(2009) 12 AHC CK 0343

Allahabad High Court

Case No: None

New India Assurance Co. Ltd.		APPELLANT
	Vs	
Smt. Meharunisha alias Misroz and Others		RESPONDENT

Date of Decision: Dec. 17, 2009

Acts Referred:

- Motor Vehicles Act, 1988 - Section 170

Citation: (2010) 1 AWC 961

Hon'ble Judges: Shishir Kumar, J; Amitava Lata, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Amitava Lala, J.

The issue is when the claim petition is disposed of by the Tribunal keeping the application u/s 170 of the Motor Vehicles Act, 1988 (hereinafter referred to as the ''Act'') pending, the same will be construed as implied permission by the Tribunal to the insurance company and, if at all can the appeal be disposed of on merit.

2. It is The New India Assurance Company Limited Vs. Dr. Prem Singh Bhadauria and Smt. Sadhna Tripathi, this Bench has decided the issue by holding a view that no one can be allowed to draw any favourable inference by saying that there is an implied permission in such circumstances. No application either interim or interlocutory or miscellaneous in nature can be treated to be pending when the main cause by way of suit or proceeding is disposed of either way. Non-recording of any such order in any of such applications is a bona fide mistake. No scope of appeal can be said to be available for alleged pendency. In other words, pendency can be couched in both ways. It can be said to be implied permission or implied rejection. According to us, when an affirmative order is passed ignoring or refusing insurance companies'' plea particularly in absence of statutory defence u/s 149(2) of the Act, implied permission

could not have been couched. Ratio of such judgment has been followed by this Bench in the subsequent judgments inclusive of the judgment in The New India Assurance Company Limited Vs. Smt. Padma Devi and Others,

3. According to us, the appeal is a creature of statute. Therefore, unless statute prescribes to prefer the appeal, an insurer, as a matter of course, cannot prefer the appeal. Insurers have limited independent right to prefer the appeal unless there is a clear violation of Section 149(2) of the Act. However, insurance companies are not remediless for their relief.

4. In National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, we find as follows:

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 has not filed any appeal. Section 149(2) of 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 other plea other than those provided in Section 149(2) of 1988 Act. The view taken in United India Insurance Co. Ltd. v. Bhushan Sachdeva (supra) 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 Co. Ltd. (supra) that since the insurance companies are nationalised 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 the Parliament behind enacting Chapter XI of 1988 Act. The main object of enacting Chapter XI of 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 insurer engaged in the business of insurance. Provisions embodied either in 1939 or 1988 Act have been purposely enacted to protect the interest of travelling public or those using road from the risk attendant upon the user of motor vehicles on the roads. If law would have provided for compensation to dependants of victims of motor vehicle accident, that would not have been sufficient unless there is a guarantee that compensation awarded to an injured or dependant of the victims of motor accident shall be recoverable from person held liable for the consequences of the accident. In Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, it was observed thus:

In other words, the Legislature has insisted and make 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 dependants of the victims of fatal accidents are really compensated in terms of money and not in terms of premise. 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 light of the aforesaid perspective.

28. We have noticed the legislative development in regard to third party rights in England and found that the object of those legislations was to protect the interest of third, party rights. The 1939 Act as well as 1988 Act both were enacted on pattern of English statute with the object to relieve the distress and miseries of victims of accidents and reduce the profitability of the insurer in regard to occupational hazard undertaken by them by way of business activities and not to promote business interests of insurance companies even though they may be nationalised companies.

29. For the aforesaid reasons, as well as that the learned Judges in United India Insurance Co. Ltd. (supra) have failed to notice the limited grounds available to an insurer u/s 149(2) of the Act, we are of the view that the decision in United India Insurance Co. Ltd. (supra) does not lay down the correct view of law."(Emphasis supplied)

5. The ratio of Nicolletta Rohtagi (supra) was again followed by a three Judges'' Bench of the Supreme Court in the judgment in Sadhana Lodh Vs. National Insurance Company Ltd. and Another, There also it was held that right of appeal is a statutory right and when law provides remedy by way of appeal on limited ground, the same will be done for the said purpose and not for any other purpose. The judgment is categorical that limited purpose is only with regard to those provided u/s 149(2) of the Act.

