

(1995) 09 OHC CK 0018
In the Orissa High Court
Case No : Misc. Appeal No. 587 of 1991

Divisional Manager, New India Assurance Co. Ltd., Berhampur	APPELLANT
Vs	
Bhagirathi Sabar and Another	RESPONDENT

Date of Decision : 27-09-1995

Acts Referred:

Motor Vehicles Act, 1939 — Section 110D, 96(2)

Citation : (1997) ACJ 470 : AIR 1996 Ori 107 : (1996) 81 CLT 344

Hon'ble Judges : P.C. Naik, J

Bench : Single Bench

Advocate : P. Roy, S. Roy and L. Dash, for the Appellant; D.P. Sahoo, for the Respondent

Final Decision : Dismissed

Judgement

P.C. Naik, J.—The Motor Accident Claims Tribunal, Kalahandi, Bhawanipatna had awarded a sum of Rs. 75,800/- as compensation to the claimant/Respondent No. 1 with a direction to the insurer (appellant) to satisfy the award. Hence, this appeal by the insurer.

2. The Tribunal has held that the claimant/Respondent No. 1 was knocked down by a jeep bearing Registration No. ORN 3211 of which the Respondent No. 1 is the owner and appellant the insurer, Due to the injuries, the right leg of the claimant was amputated. On a further finding that the accident was due to the rashness and negligence of the jeep driver, the Tribunal held the claimant was entitled to compensation from the owner and the insurer of the jeep. Accordingly the award in question was passed in favour of the claimant.

3. The learned counsel for the insurer assails the award on merits. It is urged that the insurer having denied that Respondent No. 2 was the owner of the vehicle, the Tribunal committed an error in not framing an issue and giving a specific finding on the question of ownership and, in the absence of such finding regarding ownership, the liability could not be fastened on the insurer. The

appellant also challenges the quantum and submits that the compensation awarded is excessive. It is also submitted that in view of the material contradictions in the testimony of the claimant and, because of the apparent collusion between the owner and the claimant, the claim ought to have been negatived.

4. In reply, the learned counsel for the claimant (Respondent No. I) submits that no interference on merits is called for in an appeal by the insurer as it cannot assail the award on merits. Further, in the absence of any evidence, in rebuttal, submits the learned counsel, the Tribunal was justified in placing reliance on the un rebutted evidence of the claimant and in passing an award in his favour. The learned counsel further submits that the appeal has no substance and is liable to be dismissed.

5. The preliminary question which requires for consideration is whether it is open to the insurer to challenge the award on merits or even though its defence is confined to those specified in Section 96(2) of the Motor Vehicles Act, 1939 (now Section 149 of the M. V. Act, 1988). For determination of this question, it is necessary to make a reference to Section 96(2) which reads thus :

"96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks--

(1) xxx xxx xxx (2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment unless before or after the commence merit of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceeding is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

(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 cancellations of the certificate after compliance with the provisions of Section 105; or

(b) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

. (i) a condition excluding the use of the vehicle-

(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 motor cycle, or

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

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

(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."

While interpreting the above provisions, the Supreme Court in the case of *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, observed thus (At pp. 1333-34):

"To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its contents necessarily depends on the provisions of the statute. The question then really is, what are the defences that Sub-section (2) makes available to an insurer? That clearly is a question of interpretation of the Sub-section.

"Now the language of Sub-section (2) seems to us to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action 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 therein 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 that 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."

6. The right to be impleaded as a party is created in favour of the insurer by Sub-section (2) of Section 96 (Section 149(2) of the M. V. Act, 1988). The section which has created a right in favour of the insurer itself restricts the exercise of the right of defence to the grounds specified in that very section. Hence, the right has to be exercised in accordance with the provisions contained therein except in a case which falls within the ambit of clause (2 A) of Section 110-C of the M. V. Act (Section 170 of 1988 Act).

7. Learned counsel for the appellant places reliance on a Bench decision of this Court in the case of *The Oriental Insurance Company Ltd. Vs. Harapriya Nayak and Others*, wherein the Bench has held as under:

"A further question arises whether the Court is helpless when it finds in an appeal that the award is unreasonable, yet insurer is the appellant, and quantum is in issue? Our answer to the question is an emphatic no. Court cannot remain a mute spectator when the course of justice is deflected by latent collusion, a shadow-boxing. It cannot stand in the side lines watching helplessly the games played by the parties which put off a show of contest while really shaking hands of friendship aimed at making a fortune out of a misfortune. That itself is collusion. There may be cases where the Tribunal itself acts without application of mind.

XXX XXX XXXX A distinction has to be made between a compensation which at one hand is not to be positive nor on the other a source of profit in whose favour it is awarded, and it should not be a windfall to make fortune out of a misfortune. *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, , on which reliance is placed to rule out the appeal by the insurer on the question of quantum is clearly distinguishable on facts. That was a case where it was not decided anything about the appellate powers. The only question is that case was whether the insurer can take pleas in defence other than those mentioned in Section 96(2) of the Act. In case a view is taken that the insurer would not be able to assail the quantum, the quantum fixed by the Tribunal though unreasonable and arbitrary would become final. The appeal which is wide in its scope would be limited in its scope which cannot be the intention of the legislature. Appeal is a continuation of the original proceeding."

