
(1959) 09 P&H CK 0001

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision Case No. 155-D of 1956

British India General Insurance Co. Ltd.

APPELLANT

Vs

Itbar Singh etc.

RESPONDENT

Date of Decision : 01-09-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Motor Vehicles Act, 1988 — Section 96, 96(2), 96(3), 96(4), 96(6)

Citation : AIR 1960 P&H 131

Hon'ble Judges : G.L. Chopra, J

Bench : Single Bench

Judgement

(1) The points involved in these two petitions preferred by the British India General Insurance Company Ltd. are identical. They can, therefore, be disposed of by one order.

(2) Suit No. 605 of 1951 (out of which petition No. 155-D/55 arises) was brought by Capt. Itbar Singh for damages against Wing Commander P. S. Gill and Shrimati Tara Devi Dogra in respect of a car accident that took place on 7-11-1950. The other petition arises out of suit No. 192 of 1952 instituted by Jagjit Singh against Nazar Singh and Capital Bus Service in respect of a running down accident dated 3-4-1952. In both the cases the cars were insured against third party risk with the British India General Insurance Company Ltd. the appellant. Notice of the suit was given to the Company as provided by Section 96 of the Motor Vehicles Act.

The Company in their written statement took up places other than those permitted by Sub-section (2) of Section 96, which was objected to by the respective plaintiff. In the first suit the objection was turned down by the trial Subordinate Judge and the Company was allowed to contest the suit on grounds other than those enumerated in Section 96(2) of the Motor Vehicles Act. In the other suit, the plaintiff's objection prevailed & the Company was directed to confine its defence to the grounds mentioned in the Section.

(3) On the matter coming to this Court in revision, the petition filed by Itbar Singh was accepted and that preferred by the Company dismissed. The result was that the Company, as a defendant in its own name, was not allowed to defend the suit on any grounds other than those permitted by S. 92(2). The decision of the Division Bench is reported as Itbar Singh Vs. P.S. Gill and Others, It concluded by saying:

"Insurers in the several matters on showing sufficient cause may be permitted to defend the action affecting them on merits in the name of the original defendant or defendants as the case may be."

(4) On the case going back for trial, acting on this suggestion, the Company in each of the suits presented an application for being allowed to defend the action on merits in the name of the insured the original defendant, on the ground that the letter appeared to be colluding with the plaintiff. Inherent power of the Court u/s 151 CPC was invoked in this connection. The application was opposed not only by the respective plaintiff but also by the defendant. Mr. K. K. Guiral, Subordinate Judge 1st Class, Delhi, vide his order dated 31-1-1956, in the one and Mr. P. P. Singh, Subordinate Judge 1st Class, Delhi, vide his order dated 2nd December, 1955, in the other, dismissed the application holding that no collusion was proved and that the suit was being properly and fairly contested by the original defendant. The present petitions are directed against these orders.

(4a) To prove the alleged collusion there is little or no evidence and realizing that the finding on the point can with no chance of success be challenged in revision learned counsel for the petitioner Company have urged a totally new ground for being allowed to defend the action on merits in the name of the insured. It is submitted that there being "a control of proceedings clause" in the policy of insurance the Company, by virtue of that clause, was entitled to undertake the defence of the suit on all points in the name of the insured, as the suit was to result in the insurer's responsibility under the policy. That has never been the case of the insurer. The plea was not taken at any time during the earlier proceedings, nor was it urged in the applications now in question. Even the insurance policy is not placed on the record. The contention can, therefore, be rejected on that short ground alone.

(5) Moreover, it has to be noticed that the prayer for being allowed to defend the suit in the name of the insured is being opposed by the insured. He is himself defending the suit and is willing and prepared to defend it to the last. He does not want or agree to be represented by the insurer. One of the reasons given is that the policy is in the amount of Rs. 5,000/- and the damages claimed in the suit are Rs. 10,000/- and odd; responsibility for payment of the balance of the decretal amount, if any, amount, if any, would ultimately fall on the insured.

