
(1996) 10 MAD CK 0008
In the Madras High Court

New India Assurance Company Limited	APPELLANT
Vs	
Shyamala and Others	RESPONDENT

Date of Decision : 07-10-1996

Acts Referred:

Motor Vehicles Act, 1988 — Section 95(2)

Citation : (1997) 1 MLJ 142

Hon'ble Judges : Govardhan, J

Bench : Division Bench

Judgement

Govardhan, J.—This appeal is against the order passed by Motor Accidents Claims Tribunal, Salem in M.C.O.P.No.163 of 1983.

2. The petitioner in their petition contend as follows: The first petitioner is the wife and the petitioners 2 to 9 are the children of the deceased

Seethapathy who was employed in the Tamil Nadu Electricity Board, Mettur Electricity System as a Foreman on a salary of Rs. 1,103.20 per

month. On 2.11.1982 at about 9.30 a.m., Seethapathy was proceeding from Athur to Kattukottai on his cycle in the Salem-Cuddalore Main

Road. Taxi bearing registration No. M.D.G. 1990 and driven in a rash and negligent manner dashed against him from behind as a result of which,

he sustained injuries and succumbed to the injuries on the spot. The respondents 1 and 2 are the owner and the insurer of the taxi. Deceased was

aged 52 years at the time of his death. The petitioners make a claim for Rs. 1 lakh.

3. The second respondent in his counter contends as follows: The car M.D.G. 1990 has not been insured with the second respondent on the date

of the accident. There is no privity of contract between them and the first respondent. The age and earning of the deceased are not admitted.

Compensation claimed is excessive and the petition is liable to be dismissed.

4. The respondents 3 and 4 in their counter contended that the accident was due to the negligence on the part of the deceased and therefore they are not liable.

5. The Motor Accidents Claims Tribunal held an enquiry on the above pleadings and gave a finding that the accident was due to the rash and negligent driving of the car and awarded a compensation of Rs. 1 lakh payable by the respondents 3 and 4 jointly and severally.

6. Aggrieved over the same, the fourth respondent has come forward with this appeal.

7. The learned Counsel appearing for the appellant has stated even at the outset. That this appeal has been preferred by the fourth respondent

Insurance Company, with regard to their liability alone and the appellant is not questioning the finding of the tribunal that the accident was not due

to the rash and negligent driving of the bus, and the petitioners are entitled to a compensation of Rs. 1 lakh. According to the learned Counsel, the

order of the tribunal that the compensation of Rs.1 lakh is payable by the respondents 3 and 4 jointly and severally is alone challenged in this

appeal, in that the tribunal cannot direct the 4th respondent to pay more than Rs. 50,000 which is the liability of the insurance company as per the

terms of the policy. According to the learned Counsel, the insurance policy which has been marked as Ex. A-4 would show that the basic premium

alone has been collected and the vehicle is a passenger vehicle and as per Section 95(2) of the Motor Vehicles Act (hereinafter called as "the

Act"), the insurance company can be made liable only for the statutory liability and not anything more than that and in support of his case, relies

upon the decision reported in New India Assurance Co. Ltd. Vs. V.K. Chandra and Others, wherein, it has been held, that in the case of a

comprehensive policy, the extent of the liability of the insurance company u/s 95(2)(b) of the Act, is not unlimited and insurance company is liable

to the extent of Rs. 50,000 only as per the statutory liability. The Division Bench has also referred to the decision of the two other decisions

reported in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, and Rajeswari Transports (Firm), Theni v. M.G. Rajan 1982

A.C.J. (Supp.) 118 (Mad.), which decisions the Division Bench has followed.

8. The learned Counsel appearing for the respondents would contend that in the decisions relied by the learned Counsel, the Division Bench has

not considered the effect of Sections 96(2) and 96(6) of the Act, and therefore, they may not be available to the benefit of the appellant.

