
(1985) 08 MP CK 0025
In the Madhya Pradesh High Court
Case No : First Appeal No. 71 of 1971

New India Insurance Co.

APPELLANT

Vs

Shrimati Rukiyabai and Others

RESPONDENT

Date of Decision : 20-08-1985

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(1), 96(2), 96(6)

Citation : (1988) 64 CompCas 155

Hon'ble Judges : R.K. Varma, J; P.D. Mulye, J

Bench : Division Bench

Advocate : M.L. Dhupar, for the Appellant; R.S. Garg, for the Respondent

Final Decision : Dismissed

Judgement

P.D. Mulye, J.—Civil First Appeal No. 71 of 1971 is filed jointly by the insurance company, the owner and driver of the truck, against the judgment and decree dated September 10, 1971, passed by the Third Additional District Judge, Indore, in Civil Suit No. 8B of 1969, whereby he has decreed the plaintiff-claimant's suit arising out of a motor accident, for Rs. 33,000 with proportionate costs, out of which the insurance company has been held liable to the tune of Ri 20,000 only.

2. Being aggrieved by that part of the judgment and decree whereby the learned trial court has not awarded any interest on the amount of compensation decreed, the plaintiff claimants have filed Civil Revision No. 151 of 1971. This judgment shall, therefore, govern the disposal of both these cases.

3. Facts giving rise to this appeal may be stated in brief, thus : Truck No. MBK 5026 belonged to Nazir Mohammad who is now represented by his legal representatives. His son, Bashir Khan, was the driver of the said truck on the relevant day, i.e., November 27, 1958, when the accident took place in which Ganesh Prasad died. The said truck was insured with the New India Insurance Co. Ltd.

4. Plaintiff, Rukiyabai, is the widow of Ganesh Prasad and the other plaintiffs,

namely, Rampratap, Ramsahay and Shriram, are his sons.

5. According to the plaintiff, Ganesh Prasad had hired the said truck from its owner, Nazir Mohammed, for carrying vegetables, which included arvi, potatoes and cauliflower from Gujarkheda to Bombay. Thus, after loading the vegetables in the said truck, Ganesh Prasad, Rashid, cleaner, Mubarak, Rashid Khan and Siddiqui were travelling in the said truck. The truck driver on the fateful day, i.e., November 27, 1958, drove the truck in such a rash and negligent manner that an accident took place near village Malsana, near Nasik on the Bombay-Agra road as a result of which Mubarak, Rashid and Ganesh Prasad died. Siddiqui and Bashir Khan also received injuries.

6. According to the plaintiff, the accident occurred on account of the rash and negligent driving by the truck driver, and Ganesh Prasad was carried in the truck for hire or reward or by reason of a contract of employment as the hire charges for the vegetables were reduced from Rs. 275 to Rs. 225 in lieu of Ganesh Prasad's services in accompanying the truck and in looking after the vegetables by protecting the same from heat and sun. According to the plaintiff, the deceased at the time of the accident was aged about 45 years, was earning Rs. 250 per month, he was a cultivator-cum-businessman and a man of great ability and experience and had started the business of export of fruits and vegetables. They, therefore, filed the present suit on November 26, 1959, claiming Rs. 1,00,000 by way of compensation and Rs. 1,500 on account of loss of vegetables carried in the said truck.

7. The owner and the driver of the said truck, defendants Nos. 1 and 2, denied the plaintiff's claim. They contended that defendant No. 2 was not driving the truck at the relevant time. They also denied that the accident occurred on account of the rash and negligent driving of the truck by the truck driver. They also denied that Ganesh Prasad was carried in the truck for hire or reward or contract of employment. Further, according to them, Ganesh Prasad had voluntarily accompanied the truck at his own risk without paying any fare and beyond the terms of the contract. They further contended that the trial court had no jurisdiction to try the suit. Consequently, they also denied their liability to pay the amount as claimed in the suit by way of compensation for loss of vegetables.

8. Defendant No. 3, namely, the insurance company, contended that the suit filed against them was time-barred and that at best, their liability was to the tune of Rs. 20,000 only as per the terms of the policy.

9. The learned trial court, on the basis of the evidence and material record, after considering the point of controversy for which issues were framed, came to the conclusion that defendant No. 2, Bashir, was the employee of defendant No. 1 on the date of the accident, that he was driving the said truck in that capacity and that the accident occurred on account of the rash and negligent driving of the truck driver. He also found that Ganesh Prasad did not travel in the truck voluntarily without payment of any fare. He also found that this travel was not

beyond the scope of the contract. He also found that the trial court had the jurisdiction to try the suit and that the same was not barred against defendant No. 3. He also found that Ganesh Prasad was carried on the truck for reward. He ultimately decreed the plaintiff's suit as stated above.

