
(1992) 01 MAD CK 0017
In the Madras High Court

Common Wealth Insurance CO. (Now Known as New India Assurance Co. Ltd.)

APPELLANT

Vs

D. Krishnaswamy and Others

RESPONDENT

Date of Decision : 08-01-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 95(2)(d)

Citation : (1993) 1 ACC 371 : (1992) 2 LW 368

Hon'ble Judges : Abdul Hadi, J

Bench : Single Bench

Judgement

Abdul Hadi, J.—The third defendant-Insurance Company which had insured the first defendant's (second respondent's) lorry, is the

appellant in this appeal against the decree for compensation of Rs. 26,000/- with interest granted by the trial Court in O.S. No. 108 of 1975 on

the file of I Additional Subordinate Judge, Salem. The decree is against the appellant alone for the damage caused to the abovesaid lorry and its

contents, in a motor accident that took place on 8.4.72. The accident took place pursuant to collision between the abovesaid second respondent's

lorry driven by the third respondent-driver and the plaintiff's (first respondent's) lorry which was insured by the fourth defendant-(fourth

respondent) Insurance Company.

2. Now, the appeal is only against the first respondent plaintiff (claimant), since pursuant to earlier orders the appeal stands dismissed against the

other respondents in view of the non-prosecution by the appellant. In this appeal the following three submissions were alone made by the learned

Counsel for the appellant:

(1) The trial Court erred in granting a decree only against the third defendant-Insurer without granting a decree against the insured-the first defendant.

(2) In a regular suit before the civil Court, unlike in the case of claim petition before a Motor Accident Claims Tribunal, the Insurance Company of the offending vehicle in a motor accident cannot be made a party straightway, (unless Order 8-A procedure was initiated and permission of the Court was thereby obtained to implead the third party Insurance Company) since there is no privity of contract between the plaintiff and the third defendant-Insurance Company.

(3) At any rate as per Section 95(2)(d) of the Motor Vehicles Act, the liability of the appellant Insurance Company is limited to Rs. 2,000/- only and the trial Court erred in granting a decree for Rs. 26,000/-.

3. As against these submissions of the learned Counsel for the appellant, learned Counsel for the plaintiff-first respondent argues that the trial Court has actually held that the first defendant is liable and that hence only it gave a decree against the Insurance Company in view of the indemnity under the Insurance Policy. He particularly drew my attention to the following passage in the trial Court's judgment.

P.W. 1 says that the accident occurred only due to the rash and negligent driving of the first defendant's lorry. It is not denied by examination of

any witness by the defendant's....So, the loss occurred to the lorry as well as the petrol and diesel is the direct cause of the accident due to the

rash and negligent driving on the part of the driver of the first defendant's lorry. Since the first defendant's lorry is insured with the third defendant,

covering the risk the third defendant alone is liable to pay the damages to the plaintiff. Defendants 1 and 2 are not liable to pay any damages.

According to the learned Counsel, though in the abovesaid passages the trial Judge concludes that the third defendant along is liable, the earlier

part of the passages clearly suggested that the first defendant is primarily liable. Therefore according to the learned Counsel there is no case for the

appellant on this ground.

4. Regarding the abovesaid second submission, the learned Counsel for the first respondent drew my attention to a decision in British India General

Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, . The said decision of the

Supreme Court also arises out of a regular suits filed against owner of the motor cars for recovery of damages suffered by the plaintiffs therein as a result of the negligent driving of the cars. The owners of the cars in the said case were insured against third party risks and the insurers were subsequently added as defendants to the suits under the provisions of Sub-section 2 of Section 96 of the Motor Vehicles Act, 1939. In that context the Supreme Court observed that the said Section 96(2) of the Motor Vehicles Act, 1939 gives the insurer the right to be made a party to the suit and to defend it, and that the right is created by statute. Therefore according to the learned Counsel, there is no necessity for resorting to Order 8-A Procedure and in view of Section 96(2) of the Motor Vehicles Act, 1939, even in a regular suit claiming compensation for damages suffered in a motor accident, the Insurance Company could be made a party to the suit.