Relying on the above decision, learned counsel for the insurer/appellant submits that as an appeal is a continuation of the original proceeding and, in a case where the quantum awarded by the Tribunal is arbitrary and unreasonable and cannot be held to be just, the appellate Court is not powerless to decide the quantum though the appeal has been filed by the insurer. Once the appeal is filed before the appellate Court, urged the learned counsel for the appellant, the

appellate Court can test the justness of the award because the Tribunal is obliged to pass a "just" award. The learned counsel for the appellant also refers to a recent judgment of this Court wherein relying on the Bench decision of this Court, interference has been made by a learned single Judge in an appeal filed by the insurer.

8. Having heard the learned counsel, I am of the opinion that the contentions raised on behalf of the appellant cannot be accepted and need to be overruled.

9. What would be the nature and scope of an appeal filed by the insurer has been considered by the Apex Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, a reference to which has been made earlier. However, the Division Bench in *The Oriental Insurance Company Ltd. Vs. Harapriya Nayak and Others*, sought to distinguish *British India General Insurance Company's* case and held that:

"In case a view is taken that the insurer would not be able to assail the quantum, the quantum fixed by the Tribunal though unreasonable and arbitrary would become final."

It is in this view of the matter that the learned Judges who constituted the Bench entertained the insurer's appeal on merits. But, with respect to the Hon'ble Judges who constituted the Bench, the view taken runs counter to that of a Full Bench of this Court in the case of *National Insurance Co. Vs. Magikhaia Das* (After him) *Mst. Laxmi Dibya and Others*, , which, it appears, was not brought to the notice of their Lordships at the time of hearing. Probably, it is for this reason that a contrary view was expressed by them. In the case before the Full Bench, claimant *Magikhaja Das* who was injured in an accident was awarded Rs. 17,000/- as compensation by the Claims Tribunal. Puri. which was directed to be paid by the National Insurance Company. Against the award, the insurer filed an appeal before the High Court. When the appeal came up for hearing before a learned single Judge, a preliminary objection was raised on behalf of the claimant that the appeal did not lie at the instance of the insurer in view of the provisions contained in subsection (2) of Section 96 of the Motor Vehicles Act, 1939 which restricts the grounds upon which an insurer can defend the claim. When the matter came up before the learned single Judge, he noticed a conflicting decision and asked that the matter be referred to a Full Bench for disposal. The Full Bench observed thus (Para 6):

"As the facts of this case show, the insured had entered contest and there is no reason to hold in the absence of any allegation, and something more, that the insured has been colluding with the claimant. Leave of the Tribunal had admittedly not been taken u/s 110-C(2-A) of the Act. There exists a clause in the policy bond authorising the insurer to defend in the name of the insured. As we have already noted, the insured and the insurer simultaneously wanted to defend, the insured defending in his own name and the insurer in its own name. The term in the policy bond did not authorise such defence by the insurer. In the

instant case, therefore, to the insurer the restriction u/s 96(2) of the Act applies and he could not travel beyond the restriction imposed by the Statute either before the Tribunal or in appeal before this Court. None of the grounds in the memorandum of appeal appertains to a defence raised within Section 96(2) of the Act and what is being mainly challenged is the quantum and liability on a ground not covered by Section 96(2) of the Act and what is being mainly challenged is the quantum and liability on a ground not covered by Section 96(2) of the Act. On these grounds the insurer was not entitled to contest the claim nor the award. The appeal filed on its behalf, therefore, is not maintainable."

10. In view of the clear pronouncement of the Full Bench which is binding on me, the contention that an insurer can challenge the award on merits cannot be accepted and is accordingly overruled.

11. The learned counsel for the appellant however, submits, that in the absence of any finding regarding ownership of the vehicle, liability ought not to have been fastened on it. This contention is also without substance. In column 15 of the claim petition, there is a clear averment that Mahabir Prasad Agrawal, Bazarpada, P.O. Bhawanipatna, District-Kalahandi, was the owner of the vehicle. " This averment is admitted by the owner Mahabir Prasad Agrawal, in para 5 of his written statement. Though this averment is denied by the appellant, a copy of the certificate of insurance (Ext. 4) clearly shows that the policy of insurance was issued in favour of Mahabir Prasad Agrawal, Bazar Panda, P.O. Bhawanipatna, Dist. Kalahandi, who is the registered owner of vehicle No. ORN 3211 (jeep) which, according to the claimant, was involved in the accident. If the insurer wanted to avoid liability it could do so on any of the grounds available to it under Sub-section (2) of Section 96 of the Act. But, such, a ground was not taken by the insurer in its written statement. The written statement as is usually with the insurance company, contained general denials and pleas which are not available it cannot be permitted to be raised in this appeal for the first time. The submission is also rejected.

12. For the reasons aforesaid, the appeal is dismissed with costs.