
(1992) 09 KL CK 0030
In the High Court Of Kerala
Case No : M F A No. 308 of 1986

New India Assurance Co. Ltd

APPELLANT

Vs

N. Ramakrishna and others

RESPONDENT

Date of Decision : 03-09-1992

Acts Referred:

Motor Vehicles Act, 1988 — Section 110, 110A, 94, 95, 95(2)

Citation : (1993) 1 KLJ 409

Hon'ble Judges : T. L. Viswanatha Iyer, J; L. Manoharan, J

Bench : Division Bench

Advocate : M.K. Abdulla, for the Appellant; P. K. Moosa and B. Krishnamani, for the Respondent

Judgement

Viswanatha Iyer, J.—The appellant is the insurer of a bus KLZ 1927 owned by the third respondent. The vehicle was involved in an accident which took place at 7.30 A.M. on January 13, 1979 when the first respondent got injured, being hit by the bus. The first respondent thereupon filed application for compensation u/s 110 of the Motor Vehicles Act, 1939 (the Act) before the Motor Accidents Claims Tribunal, Kohekohe. The appellant, who was the third respondent, did not admit that the accident was caused by the rash and negligent driving of the driver, the second respondent; nor did they admit the other particulars regarding the age, or the injuries sustained by the first respondent. They also contended that the compensation claimed was excessive and without any rational basis. They then went on to state as follows in paragraph 7 of the counter statement.

The liability of this respondent if any is limited to the terms and conditions of the policy of insurance and to the relevant provisions and exceptions of the Motor Vehicles Act. At the trial, the appellant produced the office copy of the insurance policy and it was marked as Ext. R2. The original of the policy was not produced, but it was produced in this court by the third respondent herein the owner of the bus, along with C. M P. No. 6717 of 1992. The limit of the insurer's liability was specified as under in the policy of insurance:

Limit of the amount of the Company's liability u/s II-I(i) In respect of any one accident

Such amount as is necessary to meet the requirements of Motor Vehicles Act, 1939

Limit of the amount of the Company's liability u/s II(ii) in respect of any one claim or series of claims arising out of one event

Rs. 50,000/-

Section II referred to is section II of the Commercial Vehicles Clause attached to the policy, sub-clause (I) of which related to death or bodily injury to any person caused by or arising out of the use of the motor vehicle, and sub clause (ii) related to damage to property caused by the use of the motor vehicle. Based on these terms in the policy appellant pleaded that their liability was limited to an amount of Rs. 50,000/-.

2. After trial, at which the injured claimant examined himself, the Tribunal found that the accident was caused due to the rash and negligent driving of the second respondent driver. The Tribunal fixed the compensation payable to the first respondent at Rs. 77,400/-. An award was therefore passed for the amount of Rs. 77,400/- with interest at 6% per annum from the date of the accident, namely January 13, 1979, as also costs. Regarding liability, the Tribunal directed the amount to be paid by the appellant, in the view that the insurer was liable for the full amount awarded as per the decision of the Supreme Court in-New Asiatic Insurance Co, v. Fessumal 1964 2 S. C. J. 428 AIR 1964 S. G. 1736.

3. The appellant is aggrieved by the award in so far as it makes them liable for the entirety of the claim, without limiting it to the amount of Rs. 50,000/- as contended by them. That is the subject matter of the appeal and the question we have to decide is, whether on the facts, and on the law applicable to the case, the liability of the appellant company is limited to Rs. 50,000/-, Counsel for the appellant submits that the appellant's liability relating to claims u/s II-I (1) has been limited by the policy itself to such amount as is necessary to meet the requirements of the Motor Vehicles Act, 1939. It is pointed out that the requirements of the Act have to be discerned in the provisions of section 95 (2) (b), and thereunder, the liability of the insurer in such cases is limited to Rs. 50,000/-. The appellant has undertaken to indemnify the insured only to this extent and no more, and therefore the Tribunal has erred in making the appellant liable for the entirety of the amount awarded.

