

(1989) 02 MAD CK 0061
In the Madras High Court

Dharman and Another

APPELLANT

Vs

N.C. Srinivasan and Others

RESPONDENT

Date of Decision : 23-02-1989

Acts Referred:

Citation : (1989) 1 LW 315 : (1989) 1 MLJ 297

Hon'ble Judges : Padmini Jesuduri, J;Padmini Jesudurai, J

Bench : Division Bench

Judgement

Padmini Jesuduri, J.—The owner and driver respectively of a motor cycle against whom the Motor Accidents Claims Tribunal, had passed an award, confirmed by this Court in appeal, have preferred this Letters Patent appeal.

2. Facts briefly are: on 6-3-1980 at 7-05 p.m., motor cycle bearing registration No. T.M.C. 6883 which had formerly belonged to the third respondent herein and on the day of the accident here belonged to the first appellant, was driven in a rash and negligent manner by the second appellant and dashed against the first respondent claimant and caused him serious injuries. The first respondent filed O.P. No. 525 of 1980 u/s 110-A of the Motor Vehicles Act, (hereinafter referred to as the Act) before the Motor Accidents Claims Tribunal, Madras, claiming a compensation of Rs. 25,000.

3. The appellants resisted the claim contending that the accident was not due to the rash and negligent driving of the second appellant, but was due to the negligence of the first respondent in suddenly crossing the road. The second respondent, the Insurance Company resisted its liability contending that the vehicle belonged to the third respondent herein, with whom alone there was a valid policy of insurance and the vehicle having been transferred during the period of cover to the first appellant, the second respondent could not be called upon to indemnify the first appellant. On this counter, the third respondent was also made a party and he chose to remain ex parts.

4. The Tribunal, on the material placed before it, held that the accident was due

to the rash and negligent driving of the vehicle by the second appellant and assessed the compensation of Rs. 6,500. Holding that because the vehicle had been transferred by the third respondent to the first appellant even before the date of the accident, neither the third respondent, the erstwhile owner, nor his insurer, the second respondent, could be held liable. An award was passed against the appellants alone. C.M.A. No. 172 of 1982 filed by the appellants in this Court was dismissed. Hence this Letters Patent appeal.

5. Thiru S. Subbiah, learned Counsel for the appellants, urged the following two contentions in support of his prayer-(1) the vehicle having been insured with the second respondent, and the accident having taken place during the period of cover and the policy of insurance not having been terminated during in the period of cover in any one of the modes contemplated in Section 96(2) of the Act, it is not open to the second respondent, the Insurer, to avoid the liability against third parties by taking a plea not available to it u/s 96(2) of the Act, contending that the policy had come to an end on the transfer of the vehicle from the third respondent to the first appellant. (2) Both the tribunal as well the learned Judge erred in placing reliance on Ex.P-6, the rough sketch of the scene prepared by P.W.3, the Investigating Officer, based purely on the statements recorded by him u/s 161, Criminal Procedure Code which were not admissible in evidence. The finding that the accident was due to there ash and negligence driving of the second appellant was therefore, unsustainable.

6. Thiru Madanagopal Rao, learned Counsel for the second respondent, countered the above contentions.

6-A.Contention No. 1: The first contention of the learned Counsel for the appellants is that this being a claim by a third party it is not open to the insurer, the second respondent, to escape the liability accrued during the period of cover of the policy of insurance by putting forward any defence not contemplated in Section 96(2). According to the learned Counsel, a policy of insurance against third party claims, could come to an end only in the manner provided u/s 96(2) (a) and (c) of the Act. The short question, therefore, is whether a plea that the policy of insurance has lapsed on the transfer of a vehicle, is a plea that could be put forward u/s 96(2) as against a third party claim.

7. According to Section 96(2) of the Act, an insurer, if he is to be called upon to indemnify his insured, should be made a party to the proceedings to the limited extent of enabling him to put forward certain defence made available to him in that sub-section itself. It is, therefore, clear that the defence of an insurer is directly limited only to what the Statute has chosen to provide in Section 96(2). That the insurer cannot take any defence, not specifically provided for u/s 96(2) of the Act, has been laid down by the Supreme Court as early as in 1959 in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, , in the following words:

Now the language of Sub-section (2) seem to us to be perfectly plain and to

admit of no doubt or confusion. It is that an insurer to whom the requisite of notice of the section has been given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely, after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified, they cannot be added to. To do that would be adding words to the statute.