6. We have repeatedly followed ratio of the aforesaid judgments. Amongst others one of the reported judgment in this respect is Oriental Insurance Co. Ltd. Vs. Manju and Others,

7. It is essential in this context to know the import of Section 170 of the Act, therefore, the same is set out hereunder:

Impleading insurer in certain cases.--Where in the course of any inquiry, the Claims Tribunal is satisfied that--

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim,

it may, for reason to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in Subsection (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

8. In one of the judgments in United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others, the Supreme Court observed that the driver and the owner of the vehicle did not contest the proceeding. Even they did not choose to file written statement. The insurance company filed an application u/s 170 of the Act seeking permission to contest the proceeding giving the necessary details. The award passed by the Tribunal also evidently shows that pursuant to the permission the insurance company cross-examined the witnesses produced by the claimant to prove the negligence of the offending vehicle. Though an order was passed by the Tribunal on the application u/s 170 of the Act granting permission but no reason was given by the Tribunal following the mandate of Section 170(b) of the Act. But it was evident that the driver and owner did not file the written statement and failed to contest the proceedings. Then the Supreme Court held in such judgment that the Tribunal could have merely recorded that fact while allowing the application. In a situation contemplated by Clause (b) of Section 170 of the Act, nothing more was required than recording that indisputable fact. For failure to do so, the appellant shall not suffer prejudice.

9. This Bench has already directed the subordinate Courts to pass reasoned order, by its judgment in United India Insurance Co. Ltd. v. Krishna Kumar and Ors. 2008 (3) ADJ 572 (DB), following the ratio of Jyotsnaben Sudhirbhai Patel (supra). Even in paragraph 11 of Dr. Prem Singh Bhadauria (supra) the relevant part of the judgment of Jyotsnaben Sudhirbhai Patel (supra) has been followed which is as hereunder:

11. In United India Insurance Co. Ltd. v. Jyotsnaben Sudhirbhai Patel and Ors. 2003 (52) ALR 131, the Supreme Court observed that it is now a settled position that an insurer can contest the proceeding before the Motor Accidents Claims Tribunal only on any of the grounds prescribed u/s 149(2) and unless specific order is passed by the Tribunal u/s 170, the insurer cannot contest the claim on the grounds other than the grounds mentioned in Sub-section (2) of Section 149 of the Act. Interestingly in that case although a cryptic order was passed by the Tribunal "granted as prayed for" but the Supreme Court observed that it not sufficient. The Tribunal should give reasons while passing such orders as per the provisions of such section. It has been further observed by the Supreme Court that when the driver and the owner did not file the written statement and failed to contest the proceeding the Tribunal could have recorded such fact while allowing the application. However, ultimately Supreme Court held that the appeal should not be dismissed only on the sole ground that the appellant had not obtained a reasoned order permitting it to

contest u/s 170 of the Act. From the observations of the Supreme Court, it is crystal clear, as aforesaid, that even non-reasoning in the order might have been fatal therefore it is far to say that when no order is passed the same will also be considered as permission.

10. According to us, necessity of passing reasoned order was never overlooked by this Court.

11. The question of reconsideration of the cause arose before us due to delivery of judgment by a Division Bench of this Court in the case of National Insurance Co. Ltd. Vs. Smt. Jairani and Others, on 7th January, 2009 without considering the ratio of Dr. Prem Singh Bhadauria (supra) delivered on 1st August, 2007 and Smt Padma Devi (supra) delivered on 26th September, 2008 dealing with similar issue. However, the dispute has been raised by the appellant herein on the basis of Smt. Jairani (supra) in which such Division Bench has held that when the Supreme Court under the judgment and order of Jyotsnaben Sudhirbhai Patel (supra) has directed the Tribunal to pass a reasoned order and when no order has been passed thereon but the claim petition has been allowed, therefore, the final order is nullity. Relevant part of the judgment of the Division Bench in Smt. Jairani (supra) is quoted hereunder:

11....The Tribunal may sometimes by mistake or oversight fail to pass an order on the application u/s 170 of the Act and deliver the award. What would be the effect of such mistake or omission? Whether the omission to pass an order on the application filed u/s 170 of the Act would result in deemed allowing or rejecting it? In law an act is deemed to be done if the law provides so or it is ancillary to the main order. For instance if an appeal or writ petition is allowed or dismissed then the applications ancillary to it are deemed to have been allowed or dismissed. If no order is passed by the Tribunal allowing the application it cannot be deemed to be allowed for the simple reason that it could be allowed only if the facts, namely, collusion between the owner and claimant were proved or the owner was not contesting. In absence of this finding the application u/s 170 cannot be allowed nor can it be deemed to be allowed. In Jyotsnaben Sudhirbhai Patel''s case it was categorically held that since the insurance company''s right to contest gets widened the recording of reasons and passing of the order was necessary. In other words, it cannot be implied or deemed to be allowed. The principle of deemed alloy or reject may apply to formal applications which do not affect the merit of the matter. But the same cannot be said of those applications which stand on their own, namely, an application for substitution of legal heirs, etc. If the Court does not pass an order on a substitution application and a decree is passed in a suit or appeal then the decree would be a nullity having been passed against a dead person. An application u/s 170 of the Act, is not a formal application. It confers a statutory right on the insurance company. It enlarges the scope of contest by the insurance company. That is why the Apex Court has held that recording of reasons is mandatory. If no order is passed and award is

made, then it would in our opinion, being in violation of mandatory provisions of law, be rendered invalid and would be nullity.

