

(1970) 12 GAU CK 0003
In the Gauhati High Court
Case No : First Appeal No. 19 of 1967

Hindustan General Insurance Society Ltd.	APPELLANT
Vs	
Satish Chandra Paul and others	RESPONDENT

Date of Decision : 21-12-1970

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (1972) ACJ 453

Hon'ble Judges : K.V. Rathnam, A.J.C.

Bench : Single Bench

Advocate : N.M. Paul, for the Appellant; M.R. Choudhury (for Respondent No. 1), A.M. Lodh (for Respondent Nos. 2 and 3) and P. Palit (for Respondent Nos. 4 and 5), for the Respondent

Final Decision : Dismissed

Judgement

K.V. Rathnam, Addl. J.C.

1. This appeal by Hindustan General Insurance Society Ltd. is directed against the decree and judgment of Claims Tribunal Tripura. in motor accident case No. 2 of 1962.

2. The facts leading to the filing of this appeal may, briefly, be stated thus:-- On 17-11-61 one Satish Chandra Paul, the 1st respondent herein, a vegetable vendor by profession, along with other passengers was proceeding to Teliamura on a Jeep bearing No. T. R. T. 46 for purchasing vegetables. The jeep covered a distance of 17 miles from Agartala and at Baramura a lorry bearing No. T. R. L. 215 coming in the opposite direction in a down gradient dashed the jeep; as a result the hood of the jeep was broken and an iron rod of the hood hit the head of the cleaner of the jeep resulting in his instantaneous death. Another iron rod pierced through the leg of Satish Chandra Paul, the 1st respondent, with the result that he was unable to move about. Immediately he was carried to the hospital and was admitted as an in-Patient. He sustained a compound and

comminuted fracture of both right tibia and fibula resulting in chronic osteomyelitis. His leg was put in plaster. Though he was discharged from the hospital on 22-2-62. he was advised to continue treatment as an out-patient and on 8-5-62 the plaster was removed, but as there was an infection of the wound he was put under plaster again on 19-6-62. The plaster was ultimately removed on 2-8-62, but as the wound did not heal up he was advised to continue the treatment. On -27-10-62 Satish Chandra Paul obtained a medical certificate Ext. P-I and on 16-11-62 he filed the application before the Tribunal u/s 110-D of the Motor Vehicles Act claiming Rs. 30,000/- towards damages and compensation. The driver of the jeep and the widow of the owner of the jeep were Impleaded as respondents Nos. 1 and 2. The driver of the lorry and the Tripura Transport out Agency, the owner of the lorry, were impleaded as 3rd and 4th respondents. The 5th respondent is the Hindustan General Insurance Society Ltd. in which the lorry in question was insured. To establish his claim for damages and compensation the petitioner including himself has examined 4 witnesses: P. W. 1 is the petitioner while P. Ws. 3 and 4 Manmohan and Thakurdas Dutta are the persons who were also travelling in the jeep at the time of the occurrence. P. W. 2 is Dr. Biswas who treated the petitioner. Respondents Nos. 1 and 2, the driver and the owner of the jeep having filed a statement have not contested the application. The owner of the lorry and the Insurance Company filed statements contending inter alia that the jeep was heavily over loaded with passengers, that when the lorry was coming on the down gradient, the driver of the jeep became nervous, lost control of the jeep and dashed against the lorry and though the driver of the lorry tried to avoid the accident, the jeep fell upon the lorry and hence it is only the jeep driver that was responsible for the accident. The owner of the lorry pleaded that the Hindustan General Insurance Society in which the lorry was insured has to pay damages. So far as the quantum of damages and compensation is concerned it is alleged that the petitioner's monthly income was only Rs. 150/-. that he is still running his shop getting Rs. 150/- a month and hence by reason of the injury sustained by him he cannot claim more than Rs. 150/- a month. The Insurance Company further contended that the petitioner's remedy is only against the driver of the lorry for his rash and negligent driving and that the company cannot be made liable. The Insurance Company has also taken the plea that the application is barred by limitation and that no notice was issued to it before condoning delay u/s 5 of the Limitation Act.

3. On the pleadings the claims Tribunal has settled the following issues for trial:--

- (1) Is the opposite party No. 5 a necessary party in this case?
- (2) Is the case bad for not impleading the insurer of jeep car No. 46 ?
- (3) Is the case barred by limitation?
- (4) Is the petitioner entitled to get any compensation if so, what amount and against which of the O. Ps.?
- (5) Has this Tribunal jurisdiction to try this case ?

