

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT: - THE HON'BLE JUSTICE SUBHENDU SAMANTA

FMAT (MV) 316 of 2022
With
IA No.: CAN/1/2022
New India Assurance Co. Ltd.
versus
Bappa Ali Khan & Anr.

For the Appellants : **Mr. Rajdeep Bhattacharyya, Adv.**
: **Mr. Arpayan Mukherjee, Adv.**
: **Mr. Debasish Banerjee, Adv.**

For the Respondent/claimants : **Mr. L.M. Ghosh, Adv.**

Hearing on : **01.03.2024**

Judgment on : **05 .03.2024**

Subhendu Samanta, J.:-

1. Delay in preferring the instant appeal is condoned.
2. The instant appeal has been preferred against the judgment and award dated 15.07.2017 passed by the learned Judge, Motor Accident Claims Tribunal, ADJ, 14th Court, Alipore, 24-Parganas (South), in MAC Case No. 44 of 2006.
3. The present respondent No. 1 injured in a road traffic accident on 25.02.2003 by rash and negligent driving of bus bearing No. WB/04/4901 by which the victim received serious fracture injuries and became permanent partial disable.

4. The respondent No. 1 filed an application for compensation under Section 163-A of the M.V. Act before the learned tribunal.
5. Owner did not contest the matter before the learned tribunal.
6. The Insurance Company i.e. the present appellant though appeared initially but subsequently did not contest the matter by filling written statement. Accordingly, the case was heard ex-parte.
7. After hearing the parties and after receiving the evidences the learned tribunal has awarded an amounting to Rs. 4,23,200/-in favour of the claimants and directed the Insurance Company to pay the compensation. Being aggrieved by and dissatisfied with the said award the instant appeal has been preferred.
8. Learned advocate for the appellant submits that this is an ex-parte order passed by the learned tribunal which can be very well challenged in this appeal. Mr. Rajdeep Bhattacharya, learned advocate appearing on behalf of the appellant further argued that the Insurance Company was prevented by sufficient cause to contest the matter before the learned tribunal so to determine the entire matter the instant case be remanded back to the learned tribunal by giving an opportunity to the Insurance Company to contest the matter.
9. 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."

10. 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.

11. 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:

12. 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.

13. 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.

14. In this present case the Insurance Company initially appeared before the learned tribunal but did not contest the matter by filing written statement. However, after filing is getting knowledge of the impugned award they did not file any application under Order IX Rule 13, CPC for setting aside the ex-parte decree. 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 points in the instant appeal. Accordingly, the appeal filed by the Insurance Company is appears to me not meritorious.

15. However, Mr. Rajdeep Bhattacharya submits that the Insurance Company has no liability to pay the compensation as the policy premium cheque issued by the owner of the offending vehicle has been dishonoured due to insufficient fund.
16. It appears that this defence is available in the statute on behalf of the Insurance Company which they did not raise before the learned tribunal. Thus, by virtue of decision of Hon'ble Apex Court in ***Nicolletta Rohtagi (supra) as well as the Josphine James (supra)***, this ground of appeal cannot also be entertained by this appellate Court. However, the Insurance Company is at liberty to recover the amount by initiate a separate proceeding against the owner according to the law.
17. It appears that the Insurance Company has deposited the entire awarded sum. The office of the learned Registrar General, High Court, Calcutta is directed to disburse the amount in favour of the claimant along with accrued interest within four weeks.
18. Under the above observations, the instant appeal is disposed of.
19. The office of the learned tribunal shall act upon the certified copy of this order to receive the deficit Court fees, if any.
20. The payment of compensation is subject to the ascertainment of payment of deficit Court Fees, if any.
21. All connected applications, if any, stand disposed of.
22. Interim orders, if any, stand vacated.

23. Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

(Subhendu Samanta, J.)