
(1967) 02 DEL CK 0020

In the Delhi High Court

Case No : Regular First Appeal No. 76D of 1957

New Zealand Insurance Co. Ltd.

APPELLANT

Vs

Kalu Ram and Others

RESPONDENT

Date of Decision : 07-02-1967

Acts Referred:

Citation : (1967) ACJ 186

Hon'ble Judges : S.K. Kapur, J; Narain Andley, J

Bench : Division Bench

Advocate : G.L. Seth and K. Mehta, for the Appellant; S.S. Chadha and H.S. Dhira, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Andley, J.—The New Zealand Insurance Company Ltd. which was originally Defendant No. 4 in the suit, have filed this appeal against the decree passed by Shri Asa Singh Gill, Sub-Judge 1st Class at Delhi, for Rs. 5,000/-, in favour of Kalu Ram, who was the Plaintiff and who is Respondent No. 1 in this appeal. In the plaint Defendants Nos. 1 and 2, Sarwan Dass and Balwant Singh, respectively, were described as the owners of the motor vehicle; Gandur Singh Defendant No. 3 was described as driver of the motor vehicle.

2. The accident which gave rise to the suit occurred on 4th July, 1953 at Delhi, as a result of which various injuries were sustained by the Plaintiff.

3. Against the decree, only the New Zealand Insurance Company Ltd. have filed this appeal in this Court. The appeal does not purport to be on behalf of or in the name of the insured. A preliminary objection has, therefore, been raised by Mr. S.S. Chadha, learned Counsel for the Plaintiff-Respondent No. 1 about the competency of this appeal and the objection is based upon the provisions of Section 96(2) of the Motor Vehicles Act, According to which the pleas and defences which are open to an Insurance Company are curtailed to a large extent and it is only certain defences which are open to the Insurance Company.

4. The basis of the objections is that the appeal is on grounds other than those which are open to an Insurance Company u/s 96(2) of the Motor Vehicles Act.

5. Anticipating this objection, an application was made to us to-day at the time of the hearing of the appeal on behalf of the Insurance Company by Mr. G. L. Seth. In the application which is unaccompanied by any affidavit, it has been stated, *inter alia*, that the Appellant-insurer has a cause of action to make an Application to this Court praying for permission to defend the action and challenge the decree passed by the trial Court in the name of the insured, that the insured was in collusion with the injured person as a result of which he did not file the appeal, and that the Insurance Company was entitled to relief in law. It has further been stated that the insurance policy in question has reserved this right to the Appellant-insurer because it states that the insurer shall be entitled if it so desires, to take over and conduct in the name of the insured, the defence or settlement of any claim or to prosecute in the name of the insured for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claims. The exact prayer which has been made is that the insurer may be permitted to prosecute the appeal and attack the decree under appeal on behalf of the insured.

6. We may point out that even in the trial Court objection had been raised on behalf of the Plaintiff whenever the Insurance Company wanted to cross-examine the witnesses on the merits, that such cross-examination was not permissible at the hands of the Insurance Company. An application in this behalf was also made, but it seems that no order was ever made by the trial Court on this application and also upon the scope of the cross-examination, which could be made by the Insurance Company. At one stage in the trial Court, the decision of the Punjab High Court reported in *Itbar Singh Vs. P.S. Gill and Others*, was cited. The point of making mention about the raising of this objection in the trial Court is that it is not as if the Insurance Company were unaware even at that stage that objection was being raised about their right to cross-examine on merits. It is, therefore, difficult to believe that at the time of the filing of the appeal, the Insurance Company would not have been conscious that such an objection would be raised even in the High Court. The scope of the defence which could be raised by the Insurance Company was authoritatively decided as long ago as in 1959, as is apparent from the judgment reported in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, . In spite of this authoritative and final pronouncement by the Supreme Court and other cases decided by the Punjab High Court, no application was made by the Insurance Company in this Court to be permitted to file the appeal in the name of the insured.

7. In fact, the insured has been made party Respondent" in this appeal. Now, Mr. Seth, learned Counsel for the Insurance Company has pressed upon us that we should at least allow transposition of Respondent No. 2 as the Appellant in this appeal.

8. As has been indicated above, the application has been made after a lapse of

nearly 10 years from the filing of the appeal, no affidavit in respect of the allegation, particularly, of collusion has been filed along with the application and, in fact a reading of the application shows that the relief claimed is being claimed as of right and not as an indulgence.

9. No consent has been obtained from Respondent No. 2 for his being transposed as the Appellant. Without deciding whether in the absence of such consent the Company can ask for such transposition, we are of the opinion that the Appellants have not made out any case for being permitted to transpose Respondent No. 2 as the Appellant or to be permitted now to say that their appeal should be treated as an appeal by or in the name of Respondent No 2.

10. In the circumstances, we uphold the preliminary objection, dismiss the appeal and refuse permission to the Appellants to transpose Respondent No. 2 as an Appellant or to treat this appeal as having been filed by the Insurance Company in the name of Respondent No. 2. In the circumstances of the case, we leave the parties to bear their own costs.

S.K. Kapur, J.

11. I agree.