(6) To what relist if any the petitioner is entitled?

4. The Tribunal, finding that the petitioner was prevented from making the application within 60 days of the occurrence of the accident due to sufficient cause, condoned the delay and entertained the application. So far as the occurrence is concerned, relying on the independent and disinterested evidence of P. Ws. 3 and 4 it found that the collision between the lorry and the jeep was as a result of the fault of the driver of the lorry who while bringing the lorry down the gradient dashed the jeep as a result of which the hood of the jeep broke down and an iron rod of the hood struck the head of the cleaner of the jeep resulting in his instantaneous death while another iron rod of the hood of the jeep pierced through the leg of the petitioner, consequently the Tribunal held that the petitioner is entitled to claim compensation.

As regards the quantum of damages and compensation payable to the petitioner the Tribunal fixed a total sum of Rs. 7285/- and this is made up of Rs. 1275/- being the loss in the earnings of the petitioner from 17-11-61 to 2-8-62. In his business. Rs. 510/- being the amount which the petitioner might have spent for improved diet during the period he was under treatment Rs. 500/- towards expenses which the petitioner might have incurred for attending the hospital and for undergoing the treatment. and Rs. 5000/- towards compensation for the bodily infirmity as a result of which he could not carry on his business as he could do before the accident. The Tribunal directed the last item of Rs. 5000/- to be paid by the Insurance Company while the owner of the lorry is made liable to pay Rs. 1285/- and the remaining amount of Rs. 1000/- the Tribunal directed, to be paid by the driver of the lorry. Against the decree and judgment of the Tribunal directing it to pay Rs. 5000/- to the petitioner, the Insurance Company has preferred this appeal.

5. Learned counsel for the Company raised three contentions firstly that the application is hopelessly barred by limitation, that the Tribunal ought not to have condoned delay, that in any event as the company had no notice of the application for condoning delay it cannot be made liable for any portion of the amount. Secondly the jeep in which the petitioner was travelling, was admittedly over loaded with the result the driver of the jeep was not in a position to control the vehicle, that the driver of the lorry was not at all rash and negligent in driving the lorry, at any rate if the accident was as a result of rashness and negligence of the driver of the lorry also, the compensation payable should have been apportioned as between the drivers of the two vehicles and that the company cannot be made liable, and lastly the Tribunal has arbitrarily and without any basis awarded the amount of Rs. 5000/- as compensation payable by the Company. It is also contended on behalf of the Company that in respect of the other two items directed to be paid by the owner and the driver of the lorry also there is no evidence or basis before the Tribunal by which it could determine the said amounts. On behalf of the owner of the lorry it is contended that as the lorry was insured for a sum of Rs. 20,000/- the entire amount of compensation

of Rs. 7285/- ought to have been directed to be paid by the Insurance Company and that the amount of Rs. 7285/- should not have been apportioned in the manner the Tribunal did.

Before I consider the contention raised on behalf of the appellant, it will be convenient to deal with arguments advanced on behalf of the owner and driver of the lorry. The compensation amounts directed to be paid by them are Rs. 1285/- and Rs. 1000/- respectively. As the amount directed to be paid by each of them is less than Rs. 2000/-. u/s 110-D(2) of the Act they have no right to prefer an appeal and as a matter of fact no appeal is preferred by them. In this appeal filed by the Insurance Company they are impleaded as proforma respondents 4 and 5 and by filing counters in the appeal they are seeking to avoid the decree by contending that the decree of the Tribunal should be modified so as to make the Company liable for the entire amount of compensation on the ground that the insurance policy of the lorry covers a liability up to a limit of Rs. 20,000/-. My attention is not drawn to any provision in the Motor Vehicles Act by which the owner and the driver of a vehicle against whom a decree was passed for payment of compensation and when no appeal against that decree is maintainable could avoid that decree by seeking a modification of the same to make Company liable for the entire amount. u/s 110-B of the Act. In making the award the claims Tribunal shall specify the amount which shall be paid by the insurer and accordingly an amount of Rs. 5000/- is specified by the Tribunal as the amount payable by the Company. If under the terms of the policy the owner and the driver are to be indemnified by the Company in respect of the amounts which are directed to be paid by them it is a matter between them and the Company: but in this appeal which is preferred by the Company against the decree for Rs. 5000/-, at the instance of the respondents 4 and 5 who could not maintain an appeal in respect of the decree passed against them. The decree passed against the Company cannot be modified so as to enhance the amount of the decree.

