IN THE HIGH COURT OF DELHI AT NEW DELHI

MAC. APP. 100/2006

Judgment reserved on: 14th November ,2007

Judgment delivered on: 20.12.2007

Oriental Insurance Co. Ltd. ..... Appellant
Through: Mr.Ram N. Sharma, Advocate.

versus

Smt.Jyoti Malhotra & Ors. ..... Respondents
Through: Mr.L.K. Tyagi, Advocate for R-1 to 4.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

KAILASH GAMBHIR, J.

By way of this appeal, the appellant insurance company seeks to challenge the impugned award mainly on the ground that the offending vehicle bearing registration No. DL-1PA-

1920 was never involved in the alleged accident and secondly, the Tribunal by ignoring the judgments of the Apex Court has wrongly applied the multiplier of 16. The award is also assailed by the appellant on the ground that the Tribunal has committed illegality in deducting 1/4th income of the deceased towards self expenses. The brief summary of the facts necessary for deciding the present appeal are set out as under:-

On 06.01.2003 at about 9.00 p.m. near Monastery, ISBT, within the jurisdiction of PS Civil Lines, Sh. Rakesh Kumar Malhotra was driving his scooter bearing registration No. DL 1 SM 4500 and was hit by a bus bearing registration No. DL 1 PA 1920, being driven in the most rash and negligent manner by its driver, Sh. Prithviraj, who ran away along with the bus after hitting Sh.Rakesh Kumar Malhotra. Sh. Malhotra was removed to Sushruta Trauma Centre, from the site of the accident, where he succumbed to his injuries on 17.1.2003. A claim petition was filed on 05.06.2003 and award was made on 29.11.2005. Aggrieved with the said award, present appeal is preferred by the appellant insurance company.

I have heard learned counsel for the parties and have perused the records.

The present appeal has been preferred by the insurance company without taking over the defence of the owner to contest the claim on all or any of the grounds that are available to the owner insured. Mr.L.K. Tyagi, Advocate appearing for the respondents/claimants has taken a preliminary objection to the very maintainability of the present appeal in the absence of there being any permission in favour of the appellant under Section 170 of the Motor Vehicles Act to contest the case on any of the grounds as are available to the insured not merely confining to the statutory defences available to the insurer under Section 149(2) of the Motor Vehicles Act. In reply to the said objection of the respondents, counsel for the appellant vehemently submitted that respondent Nos.1 and 2, owner and driver of the offending vehicle were ex-parte and thereafter they were thoroughly cross-examined by the appellant insurance company and, therefore, even in the absence of any specific application moved by the appellant or permission granted by the Tribunal under Section 170 of the Motor Vehicles Act, the present appeal challenging the award on the ground of quantum can be maintained by the insurance company. Counsel also contended that in the written statement filed by the insurance company, this stand has already

been taken by the appellant that in the event of the owner and driver willfully abstaining from the proceedings or on account of their failure to contest the claim the insurance company shall have the right to contest the claim petition by taking up all the defences as are available to it under the law.

The contention of counsel for the appellant is that for taking over the defence of the owner and driver of the offending vehicle, no specific order from the Tribunal is required and in the given facts and circumstances of the case, the order under Section 170 of the Motor Vehicles Act can be taken to have been passed. Counsel for the appellant thus, urged that there is a deemed order under Section 170 of the Motor Vehicles Act in favour of the appellant when the claim is not contested by the owner and driver and then the insurer is permitted to cross-examine the witnesses on the quantum and negligence aspects.

The legal position on this aspect is no more res integra. It is a settled legal position that the insurer can avoid its liability only on the statutory defence expressly provided under sub-section 2 of Section 149 of Motor Vehicles Act, 1988 and except the said statutory defence, the insurer cannot avoid its liability on any other ground. In the case of **Shankarayya & Anr. Vs.**

United India Insurance Co. Ltd., *(1998) 3 SCC 140*, the Apex Court has clearly held that the insurance company has to obtain an order in writing from the Tribunal and the Tribunal has to pass a reasoned order after finding the conditions as envisaged under Section 170 of the Motor Vehicles Act being satisfied. Thus, Apex Court was also categorical in holding that unless this procedure is followed, the insurance company cannot have a wider defence on merits then what is available to it by way of statutory defences. The relevant para of the said judgment is reproduced below:-

> "**4.** It clearly shows that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for that purpose the Insurance Company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence."