10. As Civil First Appeal No. 71 of 1971 was filed jointly by the owner, driver and the insurance company, learned counsel for the plaintiff-respondent had raised a preliminary objection that as the interest of the insurance company and that of the owner and the driver are conflicting, such a joint appeal is not maintainable and learned counsel, Shri Behl, who initially was appearing as a counsel on behalf of all the appellants, was not, therefore, entitled to argue the appeal on behalf of all the appellants. In view of this objection, Shri N. C. Behl, learned counsel for the appellants, withdrew his power from this case and, subsequently, Shri M. L. Dhupad put in his appearance for the insurance company alone on whose behalf he very vehemently and strenuously argued the appeal and Shri N. P. Sharma, learned advocate, appeared on behalf of the other appellants.

11. During the pendency of this appeal, the owner, Nazir Mohammed, died. His legal representatives did not file any application for being substituted in place of the deceased. Therefore, the insurance company by submitting an application has impleaded them as respondents.

12. Learned counsel for the owner and the driver, Shri N. P. Sharma, fully supported the judgment and decree of the trial court and submitted that he had absolutely no grievance against the claim decreed. Therefore, apparently there is a conflict of interest between the appellants who have filed this joint appeal.

13. Learned counsel for the insurance company raised the following points :

(1) That the insurance company could not be held liable at all u/s 95(1)(b)(ii) under the provisions of the Motor Vehicles Act.

(2) That the plaintiff has failed to prove that there was a contract of employment.

(3) That hire or reward would not make any difference so far as the liability of the insurance company is concerned.

(4) That the plaintiff had amended the plaint after eight years and consequently the claim against them was barred.

(5) That the trial court has no jurisdiction to try the suit because the accident having occurred within the jurisdiction of the Nasik Court, the court at Nasik or the Tribunal at Nasik alone had the jurisdiction to decide the case.

15. We shall take the question of jurisdiction first. Learned counsel for the appellant contended that under the provisions of the Motor Vehicles Act, the plaintiff ought to have put up their claim before the Claims Tribunal at Nasik as it is not in dispute that under the provisions of the Motor Vehicles Act, after a Tribunal is constituted and starts functioning, the civil court will have no jurisdiction to try such a case, if the accident had occurred thereafter. In the

present case, admittedly the accident had taken place within the jurisdiction of the Nasik Court. There is nothing on record to indicate that on the date when the accident occurred or on the date when the present suit was filed, a Claims Tribunal was constituted and functioning at Nasik because, according to Section 110F of the Motor Vehicles Act, it is provided that "Where any Claims Tribunal has been constituted for any area, no civil court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the civil court". It is, therefore, clear that, according to this section, the civil court will not have jurisdiction to entertain any question referred to it in that section after the constitution of the Claims Tribunal. But, prior to the constitution of the Tribunal, the civil court alone had the jurisdiction to entertain claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles. Therefore, the fact that a Claims Tribunal was constituted at Indore with effect from September 18, 1959, as per the Gazette notification dated August 7, 1959, as was urged on behalf of learned counsel for the appellants would not come in the way of the claimant-respondents, as admittedly even then the Claims Tribunal at Indore had no jurisdiction to try the same as the accident had not occurred within the jurisdiction of the Claims Tribunal at Indore.

16. Learned counsel for the appellant further submitted that the insurance policy was issued at Bombay where it has its head office and consequently the contract of insurance having been entered into at Bombay, on that ground also the civil court had no jurisdiction. We see no force in this contention. Firstly, because that is not the case of the appellant in the trial court; secondly, there is no evidence adduced by the insurance company to prove that the contract of insurance was entered into at Bombay and, thirdly, the insurance policy, exhibit D-1, has not been proved in accordance with law as we shall point out later. On the contrary, from the plaintiff's evidence, it is clear that the contract of hire of the truck was entered into at Indore; that the principal defendants reside at Indore and thus a part of the cause of action having occurred within the jurisdiction of the Indore Court, the suit was properly filed at Indore which had the jurisdiction to try the suit. That apart, the parties having gone for a full trial, no prejudice has been caused to any of the parties. Therefore, we see no force in this point raised on behalf of the insurance company by learned counsel.

17. As regards the question of limitation, learned counsel for the appellant insurance company submitted that the claim was barred as the appellant had amended the plaint after a period of eight years, and that the insurance company was joined subsequently. However, the amendment having been allowed which was material for deciding the controversy in suit, it relates back to the institution of the suit and under law, the insurance company being liable in case the insured is found to be held liable, the insurance company cannot be allowed to urge that

the claim against them was barred by limitation. Therefore, so far as the question of limitation is concerned, in our opinion, the suit was filed within time.