4. Mr. P. K. Moosa, counsel for the claimant, first respondent, and Sri. B. Krishnamani, for the third respondent owner of the bus, however contend that the clause in the policy, making the insurer liable for such amount as is necessary to meet the requirements of the Motor Vehicle Act, 1939 makes the appellant liable for the entirety of the amount awarded. They would read the clause as making the insurer liable for whatever is awarded, pursuant to an

action u/s 110A of the Motor Vehicles Act, 1939, and not with reference to the provisions of section 95 (2) (b). It was particularly pointed out by Mr. P. K. Moosa that the primary liability is that of the insurer to make payment of the whole of the amount awarded, and that if there is any limit to liability set by the policy, and the insurer is made to pay in excess of that limit, the insurer has to have recourse to sub-section (4) of section 96 and realize the excess amount paid by them from the insured in other appropriate proceedings.

5. Counsel for the insured relied on the decision of a learned Single Judge of the Rajasthan High Court in Smt. Chand Kanwar Vs. Mannaram and Others, where the court interpreted an identical clause in a policy. The learned Judge took the view that this clause casts an unlimited liability on the insurer to make payment of whatever amount that is required to be paid to the claimant under an award passed by the Tribunal functioning under the Act. The learned Judge observed that the policy with such a term was an unlimited one, the only limit being the requirement of the award. At the same time, the learned Judge felt that the interpretation presented before us by counsel for the appellant, namely that the liability should be limited to the requirements of section 95 of the Act, was also a possible one-vide the observations in paragraph 36 of the judgment where the learned Judge states that both the interpretations are equally logical, legal, possible and feasible. But, relying on the observation of Krishna Iyer, J. In Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, , that judges should lean in favor of an interpretation beneficial to the have-nots, the learned Judge inclined himself to that interpretation making the liability of the insurer unlimited, subject only to the requirements of the award made under the Act. This decision was strongly pressed before us for acceptance pointing out certain alleged anomalies that may arise if the contra construction was adopted. We are however spared of considering the contention in detail as the very same term in a policy was the Subject of consideration by the Supreme Court in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, . The precise meaning of the clause was delineated in paragraph 8 which runs as follows:

A perusal of the policy, therefore, indicates that the liability undertaken with regard to the death or bodily injury to any person caused by or arising out of the use (including the loading and or unloading) of the motor vehicle falling u/s II(1) (1) has been confined to "such amount as is necessary to meet the requirements of the Motor vehicles Act, 1939". This liability, as is apparent from clause (b) of sub-section (2) of Section 95 of the Act, was at the relevant time Rs. 20,000 only. The details of the premium also indicate that no additional premium with regard to a case falling u/s II(1)(i) was paid by the owner of the vehicle to the insurance company. It is only the vehicle which was comprehensively insured, the insured's estimate of value including accessories (IEV) thereof having been shown as Rs. 40,000. In this view of the matter the submission made by learned counsel for the respondents that the appellant had in the instant case undertaken an unlimited liability does not obviously have any substance. The

liability under the policy in the instant case was the same as the statutory liability contemplated by clause (b) of sub-section (2) of Section 95, of the Act namely Rs. 20,000. An award against the appellant could not, therefore have been made in excess of the said statutory liability.

The court has emphatically laid down that the liability under the policy with the clause in question is co-extensive with the liability u/s 95 (2) (b) of the Act which at that time was Rs. 20,000/- and which at present is Rs. 50,000/- after the amendment in 1984, it is therefore unnecessary for us to labor. With the construction which counsel for the insured third respondent attempted to place on this clause in the policy, having regard to the decision of Supreme Court which is directly in point, and which is binding on us.