Further in **Rita Devi & Ors. Vs. New India Assurance Co. Ltd.**, *2000 ACJ 801,* the Supreme Court held that if the insurer has not obtained permission under Section 170 of the Motor Vehicles Act, 1988, then it is not entitled to prefer any

appeal to the High Court against the award given by the Tribunal on merits other than the grounds available to the insurer under Section 149(2) of the Motor Vehicles Act. The same view was again reiterated by the Supreme Court in **National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi & Ors.**, *(2002) 7 SCC 456* and **National Insurance Co. Ltd. Vs. Mastan & Anr.**, *(2006) 2 SCC 641.* In the matter of **United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel & Ors.,** *(2003) 7 SCC 212* relied upon by counsel for the appellant, the position is no different than the said view held by the Apex Court in catena of judgments. In the said case, the insurance company had applied for the permission under Section 170(b) of the Motor Vehicles Act. But the Tribunal while passing an order did not record the reasons. Although reasons as envisaged under Section 170(b) of the Motor Vehicles Act existed in the facts of the case. In these circumstances, the Apex Court held that on account of failure of the Tribunal to give the reasons, the insurer is justified in contesting the case on the grounds other than those enumerated under Section 149(2) of the Motor Vehicles Act. However, in the facts of the present case, the situation is entirely different. One, no separate application was moved by the insurance company

under Section 170 of the Motor Vehicles Act, secondly, there is no order passed by the Tribunal under the said provisions of law and therefore, the decision of the Apex Court in **Jyotsnaben's** case (supra) can be of no help to the appellant.

Section 170 of the Motor Vehicles Act clearly postulates that the Tribunal shall give right to the insurer to contest the claim on all the grounds as are available to the person against whom the claim has been made only when, firstly, there is a collusion between the person making the claim and the person against whom the claim is made or secondly, in a situation where the person against whom the claim is made has failed to contest the claim. If any of the said condition is satisfied, then, the Tribunal shall permit the insurer to contest the claim on all the grounds by spelling out the reasons to be recorded in writing after being fully satisfied with the fulfillment of either of the said conditions arising during the course of the trial of claim petition. Section 170 of the Motor Vehicles Act, thus envisage passing of a specific order and where no such order is passed, it cannot be said that such an order can be presumed to have been passed in the given facts and circumstances of the case. In the facts and circumstances of the present case, therefore, it cannot be said

that the appellant insurance company has the right to assail the findings of the Tribunal on all the grounds as are otherwise available to the owner and driver of the offending vehicle. The present appeal, therefore, fails on this sole ground.

Counsel for the appellant also urged that even if the defence under Section 170 of the Motor Vehicles Act was not taken over by the appellant still this Court can examine as to whether at all the alleged offending vehicle was involved in the accident or not.

I do not appreciate this argument of counsel for the appellant. It is the settled legal position that the insurer can avoid its liability only on the statutory defences expressly provided under sub section 2 of Section 149 of the Motor Vehicles Act, 1988 and not beyond that. In this regard, relevant para in **Nicolletta Rohatgi's** case is reproduced below:

> **"25.** We have earlier noticed that motor vehicle accident claim is a tortious claim directed against tortfeasors who are the insured and the driver of the vehicle and the insurer comes to the scene as a result of statutory liability created under the Motor Vehicles Act. The legislature has ensured by enacting Section 149 of the Act that the victims of motor vehicle are fully compensated and protected. It is for that reason the insurer cannot escape from its liability to pay compensation on any exclusionary clause in the insurance policy except those specified in Section 149(2)

of the Act or where the condition precedent specified in Section 170 is satisfied.

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. 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 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."

Moreover, the MACT Tribunal is a final Court of findings of facts and it has arrived at the said finding of involvement of the offending vehicle which is duly insured with the appellant insurance company.

In the light of the discussion hereinabove, the other pleas raised by the appellant needs no consideration.

There is no merit in the present appeal and the same is hereby dismissed.

December 20, 2007 **KAILASH GAMBHIR J.**
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