

(1937) 10 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 146 of 1934

British India General Insurance Co., Ltd.	APPELLANT
Vs	
Janardan Vishwanath Naik	RESPONDENT

Date of Decision : 05-10-1937

Acts Referred:

Citation : AIR 1938 Bom 217 : (1938) 40 BOMLR 155

Hon'ble Judges : Norman, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Norman, J.—One Balkrishna was a passenger in a motor omnibus which had been obtained by its driver Tukaram from the General Motor Agency on hire-purchase. Due to the driver's negligence the omnibus overturned and Balkrishna received injuries from which he died. Balkrishna's legal representatives filed the suit out of which this appeal arises against Tukaram (defendant No. 1), the General Motor Agency (defendant No. 2) and the British India General Insurance Company (defendant No. 3) with which company the General Motor Agency had insured the omnibus. The trial Court awarded a decree for Rs. 1,500 against all the defendants. The insurance company appealed, but the decree was confirmed by the District Judge. The insurance company has now come in second appeal.

2. The only point taken is that Balkrishna being a stranger to the contract of insurance could not sue the insurance company. It is not disputed that the general law is that a stranger to a contract cannot sue on it, though it is a rule which is subject to certain exceptions. The English rule as regards contracts of insurance (apart from certain statutory provisions not in force in India) is laid down as follows in Halsbury, Vol. 18, paragraph 879 : " The person who has suffered the injury or damage for which the assured is liable is not a party or privy to the contract of insurance, and had not, either at common law or in equity, any right to the money payable under the policy which he could enforce directly against either the insurers or the assured." It is for the plaintiffs to

establish that the present case is not governed by that general rule.

3. The learned District Judge appears to have been influenced by a clause in the insurance policy under which the insurance company were given power to enforce the legal rights of the insured against a third party and were entitled to do so in the name of the insured. He deduced from this that the third party equally had a right to sue the company. In my judgment this deduction, for which no authority is quoted, is unjustifiable. The clause was merely an agreement between the insurer and the insured. It did not add to the rights of either party against a third person. It would not give the insurance company a right to sue a third person otherwise than in the name or by the authority of the insured. If the insured refused to lend his name or give his authority, then the company would not be able to sue a third person but would only be able to repudiate their liability under the policy and recover the money paid to the insured thereunder. The learned District Judge then refers to the Liverpool Mortgage Insurance Company's Case [1914] 2 Ch. 617, but all that was therein held was that when an insured person becomes : legally liable he is not bound to pay what he has to pay before claiming against the company on his insurance policy. That case therefore has no application here.

4. Another ground for the learned District Judge's decision is that the victim of the accident was a beneficiary under an implied trust and it is this aspect of the case that has been particularly emphasized by Mr. Gokhale for respondent No. 1. He relies in particular on the indemnity clause which runs as follows :

It is hereby agreed and declared that the Company shall indemnify the Insured against his legal liability in respect of death of, or bodily injury to passengers and/or other persons not in the service of the Insured, sustained whilst entering into, dismounting from or riding in any vehicle described in the Schedule; of this Policy but the Company's liability under this clause is limited to Rs. 1,500 (rupees one thousand and five hundred only) in respect of anyone passenger or person as aforesaid and to an aggregate of Rs. 6,000 (rupees: six thousand only) in respect of any one accident or series of accidents arising out of one event. Provided always that in the event of any accident occurring whilst the vehicle is carrying a greater number of passengers than that which it is authorised to carry, viz. 20 (twenty only), the Insured shall bear a rateable share of the total loss under this endorsement.

Mr. Gokhale argues that this clause constitutes the passengers the beneficiaries, the insurance company being the trustee and the insured the author of the trust. I am unable to agree. What is insured against is the insured's legal liability and that shows that the policy is taken out for his benefit and not for the benefit of any passenger. Mr. Gokhale refers particularly to the words " the insured shall bear a rateable share of the total loss ". But I do not understand how these words can be said to vest any rights in the passenger. " Total loss" means the total of the legal liability as may be established against the insured.

5. In support of the implied trust theory the learned District Judge cited a number of cases in which the facts are so different that I do not consider it worthwhile to set them out at length. For instance in *Blackwell & Co. v. Jones & Co.* (1870) 7 B.H.C.R. 144 which was a suit on a charterparty, the ratio decidendi was that though the plaintiffs; were not strictly parties to the contract they were not strangers to the consideration. In *Gandy v. Gandy* (1885) 30 Ch.D. 57 there was an express trust under which the beneficiaries were named. In *Khwaja Muhammad Khan v. Husaini Begam* ILR (1910) All. 410 : 12 Born. L.R. 638. there was a marriage contract in which again the beneficiary was expressly named and the ratio decidendi was that the strict rule in *Tweddle v. Atkinson* (1861) 1 B. & S. 393 was not appropriate to Indian marriage contracts.

6. In addition to the cases relied on by the learned District Judge, Mr. Gokhale has cited *Williams v. Baltic Insurance Association of London, Ltd.* [1924] 2 K.B. 282. In that case the insured took out a motor policy which gave an indemnity against all sums, which the insured or any licensed personal friend or relative of the insured, while driving the car with the insured's general knowledge and consent, should become legally liable to pay. The insured's sister while driving the car was involved in an accident and damages were recovered from her by the injured party. It was held that the insured as a trustee for his sister could recover the amount from the insurance company. That case is clearly distinguishable. The insured's sister fell within a class for whose benefit (among others) the policy was taken out. Moreover even so it was the insured who maintained the action.

7. It is lastly contended by Mr. Gokhale that a certain letter written by the second defendant to the plaintiffs after the accident operated as an assignment of defendant No. 2's right against the insurance company. This is an entirely new case and had it been made in the plaint, the insurance company might have taken other defences. It cannot be set up for the first time in second appeal.

8. The result is, I allow the appeal and vary the lower Courts' decrees by dismissing the plaintiffs' suit against defendant No. 3 with costs throughout.