

(1974) 04 MAD CK 0027
In the Madras High Court
Case No : A.A.O. No. 497 of 1972

General Assurance Society Ltd.

APPELLANT

Vs

Jayalakshmi Ammal and Others

RESPONDENT

Date of Decision : 10-04-1974

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A, 110B, 110C(2A), 95, 96(2)

Citation : AIR 1975 Mad 198 : (1975) 88 LW 758 : (1975) 1 MLJ 5

Hon'ble Judges : Paul, J

Bench : Single Bench

Advocate : N.C. Raghavachari, N.S. Varadachari and K. Ranganathan, for the Appellant; N. Sundara Varadan, S.Y. Raghuraman and S. Balakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

Paul, J.—This is an appeal by the insurance Co. with which the vehicle --Lorry MSM 1078 belonging to the third respondent Babu Reddi

and which was involved in an accident on 25-5-1970 at about 3-30 p. m. on the Poonamallee High Road which resulted in the death of one

Chandran, the husband of the first respondent and father of the second respondent was insured. The Claims Tribunal awarded a sum of Rupees

10,000, as compensation to be paid to the first and second respondents and the Insurance Co., the appellant herein was directed to pay

compensation.

2. It is contended in this appeal that the Tribunal erred in finding that the accident was due to the negligent driving of the vehicle by the driver of the

vehicle and it also erred in awarding such a huge sum as Rs. 10,000 as compensation and thirdly that the liability of the appellant as the insurer was

limited to the extent of the liability arising under the Workmen's Compensation Act. On the question as to whether there was adequate proof

before the Motor Accidents Claims Tribunal for the rash and negligent driving of the lorry by the employee of the third respondent, the finding of

the Tribunal has not been seriously challenged in this appeal. Moreover, the appellant Insurance Co. is precluded from raising the defence by

reason of Section 96 (2) of the Motor Vehicles Act where the insurer can defend the action only on the grounds specified in that subsection. This

has also been made clear by the Kerala High Court by the decision in *Kesavan Nair v. State Insurance Officer*, 1971 ACJ 219 (Ker) and in the

decision in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, and *Mangilal Vs. Parasram and Others*, . In *Orissa*

Cooperative Insurance Society Ltd. v. Bhagaban, 1971 ACJ 49 (Gua) it was held that the Insurance Co. is not allowed to raise any plea outside

the scope of the pleas specified in Section 96 (2) of the Motor Vehicles Act, but if it has reserved a right in the policy to defend an action in the

name of the insured, it can raise all the pleas that may be open to the insured, with the permission of the Tribunal. In the case now before me,

however, there is no such reservation of right in the policy in question. Therefore in this case the insurer was not entitled to contend that the

accident was not due to rash and negligent driving of the lorry by the third respondent's employee. In *Howrah Insurance Co. Ltd. v. Sundaram*,

1974 TLNJ 58, also it has been made clear that the effect of Section 96 (2) and Sub-section (2-A) in Section 110-C of the Motor Vehicles Act is

that the Insurance Co. would normally be confined in its defence to the grounds specified in Section 96 (2). But under the exceptional

circumstances contemplated in Sub-section (2-A), they would have the additional privilege of raising the defences which are normally available

only to a person against whom the claim has been made, if either of two conditions precedent are satisfied, viz., (1) there is collusion between the

person making the claim and the person against whom the claim is made; or (2) the person against whom the claim is made has failed to contest the

claim. But where neither of these two pre-conditions exist, the insurer would be confined in his defence to the grounds that have been enumerated

in Section 96 (2) which imposes a statutory embargo upon insurance companies raising any defence to the action similar to the one raised in that

appeal which was that the accident was not due to rashness or negligence of the driver of the vehicle. In the case now before me none of these two

pre-existing conditions exists.