6. Now as regards the arguments advanced on behalf of the Company, at the outset it must be pointed out that the insurer is precluded from taking defences other than those specified in Section 96(2) of the Act. The contentions raised by the insurance Company may be available to the owner and driver of the lorry but all the pleas and defences open to them are not available for the Insurance Company which is defending the action in its own right and in its own name.

Section 96(1) of the Act runs thus:--

If after a certificate of insurance has been issued under sub-section (4) of Section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 95 (being a liability covered by the terms of the policy) is obtained against any Person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this

section. pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor. in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Sub-section (2) of Section 96 is as follows:--

No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement 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 proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds.

The grounds on which the insurer can defend the action are detailed in Clauses (a) to (c) and the objections now raised by the Company namely limitation, apportionment of the compensation between the lorry driver and the jeep driver quantum of compensation are not included in the grounds specified in Section 96(2) of the Act. Sub-section (1) of Section 96 provides that an insurer to whom notice u/s 96(2) was given is not entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in sub-section (1) otherwise than in the manner provided for in sub-section (2). Thus there is a statutory prohibition for the Insurance Company from avoiding the judgment and decree of the Tribunal except on the grounds specified in Section 96(2) of the Act. Admittedly the Insurance Company, on an application by the petitioner, was brought on record as the 5th respondent in the petition and it can only resist the claim on one or the other grounds specified in Section 96(2) of the Act. If the insurance Company is allowed to take defences other than those provided by Section 96(2) of the Act it virtually amounts to the court adding some more grounds to the grounds enumerated in Section 96(2) of the Act which is not permissible. There may be cases where the insured does not resist the claim because he is aware that the decree would ultimately be satisfied by the insurer and hence he may be collude with the claimant and submit to a consent decree which may be prejudicial to the interest of the Insurance Company. If that be the case, it may be open to the Company to apply to the Tribunal for permission to resist the claim in the name of the defendant and if permission was granted possibly the Company may be able to resist the claim on any ground available to the defendant. But once the Company to whom notice as required under Sec. 96(2) of the Act or who has been brought on record as a respondent to the claim petition is resisting the claim in its own name and in its own right it can only avoid the decree only by resorting to the grounds specified in Section 96(2) of the Act.

7. The contention that the notice u/s 96(2) of the Act was not issued to the Company but at a subsequent stage the Insurance Company was directly brought

on record as 5th respondent does not in any way affect the position of law. When the Insurance Company filed objections and has chosen to defend the action and actually contested the claim, the fact that notice was not issued u/s 96(2) of the Act but straightway impleaded as a respondent in the application cannot negative the provisions of Section 96 of the Act nor by reason of that the Insurance Company could acquire additional grounds other than those mentioned in Section 96(2) to defend the action. In *Motor and General Insurance Co. Ltd. Calcutta, v. Hota Ram* AIR 1961 Puni 190 it is held that though under S. 96 of the Act it is not necessary for the injured plaintiff to implead the Insurance Company as a defendant yet he is under a duty to serve u/s 96(2) a notice of proceedings on the Insurance Company so that it could join as a defendant and watch its interest and if the plaintiff in those circumstances impleads the Insurance Company as a defendant it is open to Insurance Company to object to its being joined as a party but if it does not do so and actually defends the action, it cannot later on complain that no order regarding its liability should be passed after it has unsuccessfully contested the plaintiff's claim. In the instant case after the Company was impleaded as 5th respondent it has filed a counter and actually defended the action and it is not open to the Company to contend now that as no notice, as required u/s 96(2) of the Act, was served no decree ought to have been passed against it. In *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, the Supreme Court has held that the insurer made a defendant to the action is not entitled to take any defence which is not specified in Section 96(2) of the Act and the only manner of avoiding the liability provided in sub-section (2) is through the defences mentioned therein. The contention of the learned Solicitor General, who appeared for the appellant in that case, that it is open to the insurer to take all available legal defences except those expressly prohibited was negated. The Court made it clear that the only manner of avoiding the liability provided in subsection (2) is by taking defences mentioned therein inasmuch as sub-section (6) talks of avoiding the liability in the manner provided in sub-section (2). Their Lordships further observed that if the contention of the learned Solicitor General was right sub-section (6) would have provided that the insurer would not be entitled to avoid his liability except by defending the action on being made a party thereto. In the light of the decisions referred to above, it is abundantly clear that the Insurance Company can only defend the action and avoid the decree on one or the other grounds mentioned in Section 96(2) of the Act All the three grounds now raised in this appeal are not available for the company as they are not specified in Section 96(2) of the Act.