5. Regarding the third submission, learned Counsel for the first respondent points out that, as regards limiting the liability of the appellant-Insurance Company, pursuant to Section 96(2)(d) of the Motor Vehicles Act, 1939, first of all, there is no plea at all to that effect in the written statement of the third defendant. Further he drew my attention to the decision in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, and also the decision in Prasanna Kumar Mitra Vs. Pravati Khatei and Others, which followed the abovesaid decisions of the Supreme Court. In the said Supreme Court decisions it has been held that in all such cases where the Insurance Company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the Insurance policy along with its defence. But in the present case the relevant Insurance policy has not been filed at all. So the learned Counsel contends that the liability of the appellant could not be limited to Rs. 2,000/-.

6. I have considered the rival submissions of both the Counsel. There is considerable force in the abovesaid arguments of the learned Counsel for the first respondent. Regarding the first submission, it is clear from the above quoted passage in the judgment of the trial Court that the first defendant is also liable, even though a decree as such was not given against the first defendant also and even though the Court below also

expressed that the third defendant alone was liable. So, according to the learned Counsel for the 1st respondent, I can exercise my jurisdiction

under Order 41, Rule 33, CPC and grant a decree against the first defendant-second respondent also along with the appellant-third defendant. But

initially I expressed the difficulty in doing so, in view of the fact that the appeal has been dismissed already against the second respondent in view of

the lapse on the part of the appellant in prosecuting the appeal against the second respondent. In other words, since the second respondent is not

before me, I posed the question whether I could exercise my jurisdiction under Order 41, Rule 33, C.P.C. and grant a decree against the second

respondent also. In answer to this question posed by me, the learned Counsel for the first respondent drew my attention to one passage in

Venkataramiah v. Chinnaiah AIR 1919 Madras 196 and the decision of a Division Bench in Bejoy Kumar Sen and Another Vs. Kusum Kumari

Debi and Others, . In Venkataramiah v. Chinnaiah MR 1919Mad 196 it has been observed that the object of Order 41, Rule 33, C.P.C. is to

enable an appellate Court to pass judgment or orders which would give consistency to its decision and that although the power of interfere with an

order against a person who was not before it should be exercised with great, care and caution, the discretion of the Court to grant relief which

benefits a party who has not appealed, is not hampered. Then, in the other case reported in Bejoy Kumar v. Kusum Kumari AIR 1929 Calcutta

315, the Division Bench of the Calcutta High Court was held that under Order 41, Rule 33, C.P.C. the Court could pass an order against a party

to the suit in his absence it would have been sound exercise of discretion to give an opportunity to that party of appearing before him and of being

heard. Learned Counsel in this connection submits that even if a decree is passed against the first defendant (second respondent) also, in his

absence there will be no prejudice actually caused to him since the liability that would be fastened to him, is indemnified by the appellant Insurance

Company under the Insurance Policy. I think there is force in this argument of the learned Counsel for the first respondent also. I therefore propose

to grant a decree against the second respondent (first defendant) along with the appellant, after considering the above referred to other two

submissions also.

7. Regarding the abovesaid second submission, in view of the abovesaid decision of the Supreme Court in British India General Insurance Co. Ltd.

Vs. Captain Itbar Singh and Others, a regular suit against the Insurance Company in a Motor Accident Claim-case is maintainable in view of

Section 96(2) of the Motor Vehicles Act, 1939. There is no necessary for resorting to Order 8-A Procedure.

8. Regarding the third submission also, I agree with the learned Counsel for the first respondent in view of the above referred to absence of plea in

the written statement of the third defendant and in view of the above referred to decision of the Supreme Court in National Insurance Co. Ltd.,

New Delhi Vs. Jugal Kishore and Others, . No doubt the learned Counsel for the appellant submitted that the appellant should be given an

opportunity to produce and file the Insurance policy now. But this request cannot be accepted, because the appeal was pending for more than 12

years and the Insurance Company could have filed a petition for reception of the said alleged document much earlier but it did not do so. Further it

is also not asserted that the said policy is actually available now. In the above circumstances, I am unable to accede to the abovesaid request of the

learned Counsel for the first respondent.

9. Accordingly, the judgment and decree of the Court below is modified so as to make both defendants 1 and 3 liable for the abovesaid decree

granted. Thus the present appeal is ordered accordingly by holding that the decree given by the trial Court shall also be against the first defendant,

along with the third defendant. However, in the circumstances of the case, there will be no order as to costs.