
(1993) 01 AP CK 0003
In the Andhra Pradesh High Court
Case No : A.A. No. 345 of 1985

New India Assurance Co. Ltd.

APPELLANT

Vs

Mohd. Khaja Moinuddin and Another

RESPONDENT

Date of Decision : 27-01-1993

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(2)(b)(ii)(4)
Motor Vehicles Act, 1988 — Section 2(15), 96(2)

Citation : (1993) ACJ 1263

Hon'ble Judges : Syed Shah Mohammed Quadri, J;B. Subhashan Reddy, J

Bench : Division Bench

Judgement

Syed Shah Mohammed Quadri, J.—In this case, an important question as to whether the insurance company can raise the plea in the appeal that its liability is limited to only Rs. 5,000/- u/s 95 (2) (b) as it stood prior to its amendment even though it is not one of the defences enumerated in Section 96 (2) of the Motor Vehicles Act, 1939 arises for consideration. PA. Choudary, J. held in United India Fire and General Insurance Co. Ltd. v. Pogaku Parvathamma 1982 ACJ (Sup) 293 ,that though the liability of the insurer was limited only to Rs. 5,000/-, it was not entitled to raise the objection in appeal that its liability was limited only to Rs. 5,000/- and, therefore, it was not liable to pay higher amount of compensation. The view of Justice Choudary was affirmed by the Full Bench of this court in Madineni Kondaiah and Others Vs. Yaseen Fatima and Others, However, in M.K. Kunhimohammed Vs. P.A. Ahmedkutty and Others, the Supreme Court observed while interpreting Section 95(2) (b) of the Motor Vehicles Act as follows:

In the present case the vehicle in question being a bus carrying passengers for hire or reward registered to carry more than thirty but not more than sixty passengers the limit of the aggregate liability of the insurer in any one accident was Rs. 75,000/- and subject to the said limit the liability in respect of each individual passenger was Rs. 5,000/-. We find it difficult to hold that the limit prescribed in Section 95 (2) (b) (ii) (4) was only the minimum liability prescribed

by law. The amount mentioned in that provision provides the maximum amount payable by an insurer in respect of each passenger who has suffered on account of the accident. This appeals to us to be a fair construction of Section 95 (2) of the Act as it existed at the time when the accident took place. Our view receives support from at least two decisions of this court.

2. In my view, the matter requires to be considered by a Division Bench as to the liability of the insurance company in respect of injury to or death of an individual passenger and the validity of the defence that may be set up by the insurance company either before the Tribunal or this court in that regard. The papers shall be placed before the Hon"ble Chief Justice for posting the case before the Division Bench.

3. Pursuant to the order of this court dated 9.9.1988, this appeal and the cross-objections have been posted before this Bench. This court upon perusing the said order dated 9.9.1988 and the memo of grounds in the appeal and cross-objections and upon hearing the arguments of the counsel on both sides delivered the following judgment:

Subhashan Reddy, J.-The important points which arise for consideration in this appeal are:

(1) As to whether the insurer can take defence other than enumerated under Sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 (for short "the Act"); and

(2) Whether the insurer can contract out to pay less amount than prescribed under the statute.

5. The facts, briefly stated, thus are:

A motor accident claim in O.P. No. 371 of 1982 was laid on the file of the Motor Accidents Claims Tribunal-cum-District Judge, Medak at Sangareddy, by Mohd. Khaja Moinuddin with averments that while he was travelling in a motor vehicle, viz., Tempo van bearing registration No. APB 2616, owned by the 2nd respondent and driven by the 1st respondent on 8.2.1982, accident occurred near Korvipally village of Medak District at about 1 p.m. The accident is attributed to the anxiety to overreach the RTC bus to book the passengers and the consequent high speed. It is alleged that due to the said rash act in driving the vehicle at high speed, respondent No. 1 lost balance and the vehicle dashed against a big tree resulting in grievous injuries to the petitioner. Apart from bleeding injuries, the petitioner suffered a fracture to his right leg. It is stated that he fell unconscious and then was hospitalised, firstly, at Medak and later at Gandhi Hospital in Secunderabad and that as he was not treated well in Gandhi Hospital, he was forced to take treatment in a private nursing home by spending considerable amounts. It is also his case that movements of his fractured leg were impaired due to fracture apart from shortening of the leg and he suffered mental and physical agony and more so, being unmarried, his getting a good match was

made difficult because of the said handicap and disablement. In total, a sum of Rs. 75,000/- was claimed towards compensation, but the Claims Tribunal has granted an amount of Rs. 35,000/- towards compensation with interest at the rate of 9 per cent per annum from 7.8.1982, i.e., the date of the presentation of O.P.

6. Aggrieved by the said award, the insurer has filed this appeal making the petitioner-claimant and the owner of the vehicle as parties omitting the driver. The claimant-petitioner has preferred cross-objections aggrieved by the quantum claiming the entire amount of Rs. 75,000/- as was claimed in the O.P. But the insurer alone is made a party omitting the owner and driver of the vehicle. The parties are referred to as arrayed in O.P.

