THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 12th December, 2024

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

MAC App. No.05 of 2024

Appellant : National Insurance Company Limited

versus

Respondent : Nim Tshering Sherpa and Another

Appeal under Section 173 of the Motor Vehicles Act, 1988

Appearance

Mr. Sushant Subba, Advocate with Mr. Madan Kumar Sundas, Advocate for the Appellant.

Mr. Sudesh Joshi, Advocate for the Respondent No.1.

Mr. K. B. Chettri, Advocate (Legal Aid Counsel) for the Respondent No.2.

JUDGMENT

Meenakshi Madan Rai, J.

1. On 18-09-2011, a Maruti Suzuki, Taxi vehicle, driven by one Bikash Pradhan in which Suk Maya Tamang, the stepmother of Respondent No.1, was travelling with other occupants was hit by boulders, that rolled down the hillside, after being activated by the occurrence of an earthquake at that time. Consequently, the vehicle careened off the road into the river, flowing below, in which all the occupants, except one Nim Lhamu Sherpa, were swept away by the river. The body of one Wangdi Sherpa was recovered by the riverside near Singtam. Eleven years have passed since the date of the accident and as the bodies remained unrecovered it is presumed that they all perished in the accident. The Respondent No.1 filed a Claim Petition under Section 166 of the Motor Vehicles Act, 1988 (hereinafter the "MV Act") before the Learned Motor Accidents Claims Tribunal, at Gangtok, Sikkim (hereinafter, the

"MACT"). The cause of the accident was stated to be the vehicle driven at high speed, as a consequence of which the driver could not control it when the earthquake occurred. The vehicle was thus hit by the rolling boulders. The owner of the vehicle Respondent No.2, contested the Claim Petition on grounds that the vehicle was properly maintained and mechanically fit to be in service at the time of the accident. It was driven by a qualified driver with a valid and effective driving licence. The insurance policy and all other documents of the vehicle were also valid and effective. The Appellant Insurance Company, contested the claim and denied its liability to make good the compensation on grounds that, rash and negligent driving had not been proved nor was there a death certificate from the concerned authority to establish the death of the deceased in the accident.

(i) The Learned MACT settled a singular issue for determination; Whether the Petitioner/Claimant is entitled to the compensation claimed? If so, who is liable to pay the same?

(ii) After due consideration of the facts and circumstances, the MACT, vide its impugned Judgment dated 17-10-2023, MACT Case No.09 of 2023 (*Nim Tshering Sherpa* vs. *Passang Lhamu Sherpa and Another*), at Paragraph 13 observed *inter alia* that, in a case of this nature, roving enquiry to prove rashness and negligence on the part of the driver is not required. That, it is unnecessary for the Tribunal to delve into the technicalities because strict rules of procedure and evidence are not to be followed. That, for the purpose of this case, *prima facie*, there was rash and negligent driving on the part of the driver, which resulted in the accident and consequential death of the deceased. Having found all documents

to be valid the Learned MACT concluded that the age of the deceased undisputedly was forty years and being an able-bodied person, she was earning ₹ 6,000/- (Rupees six thousand) only, per month. The compensation was accordingly computed in favour of the Respondent No.1, under the following heads;

Sl. No.	Head	Amount in ₹
1	Loss of earning	9,00,000
2	Loss of estate	15,000
3	Love and affection	1,00,000
4	Cost of litigation	25,000
	TOTAL	**₹ 10,40,000**

Interest @ 10% per annum, was granted on the said sum from the date of filing of the Claim Petition till its full realization.

2. Before this Court, Learned Counsel for the Appellant submits that the accident was the result of *vis major* and beyond human control as it is the Claimant's case itself, that, the ill-fated vehicle fell into the river, having been hit by boulders falling from the hill, due to the earthquake, which crushed the vehicle. Besides, the Claimant failed to establish the rash and negligent act of the driver. Thus, the Appellant is not liable to pay the compensation claimed. That, the Respondent No.1 in fact ought to have filed a Claim Petition under Section 163A of the MV Act and not under Section 166 of the MV Act. That, as the finding of the Learned MACT is not in terms of the law, the impugned Judgment deserves a dismissal.

