
(1989) 02 AHC CK 0027
In the Allahabad High Court
Case No : F.A.F.O. No. 408 of 1979

Oriental Fire and General Insurance Co. Ltd., New Delhi and
Another

APPELLANT

Vs

Smt. Rajendra Kaur

RESPONDENT

Date of Decision : 08-02-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles (Amendment) Act, 1957 — Section 96, 96(2)
Motor Vehicles Act, 1939 — Section 110B, 110C, 110D, 96(2)

Citation : (1989) 2 ACC 103 : (1989) ACJ 961 : AIR 1989 All 221 : (1989) AWC 587

Hon'ble Judges : N.N. Mithal, J;B.N. Misra, J

Bench : Division Bench

Judgement

N.N. Mithal, J.—In this appeal u/s 110-D of the Motor Vehicles Act, an award of the Motor Accident Claims Tribunal has been challenged by the Insurance Company as well as the owner of the vehicle in a joint appeal.

2. A preliminary objection has been taken as to the maintainability of the appeal on the ground that a joint appeal by the insurer and the insured is not legally maintainable. It is also urged that no award having been made against the owner of the vehicle, he was not a person aggrieved and as such was not entitled to file the appeal. The claimant's learned counsel seeks support to his submission from a Division Bench decision of this Court in United India Fire and General Insurance Co. Ltd., Kanpur and Another Vs. Gulab Chandra Gupta, . In that case, two appeals had been filed against the award of the Motor Accident Claims Tribunal under which the entire amount was made payable by the insurer. One appeal was filed jointly by the owner of the vehicle and the Insurance Company while the other appeal had been filed by the owner of the vehicle alone. The appeal filed by the owner was dismissed on the ground that he was not an aggrieved person since the entire amount payable under the award was to be paid by the Insurance Company only. The joint appeal was also dismissed relying upon

Kantilal and Bros. and Another Vs. Ramarani Debi and Others, where a Division Bench of the Calcutta High Court had held that a joint appeal was not maintainable. The Bench of this Court also observed that in view of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, the Insurance Company was not entitled to challenge the award on any ground other than those contained in Section 96(2) of the Act.

3. The learned counsel for the appellant, however, submits that both the points raised by way of preliminary objection are not sustainable and the contentions are against the provisions of the Act.

4. As far as the question of filing a joint appeal is concerned, there is no provision which bars the filing of such an appeal jointly by the insurer and the insured. Objection to them can be taken only on the general principle that there should not be any conflict of interest between the two appealing parties. It is only in those cases in which the ground on the basis of which the judgment of the court below is challenged is common to both the appellants and there is no inherent conflict in their interest that a joint appeal may be permissible. However, if it appears that the interest of the insurer and the insured may come in conflict while granting relief, then certainly the court's discretion must go against the filing of a joint appeal. When the owner of a vehicle and the insurer join hands in filing an appeal, their interest may be common only to a particular extent i.e. the immediate liability which the insurer is liable to undertake u/s 95 of the Motor Vehicles Act. If, however, the claim of the insured is being challenged on the ground of any defect in the contract of insurance or where the insurer takes refuge in avoiding its liability on any of the terms of the contract, then in such an event their interest can not be co-extensive and are likely to come in conflict with each other. In such a situation, therefore, the two can not be allowed to file a joint appeal.

5. In the instant case, there is another aspect which can not be lost sight of. The owner of the vehicle did not choose to contest the claim before the Motor Accident Claims Tribunal and the matter proceeded ex parte against him. The award which has been given is only against the insurer as it is less than Rs. 50,000/- and the entire liability for paying the compensation has to be indemnified by the Insurance Company. In these circumstances it is difficult to accept the appellant's contention that the owner of the vehicle was a person aggrieved so as to entitle him to file an appeal.

6. u/s 110-D, an appeal against the award of the Claims Tribunal can be preferred only by a person aggrieved.

