	Rs. 15,000
2. Annual income	Rs. 1,80,000/-
3. Add future prospect	<u>Rs.72,000/-</u> Rs.2,52,000/-
4. Multiplier 16	Rs.40,32,000/-
5. Disability 70%	Rs. 28,22,400/-

6. Add Medical Exp. & Non Pecuniary damages	<u>Rs.2,05,529/-</u>
Total	Rs.30,27,929/-

After calculation the award comes to Rs.30,27,929/-. The learned Tribunal has awarded the interest @ 7% from the date of filing of the claim application. It appears that case of compensation in the stage of appeal, the interest portion has been uniformly given to be 6% per annum. So, in this case, it is necessary to maintain the clarity of the order passed by this Court and to maintain the uniformity of the direction. The award must carry 6% interest per annum from the date of filing of the claim application instead of 7%. It further appears that the insurance company has deposited 50% of the awarded sum along with statutory deposit of Rs.25,000/- totalling of Rs.12,98,765/- with the office of the learned Registrar General, High Court, Calcutta.

The office of the learned Registrar General, High Court, Calcutta shall disburse the amount of Rs.12,98,765/- along with accrued interest to the claimants within four weeks. On receiving such award, claimant shall inform the Insurance Company in respect of the amount they received; on such information, Insurance Company shall pay the rest amount of award within six weeks thereafter through the office of the learned Registrar General, High Court, Calcutta. The

payment of compensation is paid subject to ascertainment of payment of deficit Court fees, if any.

The office of the learned Tribunal shall act upon the certified copy of this order to receive the deficit Court fees, if any.

L.C.R., if any, be returned back immediately.

Accordingly, FMA 1451 of 2022 is disposed of.

Connected applications, if any, are also disposed of.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Subhendu Samanta, J.)