(6) Even if it be assumed that the policy does contain "a control of proceedings clause" and according to it the insurer is entitled to take over the defence in the action, that is a right which, if disputed by the insured, cannot, in my opinion, be

enforced in these proceedings. The plaintiff was not privy to the contract between the disputants, the insurer and the assured. Under the common law the plaintiff could claim no relief against the insurer on the basis of the policy and there was no obligation on him to implead the insurer as a defendant to the suit. The insurer is not a necessary party to the suit and not even a proper party, as it cannot be said that without his presence the question in the suit cannot be completely decided.

Any dispute between the insurer and the insured arising out of the terms and conditions of the insurance cannot, therefore, be agitated or brought into issue in the action started by the injured. That being a matter solely between him and the insured, with which the injured has nothing to do, can only be determined in a separate action for the enforcement of his right by the insurer or for damages in respect of the breach of a term of the contract.

(7) Section 96 of the Motor Vehicles Act casts a sort of vicarious liability upon the insurer. The section makes the insurer liable to pay the amount decreed to the person entitled to the benefit of the decree, provided that the insurer was given a notice through the Court informing him of the institution of the suit. On receipt of such notice the insurer can defend the suit on any of the grounds given in sub-section (2) of the Section. According to sub-s. (6) the insurer cannot avoid his liability on any other ground. The respective rights and liabilities of the injured, the insurer and the insured, of one qua the others, are clearly and specifically set out in the Section.

It follows that under S. 96, the insurer cannot claim to take up all the objections open to the assured or to enforce upon him any undertaking in the policy and to represent him in the suit.

(8) Reliance on behalf of the petitioner is placed on an observation made by the Supreme court in its decision of the appeals preferred against the Division Bench decision of this Court referred to above. One of the arguments raised in the appeals was that it is only fair that a person sought to be made bound by a judgment should be entitled to resist his liability under it by all defence which he can in law advance against the passing of it. The plea of supposed hardship was refuted with the following observation:

"We are furthermore not convinced that the statute causes any hardship. First the insurer has the right, provided he has reserved it by the policy to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship, if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do. Secondly, if he has been made to pay something which on the contract of the policy he was not bound to pay he can under the proviso to sub-section (3) and under sub-section (4) recover it from the assured."

Their Lordships were discussing an insurer's case in general. The observation did

not relate to the facts of this particular case, nor was it meant to entitle the insurer to defend the present action in the name of the assured, in spite of the latter's opposition. The mode or manner in which the right to represent the assured, reserved to the insurer by the policy, could be enforced was not laid down. The observation, therefore, is of no help to the petitioner.

(9) This is not a case where the defendant was not available or was not likely to defend the suit or where the defendant was colluding with the plaintiff and/or had allowed any judgment or order go against him by default or by consent. Here, the defendant is himself contesting the suit and he does not agree to be represented by the insurer or to the insurer being allowed to defend the suit in his name. Decisions in *Sarupsing Mangatsing Vs. Nilkant Bhaskar*, , *Royal Insurance Co. Ltd. Vs. Abdul Mahomed Meheralli*, and *Windsor v. Chalcraft* (1939) 1 K. B. 279 , relied upon by the counsel, would, therefore, have no application. In *Vimlabai D. Vashishtha Vs. General Assurance Society Ltd., Tendolkar, J.*, on a reference to the inherent and equity jurisdiction of the Courts in India to make any order they consider just and equitable, observed as follows:

"It seems to me to be a matter of elementary justice to the insurer that if a judgment is to be enforced against him he should have the right to defend the suit before judgment, not by being a party which he cannot be except on any of the grounds set out in S. 96(2), but through the defendant or in the name of the defendant. Ordinarily he would have to defend the suit through the defendant, and, therefore, he must in the first instance offer to the insured that the shall indemnify him against the consequence of defending, the suit and request the insured to defend the suit. But if the insured unreasonably refuses to defend the suit on those terms, it seems to me that this Court has ample jurisdiction and to defend the suit in the name of the insured so that the judgment does not go by default."

The present is not a case where the insured has refused to defend the suit or to defend it on the terms offered by the insurer.

(10) For all these reasons, I would dismiss the petitions with costs. Ordered accordingly.

(11) Petitions dismissed.