7. It is, however, contended by the appellant that in this case the award itself was defective and was not sustainable. It is urged that u/s 96(1) of the Act, the Insurance Company is liable to reimburse the insured to the extent of liability as per Section 95(1)(b) of the Act only when a judgment in respect of such liability has been rendered against the insurer. In other words, the insurer's liability to

pay the amount under the award arises only when the insured also is made liable for the amount in the first instance. Since in this case no award has been made against the insured and the insurer has been directly made liable for the payment of compensation such an award was itself bad in law and a mere nullity. In support the case of Abdul Ghafoor and Others Vs. The New India Assurance Co. and Others, has been cited. The facts of that case are. however, slightly different. The Claim Petition had been dismissed against the owner since the claimant had failed to take steps for service on him and ultimately the claim petition itself was dismissed on that account. When the matter was taken in appeal before the High Court. Hon'ble K. N. Singh, J. (as he then was) speaking for the Bench held that Section 96 compels the insurer to satisfy judgment against the person insured in respect of third parties subject to the conditions stated in Section 95. vis. (i) that there should be a judgment or decree against a person insured (2) that the judgment is in respect of liability covered by the policy u/s 95(1)(b) and (3) that the liability in fact is covered by the terms of the policy.

8. From the above, it would be clear that in that case there was no claim alive against the insured (owner of the vehicle). In those circumstances, the Tribunal was justified in dismissing the claim. In the present case, however, the insured was a party before the Tribunal though proceedings were being taken ex parte against him. It is true that proper order to be passed in such a situation was to make an award against the owner of the vehicle and then to say that the same will be payable by the Insurance Company. This, however, is merely a defect in form but in substance the award has been made against the insured to be reimbursed by the insurer. Such defect in form can always be corrected by the appellate court whose duty was to pass a decree in such form as would be in accordance with law. This power has to be exercised by the appellate court under Order 41, Rule 33, C.P.C.

9. Apart from this, Section 110-B provides the form in which the Claims Tribunal has to make the award. It lays down that the Tribunal may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be. The expression by all or any of them is wide enough to include an award being made only against the insurer. The Tribunal has the power to make an award against any of the three persons, namely, the insurer, insured or the driver and this can be done either collectively or separately or against any one of them. Therefore, when the award has been made only against the Insurance Company, the same can not be said to be invalid or a nullity.

10. After giving our careful consideration to this aspect of the matter, we are of the opinion that a joint appeal by the insurer and the insured both, in the facts

and circumstances of this case, was not maintainable. When asked to make a choice, Sri A. B. Saran, learned counsel for the appellant very candidly stated that should the Court come to the conclusion that a joint appeal was not maintainable, then the appeal may be deemed only on behalf of the Insurance Company.

11. After this statement had been made, the learned counsel for the respondent raised other preliminary objection and it was contended that the insurer was not entitled to raise any other point in appeal except that which could have been taken by it by way of defence as provided u/s 96(2) of the Act. For this objection also, reliance is placed on United India Fire and General Insurance Co. Ltd., Kanpur and Another Vs. Gulab Chandra Gupta, . In the above Division Bench decision, reliance has been placed on British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, and in para 13 of the report, while quoting Itbar Singh's case, the Division Bench of this Court mentioned that their Lordships (of the Supreme Court) held that an insurer can not challenge in appeal the award of compensation by the Claims Tribunal on any other ground than what is contained in Section 96(2) of the Act. This, however, does not appear to be the correct position. In Itbar Singh, the Supreme Court was not dealing with the matter at the appellate stage as the facts quoted in the Supreme Court decision would show. In that case what had happened was that the defendant in his written statement took pleas in defence other than those that are mentioned in Section 96(2) of the Act and this was objected to by the plaintiff who prayed that the written statement of the insurer be taken off the record. It was in this situation that a question arose as to what were the defences available to the insurer. Against the order passed by the trial court, appeals were taken to the High Court where it was held that the insurer must only take such defences as are mentioned in Sub-section (2) of Section 96 and no others. It was against this decision of the High Court that the matter came before the Supreme Court and the decision of the High Court was upheld. At any rate, the question of raising a plea other than those permitted by Section 96(2) to the insurer at the appellate stage did not arise at all in that case. It may also be mentioned that the matter which came before the Supreme Court did not arise out of a claim petition u/s 110-A of the Act but it was raised in a regular suit for damages against the owner and insurer of the vehicle. The Supreme Court, therefore, did not lay down as to what grounds would be available to the insurer in an appeal u/s 110-D. All that was considered in that case was the grounds or defences which were available to an insurer in the suit at the stage of trial. Section 110-D dealing with the appeal does not also limit or in any way circumscribe the right of the appellant as to the grounds on which the award can be assailed by insurer. All that it says is that "any aggrieved person" may prefer appeal against the award of the Claims Tribunal. On what grounds can such an award be challenged by the aggrieved party has not been specified. When the right of appeal has been given to an aggrieved party, it must have the right to challenge the award on all legal and factual grounds, of course not outside the scope of the record.