3. Refuting these arguments, it was contended by Learned Counsel for the Respondent No.1, that in the first instance, the Appeal is not maintainable as no steps were taken by the Appellant under Section 170 of the MV Act, before the MACT to

enable it to assail the Judgment of the MACT on all grounds as raised herein. In the absence of an Order under Section 170 of the Act, the Appeal is to be confined to the statutory defences as provided under Section 149(2) of the MV Act. To fortify this submission reliance was placed on ***Shankarayya and Another*** vs. ***United India Insurance Co. Ltd. and Another***[1], ***National Insurance Co. Ltd., Chandigarh*** vs. ***Nicolletta Rohtagi and Others***[2], ***Rekha Jain and Another*** vs. ***National Insurance Company Limited***[3] and ***United India Insurance Co. Ltd.*** vs. ***Chandi Rai and Another***[4].

(i) In the next leg of his argument Learned Counsel contended that, assuming but not admitting that the matter may be argued on merits, the rash and negligent act of the driver has been established by *res ipsa loquitor*. Rash and negligent driving in any event is to be proved by a preponderance of probability and not by proof beyond reasonable doubt. To buttress this aspect Learned Counsel placed reliance on ***Jay Laxmi Salt Works (P) Ltd.*** vs. ***State of Gujarat***[5], ***Rajkot Municipal Corporation*** vs. ***Manjulben Jayantilal Nakum and Others***[6], ***M.S. Grewal and Another*** vs. ***Deep Chand Sood and Others***[7], ***Naresh Giri*** vs. ***State of M.P.***[8], ***Bimla Devi and Others*** vs. ***Himachal Road Transport Corporation and Others***[9] and ***Mathew Alexander*** vs. ***Mohammed Shafi and Another***[10].

(ii) The third argument advanced was that the point of *vis major* which is being agitated in Appeal, was in fact never raised before the Learned MACT. That, it is settled law that new grounds

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[1] (1998) 3 SCC 140
[2] (2002) 7 SCC 456
[3] (2013) 12 SCC 202
[4] AIR 2006 Sikk 11
[5] (1994) 4 SCC 1
[6] (1997) 9 SCC 552
[7] (2001) 8 SCC 151
[8] (2008) 1 SCC 791
[9] (2009) 13 SCC 530
[10] 2023 SCC OnLine SC 832

cannot be urged in Appeal. That, in light of the foregoing facts and circumstances the Appeal deserves a dismissal.

4. Learned Counsel for the Respondent No.2 had no submissions to advance.

5. Having considered the opposing arguments advanced by Learned Counsel for the parties *in extenso* and having perused the records placed before me, the questions that fall for consideration before this Court are;

1. *Can a new ground be urged in Appeal when it was not raised before the MACT.*
2. *Is the Appeal maintainable sans an application and consequently an Order under Section 170 of the MV Act, 1988, to enable the Appellant to raise grounds in Appeal beyond those prescribed under Section 149(2) of the MV Act?*

(i) While addressing the first question formulated, appositely, it has to be noticed that the question of *vis major* was never raised by the Appellant before the Learned MACT. All that the Appellant averred in the Written Statement at Paragraph (h) is that; "……, it is the case of the claimants that the accident occurred due to the earthquake." This averment itself appears to be erroneous as in the Claim Petition at Paragraph 27 the Claimant has *inter alia* averred that; *"…….When the vehicle driven by Bikash Pradhan reached Chuba under Ranipool P.S, an earthquake hit the area, triggering landslide and rockslide. The driver could not stop the vehicle even when the earthquake was continuing since it was in high speed and failed to take necessary preventive measures by stopping the vehicle……..."*. Be that as it may, the Supreme Court dealt with a similar circumstance

viz., a new ground raised in Appeal in ***Rajesh Kumar alias Raju*** vs. ***Yudhvir Singh and Another***[11] and observed as follows;

> **"11.** ……..It even does not appear that the contentions raised before us had either been raised before the Tribunal or the High Court. The Tribunal as also the High Court, therefore, proceeded on the materials brought on record by the parties. In absence of any contention having been raised in regard to the applicability of the Workmen's Compensation Act which, in our opinion, ex facie has no application, the same, in our opinion, cannot be permitted to be raised for the first time.**"**