12. If an award is made without deciding the application u/s 170 of the Act it may be bad for omission to deny the right to contest to the insurer which is a vital right. Section 170 of the Act confers a right on the insurance company to file an application if the conditions mentioned in the section are satisfied. It also casts a duty on the Tribunal to decide it in accordance with law. If the Tribunal has failed to perform its legal duty, the insurance company cannot be deprived of its right to contest on merits. In law, the insurance company cannot apply for review of the award as under the Act power of review had not been conferred on the Tribunal.

12. According to us, in both the judgments of this Division Bench, in re : Dr. Prem Singh Bhadauria (supra) and Smt. Padma Devi (supra) it has been categorically held that what would be the position of law when an interim application u/s 170 of the Act remained undisposed of at the time of final disposal of the claim petition. We have already held that such type of. pendency can be couched as implied permission or implied rejection depending upon the facts and circumstances of the case. Therefore, we are constrained to hold that the judgment of Smt. Jairani (supra) delivered by another Division Bench without analysis of both the judgments appears to be per incuriam in nature.

13. The basic difference between the judgment of Supreme Court in Jyotsnaben Sudhirbhai Patel (supra) and the judgments of this Division Bench in Dr. Prem Singh Bhadauria (supra) and Smt. Padma Devi (supra) is that in the matter, from which appeal was filed before the Supreme Court, order was passed by the Tribunal without any reason whereas in the matter, which was appealed before the High Court no order was passed by the Tribunal to that effect.

14. There, the situation is to be understood on the facts and circumstances of the case whether the Court intended the insurance company to contest the claim or not. If it is allowed then obviously it will be construed that the permission has been granted impliedly. In such circumstances, either not passing the order or passing the order without any reason hardly cause any material difference. This situation is totally different when the driver and/or owner has contested the claim or there is no proof of collusion between the owner or driver and/or claimant. In such situation it has to be construed that the insurance company was disallowed to contest the claim. However, under both the circumstances non-passing of the order is irregularity. Principle enunciated by the Supreme Court and this High Court is to adjudge the situation of sustaining the appeal on the facts and circumstances of each case. Neither the Supreme Court nor the High Court ever intended to hold that non-passing of such order is nullity. Against this background we have to examine what is the meaning of the word nullity. As per Black''s Law Dictionary Sixth Edition meaning of nullity is as follows:

Nullity. -- Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect.

As per Law Lexicon 1997 Edition meaning of nullity is as follows:

Nullity.--A thing which is null and void; an error in litigation which is incurable (Wharton L. Lex.); a proceeding that is taken without any foundation for it, or that is essentially defective, or that is expressly declared to be "nullity" by a statute.

15. Nullity means non est in the eye of law. It is available in a situation where the Court or Tribunal having no authority to pass an order but passed. Such situation cannot be compared with a situation where Court or Tribunal having jurisdiction failed to pass an order or passed wrong order. Self corrective method can rectify the same.

16. It is to be remembered that an insurer, either running as a public or private company is made to help the people under a beneficial piece of legislation and in the process they make profit out of the business but not the other way round. If the Court starts encouraging the causes of insurers, the mission of creation of statute to give equitable relief to the ultimate sufferer will be frustrated. Therefore, law cannot be read in the manner other than it is written. As per the maxim ''per directum is not permissible to be done per obliqqum'' meaning thereby whatever is prohibited by law to be done directly cannot be legally done by indirectly or circuitously.