3. Even assuming that he has a right to raise such a defence, there is however overwhelming evidence in this case to prove that the accident which

resulted in the death of the first respondent's husband and father of the second respondent was due to the rash or negligent driving of the lorry. The

facts which emerge from the evidence adduced before the Tribunal are that on 25-5-1970, R. W. 2, the driver of the lorry which belongs to the

third respondent, was driving the lorry at about 3-30 p. m. along the Poonamallee High Road. The deceased Chandran was also travelling in the

lorry; and he was also working at the time as an employee under the third respondent. According to P. W. 2, who claims to have been standing

outside a tea shop on the Poonamallee High Road, the lorry was proceeding at a fast speed and at that time a car from the opposite side came and

this lorry after moving to a distance of 2 furlongs capsized and overturned. R. W. 2's explanation for the accident was that at the time of the

occurrence, a lorry came in front of him and there was a skidding and since the front left wheel moved into a pit of mud the lorry overturned. This

is a case in which the doctrine of *res ipsa loquitur* was invoked.

4. In *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, it was held by the Supreme Court in terms that where such an

inanimate injurious agency and the surrounding circumstances are all entirely within the defendant's control and the accident takes place which

originally could not happen if the defendant had taken proper care or had not remained negligent the doctrine of *res ipsa loquitur* applies, where the

event charged as negligence tells its own story of negligence on the part of the defendant. In this case, the inference is that the defendant is liable

unless he in the first instance discharges the burden to disprove his liability by saying that the accident could reasonably happen without negligence

on his part. In *Henderson v. Hendry E. Jenkins and Sons*, 1969 3 All ER 756 , Lord Pearson made this distinction between evidential burden of

proof and formal (or legal or technical) burden of proof in such negligence cases. The learned Judge observed that in any action for negligence, the

plaintiff must allege and has the burden of proving that the accident was caused

by the negligence on the part of the defendant. This is the issue throughout the trial and the formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raise a prima facie inference that accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiff's favour, unless the defendant by his evidence provides some answer which is adequate to displace the prima facie inference. It is in this situation that it is said that the evidential burden of proof rests on the defendant in such cases.

5. In *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, the bus was going along a road which passed over a culvert and then took a sharp bend with a downward gradient and the bus after crossing the culvert crashed against one of a number of stones which marked off a drain and then the bus hit against a tamarind tree which was at a distance of 20 or 25 ft. from the stone but travelled some more distance before it came to rest. Their Lordships of the Supreme Court have stated that these facts give rise to a presumption that the accident was caused by the negligence of the driver, and that the events which happened tell their own story and there is a presumption that the accident was caused by negligence on the part of the appellant.

6. In *Jagat Singh v. Sawal Singh*, 1971 ACJ 66 (P&H) this doctrine was invoked where a cow strayed into the road, the driver swerved the vehicle which went off the road and turned turtle and it was held that the negligence could be inferred and that the driver ought to have driven the vehicle with sufficient control. In the case now before me the lorry which was being driven by R. W. 2 on the Poonamallee High Road which appears from the evidence is a cement road and which was taking a curve at a particular point in the road, had skidded and left the road and rolled into an adjacent pit. It cannot be said that this accident was due to vis-major. No doubt, it appears that there were heavy rains. In the counter filed before the Tribunal there was no mention that owing to heavy rains and bad condition of the road, the lorry skidded and overturned. Any way, it is admitted, however, that the lorry had skidded, left the road and had fallen into an adjacent pit and capsized. These facts would certainly show that the driver did not have control over the vehicle at that time and must have been driving it at an excessive speed. The explanation given by R. W. 2,

for the accident is totally unacceptable. If he had driven at a slow speed and if he had applied the brakes the lorry would not have left the road and fallen into a pit. Therefore the finding of the tribunal that the death of the deceased Chandran was due to rash and negligent driving of the lorry by the driver employed by the third respondent is quite correct.

7. The next question is whether the liability of the appellant as the insurer was limited to the extent of the liability arising under the Workmen's

Compensation Act. It is argued on behalf of the appellant that the appellant cannot be made liable to pay more than the statutory liability in terms of

Schedule IV to the Workmen's Compensation Act, 1923, which in this case is limited to Rs. 3,600, and in any event the amount of Rs. 10,000

awarded is excessive. It must be noted that this contention was not raised before the tribunal at all and was raised for the first time only before me.