18. We shall now take up the question as to whether a joint appeal filed by the owner, driver and the insurance company in a case where their interests are conflicting is maintainable or not. In the present case, admittedly, Shri M.L. Dhupad, learned counsel, argued only on behalf of the insurance company whereas Shri N. P. Sharma, learned counsel for the owner and the driver, in fact did not at all challenge the judgment and decree of the trial court, but on the contrary supported the same. The basic case on this point is reported in *British India General Insurance Co. Ltd. v. Captain Itbar Singh* [1959] 29 Comp Cas 60 (Ins) (SC) on which, after placing reliance, the Allahabad High Court in its decision in *United India Fire and General Insurance Co. Ltd., Kanpur and Another Vs. Gulab Chandra Gupta*, ; [1986] 59 Comp Cas 678 (All), held that (headnote of AIR):

" The ground for challenge to a claim by the insurer of the vehicle is limited and confined to the matters which are within the purview of Section 96(2) read with Section 96(6). Similar would be the position in the appeal against the award. The owner of the vehicle involved in the accident or which was the cause of accident has, however, a very wide field of challenge to the order passed by the Claims Tribunal, He is not bound by any provision of Section 96. The nature of the grounds would, therefore, be different in the case of an insurer from that of the owner of the vehicle. It is, therefore, apparent that it would not be open to the insurer to challenge the award on the same grounds as are open to the owner of the vehicle. There are two exceptions to this rule. Firstly, where the right to contest is reserved in the policy in favour of the insurer and, secondly, where the person against whom the claim had been made has failed to contest the claim. Thus, in cases where the applicability of the exceptions is ruled out, neither the owner of the vehicle nor the insurer can have a common ground to challenge the award. Consequently, a joint appeal by the insurer and the owner of the vehicle is not maintainable. "

19. In the present case, however, admittedly, the owner and the driver had contested the claim; as stated above, there is no evidence or material on record to indicate that the right to contest is reserved in the policy as the same has not been proved. In fact, it is clear that during the pendency of the appeal, when the owner died, his legal representatives did not apply for being substituted in his place as appellants, but on the contrary, the insurance company submitted an application for bringing them on record, whereby they have been made respondents instead of being made appellants. This further shows that there is conflict of interest between the insurance company and the owner of the vehicle. Therefore, the authorities cited by learned counsel for the appellant on this point, i.e., *Manjula Devi Bhuta v. Manjusri Raha* [1968] ACJ 1 (MP) and *Motor Owners' Insurance Co. Ltd. v. Hrishikesh Das* [1975] ACJ 295 (Cal) being distinguishable are not applicable to the facts of the present case.

20. That apart, it is also evident from the record that initially Shri N. C. Behl, advocate, was appearing for and on behalf of all the appellants and it is only when an objection regarding the maintainability of such a joint appeal was taken by learned counsel for the plaintiff-respondents that two separate counsel have appeared in this appeal and Shri M. L. Dhupad, advocate, concentrated and restricted his arguments only to safeguard the interest of the insurance company, whereas Shri N. P. Sharma, learned counsel for the other appellants, did not support the insurance company, but on the contrary he fully supported the judgment and decree passed by the trial court, though learned counsel for the appellant-insurance company also contended that this argument raised by Shri N. P. Sharma at the time of the hearing of the appeal would not come in the way of the insurance company. Thus, after going through the case-law cited and considering the facts and circumstances of the case, we are of the opinion that this joint appeal by the insurer and the owner of the motor vehicle is not maintainable and the same deserves to be dismissed on this ground alone.

21. This brings us to the next question as to whether the plaintiff has succeeded in proving his case on merit. It is no doubt true that the finding of the learned trial court that the plaintiff is entitled to claim compensation on the basis of hire and reward cannot be sustained as from the evidence adduced by the plaintiff which has been considered and discussed by the learned trial court and which finding was not challenged before us on behalf of the owner and the driver of the vehicle, the contract of employment between the owner of the goods, Ganesh Prasad, and the owner of the goods carrier has been established satisfactorily. From the plaintiff's evidence, it is clear that the hire charges for carrying the vegetables to Bombay was initially fixed at Rs. 275 but those being perishable goods, the owner of the vehicle as a bailee was required to take proper care till the goods have reached the destination and for that purpose instead of keeping any of his employees in the truck to look after the vegetables, the owner of the truck agreed to charge Rs. 225 as hire charges and thereby Rs. 50 was reduced by way of contract of employment, though temporary, according to which the owner of the goods was to be paid a remuneration of Rs. 50 for the services rendered on behalf of the owner of the vehicle till the goods reached the place of destination in Bombay. Therefore, the owner has rightly been held liable and the insurance company has also been rightly held liable to the extent of Rs. 20,000 which is the statutory liability out of the entire amount decreed.