17. Now the question arose how the final judgment and award passed by the Tribunal can be treated to be nullity on account of non-disposal of an application u/s 170 of the Act on the part of the insurance company. Before going into such question, we have to assess the role of the insurance company specially in the context of Section 170 of the Act. An insurance company is an agent of its principal, i.e., the owner. The owner is vicariously liable for the fault of his driver. In effect, owner is primarily liable because of the social status of a driver in the country, when insurance company is indemnifier. Under the Contract Act when the principal is disclosed, there cannot be any independent existence of the agent. At best-it can be a proper party. But when the principal is undisclosed, the agent, i.e., the insurance company is the necessary party. The principle u/s 170 of the Act is similar in nature. An application for compensation is to be made u/s 166 of the Act. u/s 168 of the Act the Tribunal, on receipt of application u/s 166 of the Act, will issue notice of the application to the parties including the insurer and after affording an opportunity of being heard hold an enquiry into the claim. If it is so, what is the necessity to grant leave to the insurance company to contest the claim u/s 170 of the Act. Section 168 of the Act is related to two groups of the contesting parties. In one part the claimant and in other part the driver and/or owner and the insurance company. If the claimants and the owner are contesting, the insurance company will be informed to fulfil the principle of audi alteram partem. It will have no independent role unless by

its physical presence observes that there is a likelihood of collusion between the claimants and owner or owner has failed to contest. This is scheme of Section 170 of the Act.

18. It is to be remembered that though the Tribunal hears the application for compensation in a summary manner but it follows the principle of Code of Civil Procedure. Virtually the civil court is converting itself to a Tribunal while hearing the Motor Accidents Claim Petition. If the principle of CPC or the civil court practice is followed then it will be seen after final disposal of the suit or the proceeding, none of the applications can be said to be pending but treated to be disposed of alongwith the suit and proceeding. In such circumstances, higher Court is only required to see what would be the fate of non-disposal of the application at the time of disposal of the suit and/or proceeding. It will come out from the facts and circumstances of each case whether such non-disposal is treated to be implied permission or implied rejection. But how the entire proceeding is treated to be nullity is unknown to this Court. Right of appeal is statutory right. Such right is available to the driver and/or owner in the case of Motor Accident Claims since either of them are liable to pay compensation. The insurance company has no independent existence unless and until conditions of Section 170 are fulfilled. That is required to be seen on the facts and circumstances of each case. Therefore, as and when the scrutiny of the facts and circumstances is required to be done to come to an appropriate conclusion, the proceeding cannot be held to be nullity but an irregularity in the given situation.

19. Against this background let us consider the judgment and award of the Tribunal. The Tribunal categorically held that the owner did not appear when the insurance company was allowed to contest the claim and on such contest several issues were framed and ultimately award was passed. Therefore, it is a case of implied permission and the appeal of the appellant cannot be held to be unsustainable. Therefore, we can enter into the merit.

20. So far as merit is concerned, by consent of the parties we dispensed with filing of the paper book and heard the appeal on informal papers. Four issues were framed by the Tribunal. The first issue is framed with regard to rash and negligent driving of the driver. The second issue is with regard to validity of the driving licence. The third issue is with regard to insurance coverage and the fourth issue is with regard to entitlement of compensation of the parents of the deceased.

21. We have gone through the judgment carefully and we find that the case of rash and negligent driving of the driver is established. So far as the driving licence and insurance coverage are concerned, these are proved before the Tribunal on the basis of the documentary evidence. So far as the claim of the claimants is concerned, without any marital status and the deceased having been 22 years old, the claim of the parents is required to be sustained and to that extent the Tribunal held so. Being the part of the fourth issue the income of the deceased has been

proved on the basis of the assessment by showing Rs. 3,000 as monthly income to which the Supreme Court repeatedly held that this can be treated to be minimum income and after giving respective deduction the grant of compensation was allowed. We do not find any cogent reason to interfere with such part. However, at the time of fixing compensation under the award no right of recovery has been granted by the Tribunal when it has been established beyond doubt that the vehicle was insured by the appellant insurance company. However, so far as issue No. 1 is concerned, though rash and negligent driving on the part of the driver is held but no question of right of recovery even to the extent of making an application by the appellant has been granted by the Tribunal.

22. In such circumstances, we dispose of the appeal on merit by holding that we do not find any reason to interfere with the appeal. Therefore, we modify the judgment and order of the Tribunal impugned in this appeal by saying that the appellant is entitled to make appropriate application in the selfsame proceeding before the Tribunal for the purpose of recovering the amount and if such application is made, the same will be heard and disposed of preferably within a period of three months from the date of filing of the application upon giving notice and opportunity of hearing to the concerned parties. However, under no circumstances, the payment of compensation to the claimants will be stalled. Therefore, the amount of compensation, if already deposited by the insurance company, will be released immediately and if the same has not been deposited, the same will be deposited by it within a period of six weeks from the date of communication of the order and the same will be released in favour of the claimants immediately thereafter.

23. No order is passed as to costs.

Incidentally, the appellant-insurance company prayed that the statutory deposit of Rs. 25,000 made before this Court for preferring this appeal be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to adjust the same with the amount of compensation to be paid to the claimants, however, such prayer is allowed.

Shishir Kumar, J.

24. I agree.