THE HIGH COURT OF SIKKIM AT GANGTOK
(Civil Appellate Jurisdiction)

J U D G M E N T

S.B. MAC APP. No. 13 of 2013 and
CM Appl. No. 205 of 2013

1. The Branch Manager,
Oriental Insurance Company Ltd.,
Hill Cart Road, Siliguri,
Distt. Darjeeling, West Bengal.

... **Appellant / Insurer /
Opposite Party No.1.**

- versus -

1. Shri Bir Man Rai,
Son of Late Sher Man Rai,
Aged about 54 years,

2. Shri Shyam Kumar Rai,
Son of Late Sher Man Rai,
Aged about 32 years,,

3. Shri Suk Raj Rai,
Son of Late Sher Man Rai,
Aged about 28 years,

Residents of Ralap Busty,
P.O. Makha & P.S. Singtam,
East Sikkim.

... **Respondents / Claimants.**

and

4. M/s Jai Prakash Associates Ltd.,
Teesta Stage V, H.E. Project,
Baluwatar, P.O. & P.S. Singtam,
East Sikkim.

... **Respondent /
Opposite Party No.2.**

CORAM

HON'BLE THE CHIEF JUSTICE
MR. JUSTICE N. K. JAIN

Date of Judgment : 07.03.2014

For Appellant	:	Mr. Shrawan Kr. Prasad, Advocate .
For Respondents No. 1, 2 and 3	:	M/s. Ajay Rathi, Sushma Pradhan and Menuka Gurung, Advocates.

Jain, CJ (Oral).

Heard learned counsel for the parties.

2. The appellant has preferred this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short, 'the Act of 1988') against the judgment/award dated 25.07.2011 passed by Motor Accident Claims Tribunal, East and North Sikkim at Gangtok (for short 'the Tribunal') in MACT Case No. 43 of 2008, whereby the learned Member of the Tribunal awarded a sum of Rs.4,62,500/-, with interest @ 6% per annum from the date of filing of claim petition, towards compensation in favour of claimants/respondents in respect of death of

late Dhan Raj Rai, who died in a motor accident, which took place on 26.12.2006.

3. There is a delay of 669 days in filing the appeal, therefore, the appellant has filed an application i.e. CMA No. 205/2013, for condonation of delay in filing the appeal. Learned counsel for respondents has filed a written objection/ reply to the application for condonation of delay in filing the appeal.

4. While arguing the application, learned counsel for appellant submitted that the delay in filing the appeal was bona fide, an explanation in detail for delay has been given in the application. Therefore, delay in filing the appeal be condoned, whereas, learned counsel for respondents submitted that the reasons assigned in the application for condonation of delay are not tenable, the explanation furnished by appellant does not constitute a sufficient cause for condonation of delay, therefore, application is liable to be dismissed.

5. While arguing the appeal, the learned counsel for the appellant has submitted that the finding of the

learned Tribunal in respect of quantum of compensation is not correct. He submitted that there was no basis for accepting the monthly income of the deceased, multiplier adopted was not correct, the compensation on account of non-pecuniary damage has wrongly been awarded and ½ deduction should have been made in place of 1/3 for personal expenses of the deceased. He, therefore, submitted that the amount of compensation awarded in the case is on higher side and the same be accordingly reduced.

6. Learned counsel for respondents raised preliminary objection and submitted that the appellant-Insurance Company cannot be allowed to question the finding of the Tribunal in respect of quantum of compensation. He submitted that scope to challenge the finding of the Tribunal by Insurance Company is very limited. He further submitted that no application under Section 170 of the Act of 1988 was filed before the Tribunal, seeking permission to contest the case on merits and, in absence of any permission under Section 170 of the Act, the Insurance Company cannot challenge

the amount of compensation awarded by the Tribunal. In support of his submission, he relied upon a judgment of the Rajasthan High Court in **United India Insurance Co. Ltd. vs. Smt. Kadi and others** reported in **2009 (2) RLW 1801**. He also submitted that learned Tribunal has rightly applied the multiplier, the Tribunal has rightly assumed the income of the deceased on the basis of evidence available on record, the Tribunal has rightly awarded the non-pecuniary damage and Tribunal was right in deducting only 1/3 amount on account of personal expenses of the deceased. He, therefore, submitted that the finding of the learned Tribunal in respect of the quantum of compensation is absolutely legal and no interference in the same is called for by this Court.