6. We may also note that what the clause in question in the policy specifies is the amount necessary to meet requirements of the Motor Vehicles Act. 1939. A claim u/s 110 A of the Act is one which is filed by virtue of a right conferred under the Act to move a specially constituted Tribunal; but it is not one required under the Act it is an enabling provision to enforce a right of the injured, providing a special machinery and procedure for the purpose. The words "requirements" and "limits" are significant. We may here refer to section, 94 which prohibits any vehicle being put on the road unless it is covered by a policy satisfying the requirements of the Act. Those requirements are set forth in section 95, the heading of which is:

Requirements of policies and limits of liability." It is one of the requirements of this section that the insurance policy for the purpose of section 94 should cover the persons mentioned in sub clause (b) of sub-section (2) to the extent of the amount specified therein. The amount specified therein is the basic minimum requirement of a policy under the Act The reference in the clause in the policy before us is to those requirements of section 95, and not any other. We have therefore no hesitation in holding that the clause in question limits the liability of the insurer to the amount specified in section 95 (2) (b), which in this case is Rs. 50,000/-.

7. Counsel for the owner third respondent has a further contention that the appellant had undertaken a liability far in excess of the statutory limit in so far as goods are concerned, and therefore we must read the term in the policy as casting an unlimited liability. He points out that the liability u/s 95 (2) in relation to goods is limited to Rs. 2000/- whereas the appellant has undertaken liability to the extent of Rs. 50,000/-. Counsel would therefore contend that it must be presumed that the appellant had undertaken an unlimited liability in relation to passengers as well and that it was incumbent on them to establish by evidence that they intended to cover only to the extent required u/s 95 (2) (b). We are not inclined to agree. The clause is specific and clear and as per the decision of the Supreme Court in *jugal kishore*, it limits the liability of insurer to the amount specified u/s 95 (2) (b). So far as goods are concerned, a higher coverage was taken by the insured apparently for the reason that he wanted to safeguard

against loss, or damage to the vehicle, by virtue of any accident caused to it. That cannot be taken as an indication that the limits set by section 95(2) were intended to be given the go by in relation to passengers as well. This contention of the counsel for the third respondent therefore falls.

8. Another contention very vehemently pressed before us by counsel for the owner third respondent is that the pleading in the case are inadequate to sustain the insurer's claim to limit their liability to Rs. 50,000/-. We have extracted earlier the pleadings of the appellant regarding the limit of their liability. This, according to counsel for the third respondent, is insufficient. They must further state expressly that their liability is limited to Rs. 50,000/-. In other words, only an express recital that the liability of the insurer is limited to Rs. 50,000/- will do justice to the law of pleadings. Counsel relies on the decision of this court in *Kelappan v. Vijayan* 1986 KLT 874 as also on the decision of a learned single Judge of the High Court of Punjab and Haryana in *Ramesh Gupta v. Savitri Devi*, 1987 A. C.L 203, in the first of these cases, what this court stated was that a plea of limitation of liability has not merely to be pleaded but also proved in other words, what this court stated was that in the absence of any pleadings regarding limitation of liability, evidence relating to the same was not liable to be adduced at the trial. This observation is only a reiteration of the well established rule that no evidence could be adduced on a point not pleaded. It is particularly significant that the pleading in that case as seen from paragraph 3 of the judgment was only that the insurer did not admit that the accident was caused by the rash and negligent driving of the driver. Besides, the insurer only put the claimant to strict proof of the fact that the vehicle in question had a valid insurance policy, and that it was plying at the time of the accident in accordance with the conditions of the permit and the policy. There was no whisper in that case, as in the case before us, in paragraph 7 of the appellant's written statement, that the liability of the insurer was limited to the terms and conditions of the policy of insurance and to the relevant provisions and exceptions of the Motor Vehicles Act. *Kelappan* is therefore of no avail to the third respondent. The decision of the High Court of Punjab and Haryana is also equally applicable. The contention was that the vehicle had not been insured with the insurance Company. There was no further plea regarding limitation of liability.