Sub-section (6) also indicates clearly how Sub-section (2) should be read. It says that no insurer to whom the notice of the action has been given shall be entitled to avoid his liability under Sub-section(1) otherwise than in the manner provided for in Sub-section (2) "Now the only manner of avoiding liability provided for in Sub-section (2) is by successfully raising any of the defences herein mentioned. It comes then to this that the insurer cannot avoid his liability except by establishing such defences. Therefore, Sub-section (6) clearly contemplates that he cannot take any defence not mentioned in Sub-section (2). If he could then he would have been in a position to avoid his liability in a manner other than provided for in Sub-section (2). That is prohibited by Sub-section (6). We, therefore, think that Sub-section (2) clearly provides that an insurer made a defendant to the action is not entitled to take any defence which is not specified in it".

8. Learned Counsel for the second respondent however, brought to our notice a judgment of a single Judge of this Court in *The South India Insurance Co., Bombay Vs. Lakshmi and Others*, , wherein the learned Judge had observed that the defences that are open to an insurer u/s 96 of the Act, in a claim by third parties, cannot be said to be exhaustive. These observations however, cannot be sustained in view of the decision of the Supreme Court, referred to above. It is, therefore, clear that in a claim by a third party, the defences of an insurer are strictly limited to what the Statute has chosen to provide u/s 96(2).

9. A reading of Section 96(2) would show that even during the period of cover, it is open to the insurer to avoid third party claims, by putting forward the defence made available to it u/s 96(2)(a), where by the policy could be brought to an end even before its expiration by efflux of time. Once certificate of insurance has been issued u/s 95(4) of the Act, and an accident occurs during the period of cover, the only two situations that the Act contemplates, which would be available to defence by the insurer to contend that the policy is not in force, are found in Section 96(2)(a) and (e) which are as follows:

(a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability; and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for

cancellation of the certificate after compliance with the provisions of Section 105:

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

10. An analysis of Section 96(2)(a) shows that the policy could be cancelled (1) by mutual consent, (2) by virtue of any provision contained therein before the accident giving rise to the liability and the certificate of insurance is surrendered; (3) either before nor later than fourteen days after the accident, the insurer has commenced proceedings for cancellation of the certificate, after compliance with the provisions of Section 105 of the Act, which requires that when the insurer cancels or suspends a policy, he shall within seven days notify to the registering authority the effect of such cancellation or suspension. Section 96(2)(c) enables the insurer to contend that the policy itself as void on the ground that it was obtained by non-disclosure of material fact or misrepresentation.

11. Section 96(2) of the Act does not contemplate any other situation, which would enable the insurer to contend, as against a third party, regarding an accident that had occurred during the period of cover, that the policy has come to an end. One cannot miss the fact that Chapter VIII has been introduced into the Motor Vehicles Act making insurance of motor vehicles compulsory against third party risks. The Motor Vehicles Act, being a special Act and the provisions of Chapter VIII having been introduced to serve a particular purpose, should be so construed as not to defeat the object for which the provisions have been enacted, by importing into it, principles related with the general law of insurance or general law of contracts. Section 103-A merely indicates the procedure by which, on the transfer of a vehicle contractual rights inter se insurer, transferor and transferee could be regulated for working out remedies available u/s 96(3) Proviso and Section 96(4) and has no reference to the liability of the insurer against third party claims during the period of cover. It could never have been the intention of the Legislature that in the event of transfer of ownership of the vehicle during the period of cover, the rights of third party victims of accidents occurring during the period of cover, would depend on whether or not, parties choose to act u/s 103-A. The wordings in Section 96(1) that the insurer shall pay notwithstanding that he might have avoided or cancelled the policy make this interpretation imperative.

12. The Supreme Court in *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, , has given guidelines regarding in interpretation of the various provisions of Chapter VIII of the Act.