8. Even on merits, I find that the Insurance Company cannot successfully question the correctness of the award. It may be that the Jeep in which the petitioner was travelling was over-loaded, but admittedly the occurrence took place while the jeep was ascending the up gradient in which case it could not be proceeding at a high speed and according to the evidence on record the lorry which was descending the down gradient dashed the jeep resulting in the death of one of the occupants of the jeep at the spot and the petitioner sustaining

grievous injuries. The evidence of P. Ws. 3 and 4 who are disinterested and independent witnesses is that it is due to rash and negligent driving of the lorry driver that the accident took place. Nothing is suggested as to why their evidence should be disbelieved. Relying on State of Punjab and Another Vs. Smt. Phool Kumari and Others, it is contended that the compensation should have been apportioned between the driver of the lorry and the driver of the Jeep. In that case as a result of collision between an omnibus and a truck one occupant of the bus was killed while a cyclist was injured and on facts it was found that the driver of the omnibus was negligent and cannot be said to be guilty of a mere error of judgment. So far as the driver of the truck is concerned it was found that he made no attempt to swerve to avoid an impact with the bus with the result that it was found that the drivers of both the vehicles were to be blamed and consequently the compensation payable was apportioned between them to the extent to which each was at fault. But in the instant case accepting the positive, disinterested and independent evidence of P. Ws. 3 and 4 the Tribunal held that the occurrence took place as a result of the fault of the driver of the lorry and the learned Advocate for the appellant could not successfully attack the correctness of that finding. That being so, the question of apportionment of compensation as suggested by the learned counsel does not arise.

9. So far as the delay in filing the application is concerned, while the occurrence took place on 17-11-61 the application was filed on 16-11-62 and hence the application was barred by limitation. But proviso to sub-section (3) of Section 110-A lays down that the Tribunal may entertain the application after the expiry of the period of 60 days if it is satisfied that the applicant was prevented by sufficient cause from making the application in time. The injured Satish Chandra Paul was admitted in the hospital with a compound comminuted fracture of both his right tibia and fibula resulting in chronic osteomyelitis. He was admitted in the hospital on 17-11-61 and had to be in plasters. Though he was discharged from the hospital on 22-2-62 he continued to be in plasters till 8-5-62. As the wound was highly infected he had to be put in plasters again on 19-6-62. It was only on 2-8-62 the plaster was removed but the wound did not heal up and hence he was advised to continue treatment as an out-patient. It was only on 27-10-62 the doctor who treated him save the certificate Ext. P-1 and thereafter after making necessary enquiries as to the owner and driver of the lorry the petitioner filed the application on 16-11-62. On these facts the Tribunal was satisfied that the petitioner was prevented by sufficient cause from filing the application within 60 days from the date of the occurrence of accident and consequently the Tribunal has rightly condoned the delay by exercising the discretion conferred by the proviso to Section 110-A of the Motor Vehicles Act.

10. Now on the quantum of compensation it is contended that the Tribunal has fixed Rs. 5000/- arbitrarily without any data or basis. It cannot be denied that as a result of the injury sustained by the petitioner he became a cripple and his bodily infirmity would certainly affect his earning capacity. Taking this aspect into consideration the Tribunal fixed the amount of compensation at Rs. 5000/-.

Interference by an appellate court in assessment of damages or compensation is called for only when the amount has been reached by application of some wrong principle of law or the amount is so unreasonably low or high. When once the amount arrived at by the Tribunal is found to be fair and reasonable the appellate court is not expected to interfere with the quantum of compensation granted by the Tribunal.

11. For all the reasons stated above, this appeal is liable to be and it is accordingly dismissed with costs of the petitioner 1st respondent.