9. It was in these circumstances that it was held in the two cases that a definite plea regarding limitation of the insurer's liability was required and that in the absence of such a plea, evidence on such a plea could not be entertained at the trial. We do not and we cannot demur to this proposition. The plea in the appellant's written statement, which we have extracted earlier, is sufficient for the purpose of making out the limitation of the appellant's liability. The law of pleadings pertains to the realm of procedure. The law of pleadings requires specific pleas to be raised with the intent of getting the parties a fair trial, and to ensure that they are not prejudiced or surprised by new pleas thrown up at the trial. The very bails of the law is that the parties should have sufficient notice of the pleas raised by either side, there by providing them sufficient opportunity to

adduce evidence on the points arising for consideration. Therefore if the pleadings are sufficient to put the opposite party on notice of the contentions raised, a plea of absence of pleadings cannot be countenanced. The pleading of the appellant is definite that their liability is limited to the terms and conditions the policy and to the relevant provisions and exceptions of the Motor Vehicles Act. In other words, they are categorical that their liability is limited. The policy has been produced. The terms and conditions of the policy are before court to be examined. The provisions of the Motor Vehicles Act are also known. In the circumstances, we hold that the pleadings are sufficient and that the third respondent's contention on the score of absence of pleadings has only to be overruled.

10. We may now come to the contention pressed for acceptance by Mr. P. K. Moosa, who appeared for the first respondent injured. We have already indicated that the contention is that the insurer is liable to make good the entirety of the amount, awarded and that their right is to claim reimbursement of excess, if any, paid by them from the insured, by recourse to the provisions of section 96 (4) of the Act Now subsection(1) of the section obliges the insurer to make payment of the amount due under a decree in respect of a vehicle covered by the policy, as if they were the judgment debtor. It states that when judgment is obtained in respect of any liability covered by a policy under clause (b) of sub-section (2) of section 95 against any person leised 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 the 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) however provides that the aforesaid liability will arise only if the insurer had notice through court of the bringing of the proceedings. The sub-section further provides that the insurer who receives such notice is entitled to be made party to the proceedings and to defend the action on any of the grounds specified therein.

11. The above sub-sections are enacted with a purpose, namely to enable the affected party to recourse to the insurer direct, and to make them liable for payment of compensation due but not exceeding the sum assured and payable under the policy, in the absence of these provisions, the insures may not be a necessary party to the proceedings and may not be in a position to defend the action; nor could they made liable directly by the Court or Tribunal for payment of the compensation, the injured person being a third party to the contract of insurance. These provisions obviate these difficulties by specifically casting the liability on the insurer to make payment of the amount of the decree and enabling them to be made party to the proceedings and to defend the action on the specified grounds.

12. Section 96(3) states that where a certificate of insurance has been issued under sub-section (4) of section 95 to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 95 be of no effect, provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section will be recoverable by the insurer from that person. Sub-section (4) of the section on which considerable stress was laid by the first respondent provides that if the amount which the insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would, apart from the provisions of section 96, be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person. Counsel refers not merely to sub-section (4) but also to the term in the policy Ext. R2 under the heading "Avoidance of certain terms and right of recovery" which reads:

Nothing in this Policy or any endorsement hereon shall affect the right of any person indemnified by this Policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939-Section 96.

But the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.

13. Reference was also made by counsel to the decision of the Supreme Court in *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, particularly the observations contained in paragraphs 21 & 22 thereof.