According to the learned Counsel appearing for the respondent, the defence taken by the fourth respondent before the tribunal is not one which

they can take u/s 96(2) of the Act and there is no allegation of any collusion between the claimants and the fourth respondent, and therefore, the

decision relied by the appellant reported in *New India Assurance Co. Ltd. Vs. V.K. Chandra and Others*, cannot be made applicable. In the

Division Bench judgment relied by the learned Counsel appearing for the appellant, the implication of Section 95(2) of the Act has not been

considered. Similarly, in the case referred by the Division Bench and reported in *National Insurance Company Limited v. Jugal Kishore* 1988

A.C.J. 270 : AIR 1988 S.C. 779 also, the implication of Section 96(2) of the Act has not been considered. According to the learned Counsel

appearing for the respondents 3 and 4 in the tribunal, the third respondent has adopted the counter of the fourth respondent and defences raised by

the insurance company are not those which are available to the insurance company u/s 96(2) of the Act. There is also no allegation of any collusion

between the insurer and the claimants. In the above circumstances, when the insurance company has not taken a specific plea restricting their

liability, the insurer cannot be permitted to take the same as a ground of appeal in the appellate court. The learned Counsel appearing for the

respondents relies upon the decision reported in *New India Assurance Co. Ltd. Vs. V.D. Kamalam and Others*, in support of his above

contention, wherein a Division Bench of this Court has held that when the insurance company did not raise any defence available to it u/s 96(2)

before the tribunal, but in appeal, it confined itself to challenging the finding on negligence and quantum of compensation, the insurance company

cannot be permitted to raise any objection to the findings of the tribunal on negligence and quantum of compensation and that it nullify the effect of

Section 96(6) of the Act. The Division Bench which has rendered the judgment in *New India Assurance Co. Limited v. D. Kamalam* 1993 A.C.J.

1987, has referred to the decision reported in *British India General Insurance Co. Limited v. Captain Itbar Singh* (1958) 65 A.C.J. 1 (S.C). In the

decision referred by this Division Bench reported in *British India General Insurance Co. Limited v. Captain Itbar Singh* (1958) 65 A.C.J. 1 (S.C),

it is deserved as follows: "the Supreme Court has pointed out that, apart from statute an insurer has no right to be made a party to an action by an

injured person against the insured causing the injury and that though a right to be made a party to a proceeding and defend if is conferred u/s 96(2)

of-the Act, such a right is essentially a creature of statute and the content of that right depends on the provisions of the statute. Interpreting the

scope of Section 96(2) and (6) of the Act, the Supreme Court further pointed out that an insurer is entitled to defend an action on any of the

grounds enumerated and no others and if it was the intention that others and if it was the intention that other grounds would be available, there was

no need for enumeration and when specific grounds of defence have been set out, that cannot be added to and to do that would be adding words

to the statute. Referring to Section 96(6) of the Act, the Supreme Court laid down that it indicated how Section 96(2) of the Act should be read

and pointed out that it should be read in such manner as laying down that the insurer cannot avoid his liability, except by establishing such defences

as provided br under Sub-Section (2) of Section 96 of the Act and has held that Sub-section (6) contemplated that defences not mentioned in

Sub-section (2) cannot be taken, as therwise, the insurance company could avoid its liability in a manner other than that provided for in Sub-

section (2), which stood prohibited by Sub-section (6). Ultimately, the Supreme Court laid down that an insurer made a party to the action is not

entitled to take any defence which is not specified in Section 96(2) of the Act. Applying the aforesaid principle to the case on hand, it is seen that

the appellant did not at all raise any defence appropriately falling u/s 96(2) of the Act and if the defences permitted under the provisions of the Act

has not been so raised and the raising of other defences is also prohibited u/s 96(2) of the Act, then, we do not see how the appellant can now be

permitted to raise any objection with reference to the findings of tribunal on the questions of negligence and quantum of compensation. It is true that

u/s 110-D of the Act, any person aggrieved by an award of a claims tribunal may prefer an appeal, but, with reference to the insurance company, it

must be an aggrieved person in the context of an adjudication relating to the right to contest on all or any of the grounds conferred u/s 96(2) of the

Act and not in cases like this, where the appellant had not raised any defence at all u/s 96(2) of the Act. To permit an appeal u/s 110-D of the Act,

even in cases where no defence u/s 96(2) of the Act is raised, would be to nullify Section 96 of the Act and also to enlarge the scope of a defence,

which otherwise is restricted to cases falling u/s 96(2) of the Act.

9. A Division Bench of the Punjab and Haryana High Court has held in the decision reported in National Insurance Co. Limited Vs. Ravinder

Goyal and Others, that it was obligatory for the insurance company to plead that it was not liable and when the insurance company failed to plead

so, the insurance company cannot be allowed to raise the question of its joint and several liability with the insured as an abstract question of law in

appeal. In the present case, the appellant has challenged the finding of the tribunal making it liable to the claimants for the amount of compensation

awarded jointly and severally. As per the decision of the Punjab and Haryana High Court referred above, the appellant cannot be allowed to raise

this question.

10. The learned Counsel appearing for the appellant relying upon the decision in M/s/ Economic Roadways Corporation and another Vs. K.S.