7. I have considered the submissions of the learned counsel for the parties on the application as well as appeal.

8. The appellant, in its application for condonation of delay, has tried to explain the delay by mentioning that the judgment in the case was passed on 25.07.2011

and the last date of filing the appeal was 22.10.2011. The application for certified copy of the judgment was filed on 11.11.2011 soon after deposit of Court Fee amount by claimant. A copy of the judgment was delivered to appellant on 11.11.2011 and the same was sent to the Divisional Office at Siliguri by the counsel with opinion on 16.11.2011. The Divisional Office at Siliguri sent the record of the case to its Regional Office at Kolkata on 20.12.2011. Thereafter, file was sent for opinion to counsel and after receipt of opinion, the file was sent on 08.02.2012 by Regional Office, Kolkata to Divisional Office at Siliguri to file appeal. The Divisional Office sent an e-mail on 27.02.2012 to Regional Office to engage a counsel of Kolkata, as the local counsel had declined to file the appeal. Thereafter, file was sent to Mr. K.B. Chhetri, Advocate, Gangtok to file appeal on 12.03.2013, who also declined to file appeal on 16.03.2013. Thereafter, Mr. J.K.P. Jaiswal, Advocate, Gangtok was engaged, who also declined to file appeal, thus another counsel, Mr. Bhaskar Moitra was engaged, but he also refused to file appeal. Thereafter, a letter was written to the present counsel on 29.10.2013 and

the present appeal was filed on 10.12.2013. From the explanation given by the appellant, it appears that the application for obtaining certified copy of the judgment was filed on 11.11.2011, whereas the last date for filing appeal had expired on 22.10.2011. Filing of Court Fee by claimants was not relevant at all and was not concerned with the appellant. The delay from 25.07.2011 till 11.11.2011 has not been explained at all. Thereafter, record was not sent by Divisional Office at Siliguri to Regional Office at Kolkata during the period from 16.11.2011 to 20.12.2011. No explanation has been given for the period from 22.12.2011 to 08.02.2012 and it is not mentioned when the opinion was received. Thereafter, no explanation has been furnished for the period from 27.02.2012 to 12.03.2013 i.e. for more than a year. The explanation furnished even after 12.03.2013 till 10.12.2013, when appeal was filed, is not satisfactory.

9. It is a settled law that the appellant is required to explain each day's delay, whereas in the present case there is a delay of 669 days i.e. more than one and half year, for which no satisfactory explanation has been

given. In these circumstances, I am satisfied that the appellant has failed to establish sufficient cause for condonation of delay in filing the appeal and as such the application for condonation of delay in filing the appeal deserves to be dismissed.

10. So far as merits of the case are concerned, it is relevant to mention that learned counsel for appellant-Insurance Company fairly and frankly admitted that no application under Section 170 of the Act of 1988 was filed by the Insurance Company, seeking permission to contest the case on merit, before the Tribunal. He also admitted that he is not challenging the findings of the Tribunal on other issues except the finding in respect of quantum of compensation. He also admits that there is no violation of Section 149 (2) of the Act of 1988. The submission of learned counsel for the appellant is that the appellant-Insurance Company can challenge the findings of the Tribunal in respect of quantum of compensation even in absence of any permission obtained by Insurance Company under Section 170 of the Act of 1988.

However, he has shown his inability to refer any case law or provision of Act, in support of his submission.

11. The question as to whether the appellant-Insurance Company can challenge the award of the Tribunal on other grounds except those mentioned in sub-Section (2) of Section 149 of the Act of 1988 and/or quantum of compensation in absence of permission of the Tribunal under Section 170 of the Act, was considered in **United India Insurance Co. Ltd. vs. Smt. Kadi and others** (supra), wherein Rajasthan High Court relied upon judgment of the Hon'ble Apex Court delivered by three-Judges Bench in **National Insurance Company Ltd. vs. Nicolletta Rohtagi** reported in **(2002) 7 SCC 456** and other judgments of the Hon'ble Apex Court and held that Insurance Company cannot be allowed to challenge the findings of the Tribunal except on grounds those mentioned in sub-Section (2) of Section 149 of the Act, in absence of permission of the Tribunal under Section 170 of the Act to contest the claim on merits. Paragraphs 9 and 10 of the **Smt. Kadi**'s judgment (supra) are reproduced as under: -

"9. The question will arise for decision in this case as to whether the appellant Insurance Company can be allowed to press this appeal on other grounds except those mentioned in sub-section (2) of Section 149 of the Act of 1988 in absence of permission of the Tribunal under Section 170 of the Act of 1988.

10. The three-Judges Bench of the Hon'ble Supreme Court in ***National Insurance Company Limited v. Nicolletta Rohtagi, 2002 (4) RCR (Civil) 464 : (2002) 7 SCC 456***, considered the similar point and held that unless the order is passed by the Tribunal permitting the insurer to avail of the grounds available to the insurer or any other person against whom the claim is made, on being satisfied of the two conditions specified in Section 170 of the Act of 1988, 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. The Hon'ble Apex Court further held that even if no appeal is preferred under Section 173 of the Act of 1988 by an insured against the Award of the Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as the finding as regards to negligence or contributory negligence of the offending vehicle. The Hon'ble Apex Court, in the above referred case, also considered its earlier judgment in ***United India Insurance Co. Ltd. v. Bhushan Sachdeva, 2002 (2) RCR (Civil) 66 : (2002) 2 SCC 265***, wherein it was held that if the insured has not preferred an appeal then the insurer is only aggrieved and can prefer appeal, and held that it does not lay down the correct view of law. Section 149(2) of the Act of 1988 limits the insurer's appeal on the ground enumerated in Section 149(2) of the Act of 1988 only. The main object of enactment of Chapter XI of the Act of 1988 was to protect the interest of the victims and it is for that reason the insurance of all motor vehicles has been made statutorily compulsory. Compulsory insurance of motor vehicle was not to promote the business interest of the insurer engaged in the business of insurance. Para Nos. 26, 27, 31 and 32 of the judgment in ***National Insurance Company***