14. That was a case in which the motor vehicle belonging to one Asnani was involved in an accident. Asnani had insured with the New Asiatic Insurance Co. Ltd. The accident occurred when the vehicle was being driven by one Pessumal Dhanamal Aswani who owned another car which had been insured with the Indian Trade and General Insurance Company Ltd. One of the two passengers in the car died, and the other sustained injuries. In proceedings for recovery of damages notice was issued to the New Asiatic Insurance Co., namely Asnani's insurer and they took the stand that they were not liable to satisfy any judgment that might be passed against Pessumal. The plea was that the policy issued to Asnani disentitled the driver of the vehicle from claiming indemnity, if he was entitled to indemnity under any other policy. Pessumal himself was insured with the Indian Trade and General Insurance Co. Ltd. which provided him with indemnity while personally driving a private motor car not belonging to him. Therefore, the New Asiatic Insurance Co. could not be made liable under the policy taken out by Asnani, it was in this context that the Supreme Court made the following observations in paragraphs 21 and 22 of the judgment:

21. The Act contemplates the possibility of the policy o insurance undertaking liability to third parties providing such a contract between the insurer and the insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect to its realizing damages for the injuries suffered, but vis-a-vis the insured, the company does not undertake that liability or undertakes it to a limited extent. It is in view of such a possibility that various conditions, are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering liability of the company to third parties. This is mentioned prominently la the policy itself and is mentioned under the heading "Avoidance of certain terms and rights of recovery", as well as in the form of "an important notice" in the Schedule to policy. The avoidance clause says that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The "Important Notice" mentions that any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Act is recoverable from the insured, and refers to the avoidance clause.

22. Thus the contract between the insured and the company may not provide for all the liabilities which the company has to under take vis-a-vis the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties" right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of Section II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties" claim against the company on account of its claim against a person specified in para 3 as one to whom cover of the policy was extended.

15. The Supreme Court was dealing with a policy where the insurer had undertaken a liability to third parties incurred by the driver of Asnani"s vehicle. In that context the Court observed that the clause dealt with did not come in the way of the claims of third-parties against the insurer in respect of a person to whom cover was extended under the policy. A clause of limitation of liability as in this case was not in issue before the Supreme Court. We have to read the decision of the Supreme Court in the light of the provisions contained in section 96. Section 96 (1) enables the claimant to proceed against the insurer of the vehicle and make the latter liable for the amount of compensation payable by the insured. In the absence of such a provision,. it may not be open to the claimant to proceed directly against the insurer, he being a third party to the contract. But

what is made payable by the insurer is such sum "not exceeding the sum assured" i.e. the insurer's liability to make payment of the amount decreed is limited to such sum as is agreed to be indemnified by the policy itself. The liability does not exceed such amount. In other words, section 96 (1) recognizes the limitation of liability in the policy and makes the insurer liable only to that extent. Section 96 (4) is a provision enabling the insurer to recover any amounts which they might have paid in excess of what they were liable to pay under the policy of insurance. Sub-section (1) is the substantive provision and sub-section (4) has to be read in consonance with it, if sub-section (4) bears the construction which Mr. Moosa wants to put on it, the position will be that despite "the limitation of liability contained in section 96 (1), the insurer will be liable for the entire amount decreed, even if it exceeds the limits set by the policy. The legislature has made express provision for payment of only whatever is due under the policy, and in the absence of any other provision making the insurer liable for all that is awarded, we cannot read sub-section (4) as leading to such a conclusion. We are not therefore in a position to accept the contention of Mr. Moosa, based on the decision of the Supreme Court that the entire amount awarded has to be paid by the insurer subject to their right to recover the excess from the insured. We therefore overrule the plea raised by Sri. Moosa. The result of the above discussion is that this appeal filed by the insurer is liable to be allowed and liability of the appellant limited to the amount of Rs. 50,000/- as provided in section 95 (2) (b) of the Motor Vehicles Act, 1939.

The appeal is therefore allowed. The award passed by the Tribunal is set aside in so far as it directs the appellant to make payment of the entire amount of Rs. 77,400/- awarded and the interest thereon. The liability of the appellant will be limited to the amount of Rs. 50,000/- and the interest thereon, as also costs. The balance amount of Rs. 27,400/- and the interest thereon shall be payable by the third respondent, owner of the vehicle. We direct accordingly. There will be no order as to costs in this appeal.