(ii) In ***Modern Insulators Ltd.*** vs. ***Oriental Insurance Co. Ltd.***[12], the Supreme Court while again considering the fact of a new ground raised in Appeal held as follows;

> **"10.** We may refer to the next ground on which the appeal has to be allowed. It is a settled position of law that in an appeal the parties cannot urge new facts. From the pleadings of the respondent before the State Commission it is found that the respondent pleaded that the property damaged was not covered under the insurance policy. This plea was given a go-by before the National Commission and a new plea was taken up in the grounds of appeal that the terms and conditions of the insurance policy were violated by the appellant by using used kiln furniture. The National Commission accepted this new ground and allowed the appeal, which in our opinion is not sustainable in law.**"**

(iii) In view of the settled position of law as expounded by the Supreme Court hereinabove, it needs no reiteration that a new ground cannot be urged in Appeal when it was not raised at all before the Learned MACT. Hence, the argument pertaining to *vis major* being a new ground in Appeal, is not sustainable in law and is accordingly disregarded. The first question stands answered accordingly.

6. Pertinently, it is noticed that the accident occurred on 18-09-2011, hence reference is made to all relevant provisions of the MV Act before the amendments made therein in 2018, 2019.

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[11] (2008) 7 SCC 305
[12] (2000) 2 SCC 734

(i) Now to further comprehend the matter in its correct perspective, it is essential to extract the provisions of Section 170 of the MV Act herein;

> **"170. Impleading insurer in certain cases.**—Where in the course of any inquiry, the Claims Tribunal is satisfied that—
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> (a) there is collusion between the person making the claim and the person against whom the claim is made, or
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> (b) the person against whom the claim is made has failed to contest the claim,
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> **it may, for reasons 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 sub-section (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.**" (emphasis supplied)

(ii) Section 149(2) of the MV Act referred to in Section 170 of the MV Act (*supra*) reads as follows;

> **"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.**—(1).....
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> (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as its execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto, and to defend the action on any of the following grounds, namely:—
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> (a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—
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> (i) a condition excluding the use of the vehicle—
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> (a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motorcycle; or

(ii) a condition excluding driving by a named person or persons by any person who is not duly licenced, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification;

(iii) a condition excluding liability for injury caused or contributed to by conditions or war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by non-disclosure of a material fact or by representation of a fact which was false in some material particular.**"**

7. While considering the ambit of the provisions of Sections 147, 149, 170 and 173 of the MV Act, 1988, in ***Nicolletta Rohtagi*** (*supra*) the Supreme Court considered the following question;

> **"2.** The short question that arises for our consideration in this group of appeals is:
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> Where an insured has not preferred an appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the 1988 Act') against an award given by the Motor Accidents Claims Tribunal (hereinafter referred to as 'the Tribunal'), **is it open to the insurer to prefer an appeal against the award by the Tribunal questioning the quantum of the compensation, as well as finding as regards the negligence of the offending vehicle?"**
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> ……
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> **13.** ……After the insurer has been made a party to a case or claim, the question arises, what are the defences available to it under the statute? The language employed in enacting sub-section (2) of Section 149 appears to be plain and simple and there is no ambiguity in it. **It shows that when an insurer is impleaded and has been given notice of the case, he is entitled to defend the action on grounds enumerated in the sub-section, namely, sub-section (2) of Section 149 of the 1988 Act, and no other ground is available to him.** The insurer is not allowed to contest the claim of the injured or heirs of

> the deceased on other ground which is available to an insured or breach of any other conditions of the policy which do not find place in sub-section (2) of Section 149 of the 1988 Act. **If an insurer is permitted to contest the claim on other grounds it would mean adding more grounds of contest to the insurer than what the statute has specifically provided for.”**
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> (emphasis supplied)

(i) It was further observed that sub-section 7 of Section 149 of the 1988 Act clearly indicates the manner in which Section 149(2) is to be interpreted. That, the expression “manner” employed in sub-section 7 of Section 149 is very relevant which means, an insurer can avoid its liability only in accordance with what has been provided for in sub-section (2) of Section 149. In other words, an insurer cannot avoid its liability on any other ground except those mentioned in sub-section (2) of Section 149 of the 1988 Act.