8. In order to appreciate this point the learned counsel for the appellant has produced the Insurance policy under which this vehicle was insured.

Now this policy clearly shows that under endorsement No. 16 attaching to and forming part of the policy, it is stated -

In consideration of the payment of an additional premium, it is hereby understood and agreed that notwithstanding anything contained herein to the

contrary the company shall indemnify the insured against his legal liability under the Workmen's Compensation Act, 1923 and subsequent

amendments of that Act prior to the date of this endorsement, the Fatal Accidents Act 1855 or at common law in respect of personal injury to any

paid driver (or cleaner or conductor or person employed in loading and/or unloading) whilst engaged in the service of the insured in such

occupation in connection with the Motor vehicles.....

Further the policy states under the heading "Limits of Liabilities" thus:

Limit of the amount of company's liability u/s 11-1 (i) in respect of any one accident -- such amount as is necessary to meet the requirements of

the Motor Vehicles Act, 1939. Limit of the amount of the company's liability u/s 11-1 (i) in respect of any one claim or series of claims arising out

of one event -- Rs. 20,000." Further it is stated that an extra amount has been paid for wider cover to paid driver and cleaner etc.

9. In Venkataraman v. Abdul Munaf Sahib, 1971 ACJ 77 (Mad) it has been held by this court that it was open to the Claims Tribunal to

determine the liability under the Workmen's Compensation Act and award the amount so determined against the Insurance Co. In that case,

however, the policy of insurance provided that the company will indemnify the insured against all sums which the insured has become legally liable

to pay in respect of (i) death of or bodily injury to any person caused by or arising out of the use of the motor vehicle and there were seven

provisos to this clause of which proviso (b) runs as follows-

Except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act 1939, the company shall not be liable in respect

of death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment.

and proviso (c) runs as follows-

Except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939 in relation to liability under the Workmen's

Compensation Act 1923, the company shall not be liable in respect of death of or bodily injury to any person (other than a passenger carried by

reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from the motor vehicles at the

time of the occurrence of the event out of which any claim arises.

The effect of this exception was that the company undertook to indemnify the insured to the extent necessary to meet the requirements of Section

95 of the Motor Vehicles Act in relation to liability under the Workmen's Compensation Act. But in the case now before me, the policy of

insurance contained provisions which certainly make the insurer liable to indemnify the insured against the legal liability under the Workmen's

Compensation Act, as also at common law and for that wider coverage an additional sum has been paid.

10. Therefore the contention raised on behalf of the appellant cannot be accepted.

11. With regard to the amount of compensation which has been awarded it is seen from the judgment of the Tribunal that the deceased was aged

about 25 years and it was claimed that his income was Rs. 200 per month. The Tribunal, however, did not accept the evidence of P. W. 1, the first

respondent that her husband was having a monthly income of Rs. 200. From the evidence furnished by P. W. 2, that he was receiving Rs. 15 per

week and was working in a brick kiln the Tribunal came to the conclusion that it was reasonable and proper to hold that the deceased was earning an income on an average Rs. 60 per month at the rate of Rs. 15 per week and it was also safe to conclude that he would have been paying Rs. 50 per month to P. W. 1 for the family which income had been lost to the respondents 1 and 2 due to his death. The tribunal also found that normally the deceased would have lived upto 60 years and would have been earning for about 35 years and as such the loss of annual income for 35 years would come to Rs. 21,000. Deducting 20 per cent. of this for the contingencies and uncertainties of life and other conditions including lump sum payment, he arrived at the figure of Rs. 4,200 and deducting that amount from the aforesaid amount of Rs. 21,000 the tribunal had arrived at the figure of Rs. 16,800 and taking into consideration the fact that the first respondent is young and is eking out her livelihood as cooly and is able to work, the tribunal found that compensation of Rs. 10,000 claimed is reasonable and awarded that amount. I do not find that the tribunal erred in awarding that amount.

12. In the result, I find that the appeal is devoid of merits, and it is dismissed with costs.