Limited v. Nicolletta Rohtagi's case (supra) are reproduced as under:

> "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. Section 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.
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> 27. This matter may be examined from another angle. The right of appeal is not an inherent right or common law right, but it is a statutory right. If the law provides that an appeal can be filed on limited

grounds, the grounds of challenge cannot be enlarged on the premise that the insured or the persons against whom a claim has been made have not filed any appeal. Section 149(2) of the 1988 Act limits the insurer's appeal on those enumerated grounds and the appeal being a product of the statute, it is not open to an insurer to take any plea other than those provided in Section 149(2) of the 1988 Act. The view taken in ***United India Insurance Co. Ltd. v. Bhushan Sachdeva, (2002) 2 SCC 265***, that a right to contest would also include the right to file an appeal is contrary to well-established law that creation of a right to appeal is an act which requires legislative authority and no court or tribunal can confer such right, it being one of limitation or extension of jurisdiction. Further, the view taken in United India Insurance (2002) 2 SCC 265 that since the insurance companies are nationalized and are dealing with public money/fund and to deny them the right of appeal when there is a collusion between the claimants and the insured would mean draining out or abuse of public fund is contrary to the object and intention of Parliament behind enacting Chapter XI of the 1988 Act. The main object of enacting Chapter XI of the 1988 Act was to protect the interest of the victims of motor vehicle accidents and it is for that reason the insurance of all motor vehicles has been made statutorily compulsory. Compulsory insurance of motor vehicle was not to promote the business interest of the insurer engaged in the business of insurance. Provisions embodied either in the 1939 or the 1988 Act have been purposely enacted to protect the interest of the traveling public or those using the road from the risk attendant upon the user of motor vehicles on the roads. If law would have provided for compensation to dependents of victims of a motor vehicle accident, that would not have been sufficient unless there is a guarantee that compensation awarded to an injured or dependent of the victims of a motor

accident shall be recoverable from the person held liable for the consequences of the accident. In ***Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan*** it was observed thus :

> *"In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third-party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependents of the victims of fatal accidents are really compensated in terms of money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose of the legislation. The provision has therefore to be interpreted in the twilight of the aforesaid perspective."*
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> ... .

31. We have already held that unless the conditions precedent specified in Section 170 of the 1988 Act are satisfied, an insurance company has no right of appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further, the Tribunal does not implead the insurance company to contest the claim, in such cases 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 an award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenge only that

> part of the order while filing appeal on grounds specified in sub-section (2) of Section 149 of the 1988 Act. But such application for permission has to be *bona fide* and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is concerned, it is no longer *res integra* that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award.
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> 32. For the aforesaid reasons, our answer to the question is that even if no appeal is preferred under Section 173 of the 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regards negligence or contributory negligence of the offending vehicle."

So far as the present case is concerned, even the learned counsel for the appellant does not dispute that no permission was sought by the appellant Insurance Company from the Tribunal under Section 170 of the Act of 1988; he further admits that there is no violation of any of the provision of Section 149(2) of the Act of 1988 in the present case.

In view of the discussion, I am of the view that the appellant Insurance Company cannot be allowed to file/press this appeal on other grounds except those mentioned in sub-section (2) of Section 149 of the Act of 1988, which are not available in the present case, in absence of permission of the Tribunal under Section 170 of the Act of 1988 to contest the claim on merits."

(emphasis supplied)

12. From the above, it is clear that judgments of the Hon'ble Supreme Court on the point were also considered by the Rajasthan High Court. Therefore,

question involved in the present case is fully covered by judgments of the Hon'ble Apex Court as well as Rajasthan High Court.

13. That apart, it is relevant to mention that a meager amount of Rs.4,62,500/- has been awarded as compensation in respect of death of a young boy of 18 years, who died in an accident arising out of motor vehicle, which was insured with appellant-Insurance Company, after payment of premium by insured, which calls for no interference by this Court. In these circumstances, I am of the view that there is no merit in the appeal also.

14. In view of above discussions, the application for condonation of delay of 669 days in filing the appeal is dismissed. The appeal is also dismissed, being barred by limitation and also on merits with cost of Rs.10,000/-.

Sd/-

(N.K. Jain)
Chief Justice
07.03.2014