Chapter VIII of the Act, it appears from the hearing, makes provision for insurance of the vehicle against third party risks, that is to say, its provisions ensure the third parties who suffer on account of the user of the motor vehicle would be able to get damages for injuries suffered and that their liability to get the damages will not be dependent on the financial condition of the driver of the

vehicle whose user led to the causing of the injuries. The provisions have to be construed in such a manner as to ensure this object of the enactment.

13. One cannot also miss the trend of the decisions of the Supreme Court in interpreting the provisions of this Act. More recently, in *Skandia Insurance Company Limited v. Kokilben Chandravadan* 1987 A.C.J. 411 the Supreme Court, while interpreting the exclusion clause contained in the policy of insurance, held that the exclusion clause has to be read down, in order that it is not at war with the main purpose of the provisions enacted for the protection of victims of accidents and that in order to define the intention of the legislature in the course of interpretation of the relevant provisions, there can scarcely be a better test, than that of probing into the motive and philosophy of the relevant provisions, keeping in mind the goals to be achieved by enacting the same. The same strict interpretation is seen in a later pronouncement of the Supreme Court in *Guru Vovekan v. Filomen F. Lobo* 1988 A.C.J. 585.

14. We would also refer to a Full Bench decision of the High Court of Andhra Pradesh in *Madinene Kundiah v. Vassenn Fatima* 1986 A.C.J.1 (F.B.) wherein the court held that in a claim by a third party it is not open to the insurer u/s 96(2) of the Act, to raise a plea that the policy had lapsed even during the period of cover, by the vehicle being sold to someone else. We, therefore, hold that the defence that on sale of the vehicle during the period of cover, the policy had elapsed, is not one that is available to the insurer u/s 96(2) as against third party claims.

15. Contention No. 2: According to the learned Counsel for the appellants, the markings in Ex.A-6, the rough sketch of the scene made by P.W.3, the Investigating Officer, are based on statements recorded by him u/s 161, Order 1, C.P.C., which are inadmissible in evidence and as such those markings in Ex.P-6 are to be eschewed from consideration. The findings of the Tribunal, as well as of the learned Judge, based on those markings are therefore, unsustainable. Reliance was placed upon a decision of the Supreme Court in *Tori Singh Vs. The State of Uttar Pradesh*, . The bar u/s 161, Criminal Procedure Code is applicable only to criminal trials. The statements recorded by the Investigating Officer u/s 161 Criminal Procedure Code, could be looked into in other proceedings, provided of course, they are properly proved, either by examining the Investigating Officer, who recorded the statements or by examining the witnesses themselves. Once proved, those statements could be relied on in proceedings like the present one. If, however, those statements are not proved, they would come within the category of hearsay evidence and would not be admissible. In the instant case, P.W.3 has stated that he visited the scene of accident and that the driver of the motor cycle and one Kupparaj were available there and that they pointed out the scene and on the basis of that he had drawn Ex.P-6. Ex.P-6, therefore, could be relied on.

16. Both the Tribunal as well as the learned Judge have held, that the accident was due to the rash and negligent driving of the second appellant, mainly

because the accident had occurred in the eastern extremity of the road, while the vehicle was coming from north to south and the first respondent was proceeding from west to east. The width of the road was 7.55 metres. The first respondent, therefore, had crossed about 3/4 of this road, and was about to reach the eastern pavement when the accident occurred. This rules out any negligence on the part of the first respondent and clearly spells out rashness and negligence on the part of the second appellant. We concur with the findings of the Tribunal as well as the learned Judge to that effect.

17. In the result, the appeal is partly allowed with costs, and there will be an award for a sum of Rs. 4,500, as against respondents 2 and 3 and appellants 1 and 2, the amount being initially payable by the insurer, the second respondent herein. This amount shall carry interest at 12 per cent per annum from the date of the filing of the claim petition before the Motor Accidents Claims Tribunal till the date of payment. It is needless to say that it would be open to the second respondent to work out its remedies against the parties concerned either u/s 96(3) Proviso or u/s 96(4) of the Act. It is stated that the appellant had deposited one half of the amount which has since been withdrawn by the claimant. On the insurance Company depositing the amount as directed above, the appellants would be entitled to withdraw the amount which was deposited by them.