(ii) The Court was of the view that the statutory defences which are available to the insurer to contest a claim are confined to those provided in sub-section (2) of Section 149 of the 1988 Act and not more and for that reason, if an insurer is to file an Appeal, the challenge in the Appeal would be limited to only those grounds.

(iii) The Supreme Court went on to elucidate that the Legislature has, by enacting Section 149 of the Act ensured, that the victims of motor vehicle accidents are fully compensated and protected and compulsory insurance of motor vehicles was not to promote the business interest of the insurer but to protect the interest of the travelling public or those using the roads, from the risks attendant upon the user of motor vehicles on the roads. If law would have provided only for compensation to dependants of victims of a motor vehicle accident, that would not have sufficed, unless there was a guarantee that compensation awarded to an

injured or dependant of the victim of a motor vehicle accident, could be recoverable from the person held liable, for the consequences of the accident. 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 specified in Section 170 of the Act is satisfied. Thus, if the insurer is aggrieved against the award, they may file an Appeal on those grounds and not any other, unless an Order is passed by the Tribunal under Section 170 of the Act permitting the insurer to avail the grounds available to an insured or any other person against whom claim has been made, on being satisfied of the two conditions specified in the said provision. It was concluded that, unless the conditions specified in Section 170 of the 1988 Act are satisfied, an insurance company has no right to Appeal to challenge the award on merits. Even if no Appeal is preferred by the insured, it is not permissible for an insurer to file an Appeal questioning the quantum of compensation as well as the findings regarding negligence or contributory negligence of the offending vehicle.

(iv) That, having cleared the aspect on the grounds for Appeal that are available to the insurer/Appellant, we now turn to the observation of the Supreme Court on Section 170 of the MV Act. On this facet, in ***Nicolletta Rohtagi*** (*supra*) it was laid down as follows;

> **"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.**"** (emphasis supplied)

(v) In ***Rekha Jain*** (*supra*) the Supreme Court reiterated the ratio laid down in ***Nicolletta Rohtagi*** (*supra*).

(vi) Thus, it is no more *res integra* that where there is no specific Order of the MACT under Section 170 of the MV, the grounds for the Appeal are to be confined to the parameters prescribed in Section 149(2) of the MV Act.

(vii) On the touchstone of the settled position of law, it is to be examined herein, whether a Petition under Section 170 of the MV Act was filed by the Insurance Company before the Learned MACT. On meticulous perusal of the entire records placed before me, including the response of the Appellant to the Claim Petition, it is apparent that no such Petition was ever filed before the Learned MACT. The Orders of the Learned MACT, it is trite to mention, consequently bear no indication of Section 170 of the MV Act Petition having been filed or Orders made thereto thereby lending a closure to this point.

(viii) The suggestion offered by Learned Counsel for the Appellant that the Claim Petition ought to have been filed under Section 163A of the MV Act instead of Section 166 of the MV Act is erroneous. Indeed, in a claim for compensation under sub-section(1) of Section 163A of the MV Act the Claimant is not required to plead or establish that death was due to the wrongful act or neglect or default of the owner. At the same time, the reason for the insertion of Section 163A to the MV Act, 1988, cannot be lost sight of which was for the purpose of granting relief to a specified section of society, whose income range is limited to the extent of ₹ 40,000/- (Rupees forty thousand) only, per annum, which is not the case herein as the deceased was evidently earning ₹ 10,000/- (Rupees ten thousand) only, per month.

8. In view of the detailed discussions that have emanated hereinabove, I have reached a finding that the Appeal is not maintainable in the absence of a specific Order of the MACT under Section 170 of the MV Act, 1988, allowing the Appellant to raise all grounds in Appeal.

9. The impugned Judgment and Award are accordingly upheld.

10. Appeal dismissed and disposed of.

11. No order as to costs.

12. Copy of this Judgment be forwarded to all the Learned MACT of the State for information.

13. Lower Court records be remitted forthwith.

(Meenakshi Madan Rai)
Judge
12-12-2024

Approved for reporting : **Yes**

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