Murali and others, , would argue that where the insurance company collects/ premium, for five passengers at Rs. 12 per passenger from owner of a

taxi under contract of insurance, policy showing liability of an insurer as Rs. 50,000, liability should be limited to Rs. 15,000 and not Rs. 50,000

and that plea regarding limitation of liability, not expressly taken before tribunal can be raised for the first time in appeal and would argue that the

plea regarding limitation of the liability being a pure question of law can be raised for the first time in appeal. But, in this judgment also, the

implication of Sees 96(2) and 96(6) of the Act has not been considered and therefore, I am of opinion that this Ruling relied by the learned

Counsel appearing for the appellant also cannot be made applicable to the case on hand. The learned Counsel appearing for the appellant would

argue that in the case referred by a Division Bench of our High Court viz., New India Assurance Co. Ltd. Vs. V.D. Kamalam and Others, the

Division Bench has referred to the decision reported in British India General Insurance Co. Limited v. Captain Itbar Singh (1958) A.C.J. 1 (S.C)

and has held that the above earlier Ruling is followed in the above Ruling, but a

detailed study of the decision reported in British India General Insurance Co. Limited v. Captain Itbar Singh (1958) A.C.J. 1 (S.C.) would reveal that the Supreme Court has pointed out that the principle laid down by it in the above decision applies only to a case where the insurance company intends to avoid the policy in toto on the basis of the defence mentioned in Section 96(6) and the word "avoid" used in Section 96(6) is referable to a case of total avoidance of the insurance policy and therefore, is not a bar to the insurance company raising the contention that it is not liable for more than the limits prescribed in Section 96(2) and that is what the Supreme Court has observed in the decision reported in National Insurance Co. Limited v. Jugal Kishore 1988 A.C.J. 270 (S.C.). According to the learned Counsel, the controversy over this question of limitation of liability of the insurance company has been set at rest by a Full Bench decision of the Kerala High Court reported in National Insurance Co. Ltd. Vs. Roy George and Others, and therefore, the appellant's case has to be accepted. In the decision relied by the appellant viz. National Insurance Co. Ltd. Vs. Roy George and Others, the Full Bench of the Kerala High Court has referred to the decision relied by our Division Bench in British India General Insurance Co. Limited v. Captain Itbar Singh (1958) 65 A.C.J. 1 (S.C.) and also the decision relied by the another Division Bench of our High Court viz., New India Assurance Co. Ltd. Vs. V.K. Chandra and Others, in which, they have referred to the decisions reported in National Insurance Co. Limited v. Jugal Kishore 1988 A.C.J. 270 (S.C.) and have ultimately held that the defence that its liability is limited to statutory liability, u/s 95(2) is available to the insurance Company. A reading of the judgment relied by the learned Counsel appearing for the appellant viz., National Insurance Co. Ltd. Vs. Roy George and Others, would show that before the tribunal, the Insurance Company contended that its liability should have been restricted to the extent covered by Section 95(2) of the Act, and this contention of the insurance company was rejected by the tribunal and it is against the said judgment, the said appeal has been preferred to the Kerala High Court. But, in the case on hand, the insurance Company has not taken the defence before the tribunal restricting their liability to Rs. 50,000. As I have already pointed out, the stand taken by fourth respondent which is adopted by the third

respondent is that the petitioners are not entitled to claim any compensation from them. It was a case of total denial of their liability. The Full Bench decision of the Kerala High Court relied by the learned Counsel appearing for the appellant itself, has observed in paragraph 7, that the Supreme Court pointed out by it is the decision reported in Capt. Itbar Singh's case (1958) 65 A.C.J, 1 (S.C.) applies only to case where the insurance company avoided the policy in toto on the basis of the defence mentioned in Section 96(6) of the Act. The Division Bench judgment relied by, the learned Counsel appearing for the respondents reported in New India Assurance Co. Ltd. Vs. V.D. Kamalam and Others, is therefore applicable to the facts of the present case in all fours and not the decision relied by the learned Counsel appearing for the appellant and reported in New India Assurance Co. Ltd. Vs. V.K. Chandra and Others, In that view, I am of opinion that the appellant's case that their liability is only Rs. 50,000 as per the policy, in the appellate Court when they have totally denied any liability before the tribunal, cannot be sustained and the appeal has to fail. It is more so when the deceased was not a passenger, but a third party. In that view, I am of opinion that the appeal is without merits and is liable to be dismissed.

11. In the result, the appeal is dismissed. No costs.