22. So far as the terms of the insurance policy are concerned, in fact exhibit D-1, which is said to be a copy of the insurance policy, has only been produced and not proved as required by law. The witness examined by the insurance company, Rayiz Ahmed, has only produced the policy but he has absolutely no personal knowledge about the same. In fact, in cross-examination, he has further admitted that he does not know who has signed the slip affixed to the policy or the rubber stamp affixed thereon. He has also not said a word that the contract of insurance was entered into at Bombay. Therefore, mere production does not mean proof thereof even though the policy was taken on record and exhibited.

The burden lay upon the insurance company to prove the terms of the insurance policy. They should have called the owner of the vehicle to produce the original insurance policy but that too has not been done and the evidence of Bashir also does not indicate that this is a true copy of the original policy which was issued to the owner of the vehicle. Therefore, in the absence of the insurance policy having been proved as required by law, the same also cannot be looked into to find out what were the terms of the contract under the insurance policy. Therefore, in these circumstances, the submission made by learned counsel for the insurance company regarding the terms and conditions of the insurance policy, by which he Wanted to avoid the liability of the insurance company, cannot be looked into.

23. This brings us to the last question which has now become academic as to what is the scope of the provisions of Section 95(1)(b)(ii) of the Motor Vehicles Act in the case of goods vehicles and we leave this point to be decided in some other proper and appropriate case. In view of our finding that such a joint appeal is not maintainable, it is not necessary to consider and discuss the authorities cited by learned counsel for the parties which we are mentioning below. In support of his contention that in the case of a goods vehicle, the insurance company cannot be held liable, learned counsel for the appellant insurance company placed reliance on the decisions in Mahabir Prasad Agarwala v. Jiban Chandra Hazarika AIR 1972 Gau 88, C. Narayanan Vs. Madras State Palm Gur Sammelan and Another, , Oriental Fire and General Insurance Co. Ltd. Vs. Smt. Gurdev Kaur and Others, Thakarbai v. Viratha, Rustamji Patel [1983] MP WN 355, New India Assurance Co. v. Maharunnisa [1983] JLI N 21, South India Insurance Co. Ltd. v. Heerabai and Co. [1967] ACJ 65 (MP), Amar Singh v. Surajmal [1981] ACJ 382 (MP), Janab Abdul Jabbar Sahib v. Muniammal alias Peddakkaiya [1981] ACJ 543 (Mad), The Common Wealth Assurance Co. Ltd., Bombay Vs. V.P. Rahim Khan Sahib and Others, , Indian Mutual General Insurance Society Ltd. Vs. Manzoor Ashan and Others, and Surajmal v. Amar Singh (L.P.A. No. 6 of 1980--23-4-81).

24. On the contrary, in support of his contention that considering the facts of the present case, the insurance company is liable in the case of a goods vehicle, learned counsel for the plaintiff placed reliance on the decisions in Patharibai and Others Vs. Firulalji Shankarlal and Others, , State Insurance Department, State Insurance Officer, Trivandrum Vs. Sosamma Mani and Others, , Ambaben and Others Vs. Usmanbhai Amirmiya Shaikh and Others, :[1978] 19 GLR 913 , Hukam Chand Insurance Co. Ltd. v. Badruddin [1980] ACJ 164 (MP), Gujarat State Road Transport Corporation v. Malabai Menand [1981] ACJ 36 (Guj) , Ramesh Kumar Vs. Gadarai and Others, ; M. Subramanya Bhat Vs. Govindaraj and Others, and Oriental Fire and General Insurance Co. Ltd. Vs. Hanumakka and Others, .

25. Now, we shall take up the revision filed by the plaintiff. The grievance of the plaintiff has been that while decreeing the plaintiff's claim, the learned trial court

has not awarded any interest at all. According to learned counsel, he should have awarded at least future interest. However, when the learned trial court has not granted any interest at all, it has to be presumed that it refused to grant any interest and consequently the learned trial court having jurisdiction to decide whether to award interest or not, there is no question of any jurisdictional error which would require any further interference in a revision petition. Therefore, on this short ground alone, this revision petition deserves to be dismissed.

26. In the result, the appeal as also the revision are dismissed with no order as to costs. The judgment and decree passed by the trial court are maintained.