7. This appeal and cross-objections, firstly, came up before our learned brother, Lakshman Rao, J., and our learned brother has referred this matter to a Division Bench as important points arose for consideration and more so, in view of the later judgment of the Supreme Court in *M.K. Kunhimohammed Vs. P.A. Ahmedkutty and Others*, , as against the earlier view expressed by a learned single Judge in *United India Fire & General Insurance Co. Ltd. v. P. Parvathamma* 1982 ACJ (Supp) 293 and affirmed by the Full Bench of this court in *Madineni Kondaiah and Others Vs. Yaseen Fatima and Others*, .

8. In so far as the factual aspect is concerned, nothing is canvassed on behalf of the appellant and the counsel for the appellant has canvassed only with regard to the maximum liability under the Act in an accident of this nature and also tried to defend that the figure of Rs. 5,000/- mentioned in the policy of insurance is correct and that the claimant is bound by the same.

9. As on the date of the judgment rendered by the court below on 29.1.1985, the dicta laid down by the Supreme Court in *British India General Insurance Co. v. Capt. Itbar Singh* 1958 ACJ 1, was holding the field and the same was followed by a learned single Judge in *United India Fire and General Insurance Co. Ltd. Vs. Pogaku Parvathamma and Another*, and further affirmed by a Full Bench in *Madineni Kondaiah and Others Vs. Yaseen Fatima and Others*, . The reference to the said Full Bench for authoritative pronouncement was necessitated in view of the contrary view taken in *H.I. Insurance Co. Ltd. v. P. Ankiah* 1972 (1) APLJ 47 and *New India Assurance Co. Ltd. Vs. Meka Ramanamma*, from the one taken in *United India Fire and General Insurance Co. Ltd. Vs. Pogaku Parvathamma and Another*, . It is pertinent to mention that the judgment rendered by a single Judge in *P. Parvathamma's* case (supra) is based on the ratio decidendi of the Supreme Court in *British India General Insurance Co. v. Capt. Itbar Singh* 1958 ACJ 1 . The Supreme Court has held that as insurer has no right to be made a party to the action brought by the injured person against the insured causing the injury, that Sub-section (2) of Section 96 further gives him the right to be made a party to the suit and to defend it, that the right, therefore, is created by statute and its content necessarily depends on the provisions of the statute. Interpreting Sub-section (2) of Section 96, the Supreme Court held that the

insurer cannot plead any ground apart from the grounds enumerated therein. Repelling the contention advanced on behalf of the insurer that inasmuch as Sub-section (2) of Section 96 entitles an insurer to be made a defendant to the action and the same implies that the insurer has a right to take all legal defences excepting those expressly prohibited. The Supreme Court held that when the grounds of defence have been specified, they cannot be added to and if that is done, it would amount to adding words to the statute and that the same was impermissible, and, therefore, it cannot be said that in enacting Sub-section (2) of Section 96, the legislature was contemplating only those defences which were based on the conditions of the policy. But, this dicta laid down by the Supreme Court was distinguished by the court in *H.I. Insurance Co. Ltd. v. P. Ankiah* 1972 (1) APLJ 47. The Full Bench while upholding the judgment rendered in *United India Fire & Genl. Ins. Co. Ltd. v. P. Parvathamma* (supra), has reversed the judgments rendered in *H.I. Insurance Co. Ltd. v. P. Ankiah* 1972 (1) APLJ 47 and *New India Assurance Co. Ltd. Vs. Meka Ramanamma*,

10. When similar question came up for consideration before the Supreme Court in *M.K. Kunhimohammed Vs. P.A. Ahmedkutty and Others*, the view taken earlier in *British India General Insurance Co. v. Capt. Itbar Singh* 1958 ACJ 1, followed in *Sheikhupura Transport Co. Ltd. Vs. Northern India Transport Insurance Co.*, was not accepted. The later Supreme Court judgment (supra) held that the insurer can take defence apart from what is enumerated under Sub-section (2) of Section 96, thus, pleading the maximum liability of payment of compensation. At para 13 of the said judgment, the Supreme Court has ruled that "Having regard to the statute as it stood prior to the amendments by Act 47 of 1982, we hold that the insurer was liable to pay up to Rs. 10,000/- for each individual passenger where the vehicle involved was a motor cab and up to Rs. 5,000/- for each individual passenger in any other case." The same view was accepted by a later Supreme Court judgment in *National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others*, even though specific reference is not made to the said judgment (supra). In the said case, only two judgments were cited before the Supreme Court, one in *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, and another in *British India General Insurance Co. v. Capt. Itbar Singh* (supra). While *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, dealt with interpretation of Section 95 (2) of the Act as to whether the insurer was entitled to enter into contract fixing maximum liability, the decision in *Capt. Itbar Singh's* case (supra) as stated above dealt with interpretation of Sub-sections (2) and (6) of Section 96 of the Act with regard to defences suitable to the insurer. The Supreme Court distinguished its earlier judgment in *British India General Insurance Co. v. Capt. Itbar Singh* (supra) on the ground that the words employed under Sub-section (6) of Section 96 "to avoid its liability" are applicable to a case where the insurer wants to avoid its liability, but that does not bar the insurer when it is not seeking to avoid its liability, but wants a determination of the extent of its liability which is to be determined, in the absence of any

contract to the contrary, in accordance with the statutory provision contained in this behalf in Clause (b) of Sub-section (2) of Section 96 of the Act.

11. In the circumstances, we hold that in spite of the enumerated defences available for the insurer u/s 96 (2) of the Motor Vehicles Act, the insurer is entitled to take defence that it is not entitled to pay the amount beyond what is specified u/s 95 (2) of the Act, if it wants a determination of the extent of its liability, but not where it wants to avoid the liability totally. We make it clear that if the insurer takes up the plea that it is not at all liable to pay the compensation without seeking the determination of the extent of the liability u/s 95 (2) of the Act, the only defences available to the insurer shall be those enumerated u/s 96 (2) of the Act.

12. A perusal of the insurance policy, Exh. B-I, dated 22.7.1981, reveals that the insurance was operative for the period from 14.7.1981 to 13.7.1982 (both days inclusive) and the date of accident being 8.2.1982, the said accident is covered by insurance as contemplated under Sub-section (1) of Section 95 of the Act. With regard to the quantum payable, as is manifest from the said insurance policy, the same is limited to Rs. 5,000/- in respect of any one person and Rs. 50,000/- in respect of any number of persons and the type of body is mentioned as van with carrying capacity of 7 persons in all. While it is contended on behalf of the respondent No. 3-appellant that inasmuch as Exh. B-I fixed the maximum liability as Rs. 5,000/- in case of injury to individual passenger, the petitioner is bound by the same and that nothing more than that can be awarded to the petitioner. This argument is in support of the plea taken in the counter filed against the claim made before the Claims Tribunal that respondent No. 3-appellant, in any event, is only liable to pay Rs. 5,000/- as mentioned in the policy and not otherwise. The argument advanced on behalf of the petitioner is to the effect that the vehicle being a motor cab, the liability fixed under the Act is Rs. 10,000/-. In the light of the contentions mentioned supra, two aspects need adjudication, namely, (i) whether the parties can contract out by fixing the maximum liability to less than Rs. 10,000/- for each individual passenger in case of motor cab and Rs. 5,000/- in any other case and (ii) whether the vehicle involved in the accident is a motor cab.

13. For better appreciation, extraction of Section 95 (2) (b), as it stood before the amendment in the year 1982 and was in operation as on the date of accident, is relevant and pertinent which reads:

95 (2): Subject to the proviso to Sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely-

(a) XXX XXX XXX (b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,-

(i) in respect of persons other than passengers carried for hire or reward, a limit

of fifty thousand rupees in all;

(ii) in respect of passengers,-

(1) a limit of fifty thousand rupees in all where the vehicle is registered to carry not more than thirty passengers;

(2) a limit of seventy-five thousand rupees in all where the vehicle is registered to carry more than thirty but not more than sixty passengers;

(3) a limit of one lakh rupees in all where the vehicle is registered to carry more than sixty passengers; and

(4) subject to the limits aforesaid, ten thousand rupees for each individual passenger where the vehicle is a motor cab, and five thousand rupees for each individual passenger in any other case;

It is evident from a reading of Section 95 (2) (b) (ii) (4) of the Act that statutory limit in case of a motor cab was Rs. 10,000/- for each individual passenger and was Rs. 5,000/- in any other case. The language employed under Sub-section (2) "subject to the proviso to Sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits" makes it abundantly clear that the statutory provision is mandatory based on public policy fixing the liability by the statute itself and as such, the said liability is unalterable and the parties are incompetent to contract out of the said mandatory statutory provision. However, the parties can contract out making insurer liable to pay amount in excess of the statutory limits mentioned above. This view of ours is fortified by the verdict of the Supreme Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, and followed in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others,

14. Dealing with the second aspect, the insurance policy, Exh. B-I, mentions the registration number, make, type of body, horse power, year of manufacture of the vehicle and the type of liability as "Act only" and carrying capacity "7 in all". The words "7 in all" include the driver and it amply fits in the definition of motor cab in Sub-section (15) of Section 2 of the Act which reads:

"Motor cab" means any motor vehicle constructed, adapted or used to carry not more than six passengers excluding the driver, for hire or reward;

15. Coming to the cross-objections, as the owner and the driver are not made parties, and the insurer being the only party, the claim beyond the statutory limits cannot be countenanced.

16. In the circumstances, we hold that the appellant was liable to pay the amount of Rs. 10,000/- to the 1st respondent on account of the insurance coverage in favour of the 2nd respondent for the vehicle concerned. However, in view of the fact that the 1st respondent has already withdrawn half of the award amount which even though in excess of Rs. 10,000/- we are not inclined to make

the 1st respondent suffer of refunding the excess amount withdrawn by him, and the appellant shall not be entitled to the refund of any amount in excess of Rs. 10,000/- drawn by the 1st respondent pursuant to the interim orders in the interests of justice.

17. In the result, the appeal is allowed in part, while the cross-objections are dismissed. Each party shall bear its own costs.