Whatever evidence is there on the record can be taken advantage of by the appellant in order to satisfy the appellate court that the award had been wrongly made. We, therefore, find it difficult to accept the second preliminary objection as it seems to us that in *United India Fire and General Insurance Co. Ltd., Kanpur and Another Vs. Gulab Chandra Gupta*, the Division Bench of this Court had totally misconstrued the Supreme Court decision in coming to the conclusion that in appeal also, the grounds available to an insurer are limited to those mentioned in Section 96(2) of the Act.

12. The matter may be looked from another angle also. Sub-section (2A) of Section 110C provides as under : --

"(2-A) Where in the course of any inquiry, the Claims Tribunal is satisfied that -

(1) there is collusion between the person making the claim and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed to contest the claim.

it may, for reasons to be recorded by it in writing direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

13. It may be recalled that Claims Tribunals were established after an amendment had been made in the Motor Vehicles Act in 1957. Section 96(2) earlier provided that the insurer will not be liable for satisfying the judgment unless the insurer had a notice of the commencement of the proceedings and the insurer had the right to seek its impleadment and to defend the action but the grounds available to it were only those as are stated therein. When an application for compensation is made before the Claims Tribunal it is not incumbent upon the claimant to implead the Insurance Company and thus for this reason Section 110C(2A) made a provision that in certain contingencies mentioned therein, the Insurance Company will have a right to defend the claim even on grounds other than those mentioned in Section 96(2). In the present case, it is undisputed that the owner had kept away and, therefore, the Insurance Company was in the normal course, entitled to contest the Claim Petition on all such grounds as were available to the owner of the vehicle. It is true that in the present case no formal application in this respect has been made but it is obvious from the written statement that for all practical purposes the Insurance Company was entitled to defend the claim as an owner of the vehicle. At one stage, the claim had been decreed ex parte but on an application made by the Insurer, the order was set aside and it was allowed to test the claim on merits. When no objection at any stage was taken by the claimant that the grounds taken in the written statement of the Insurer were not confined to the grounds available to it u/s 96(2)(c), any objection raised when the claimant's witnesses were cross-examined by the insurer on the lines much beyond the

scope of Section 96. It would, therefore, be quite fair to assume that although no orders had been recorded in writing by the Tribunal, it did allow the Insurance Company to contest the claim on the grounds which were available to the owner of the vehicle. It is now too late for the claimant to contend that rights of the insurer are confined to the grounds mentioned in Section 96(2) of the Act. We are, therefore, of the opinion that in the facts and circumstances of this case, the Insurance Company must be deemed to have been permitted to contest the claim on those grounds also which were available to the owner of the vehicle. We hold accordingly.

14. Coming now to the merits of the case. The sole contention of the learned counsel for the appellant was that there was no evidence on the record to prove that the driver of the aforesaid vehicle was guilty of any laches or negligence. It is a fundamental rule that right to compensation can arise only on proof of rashness and negligence in causing the accident and in absence of the same no such claim can be sustained. We have been taken through the record and the statements recorded by the Claims Tribunal and we find nothing therein as would even suggest that there was any proof of rashness or negligence in driving the offending vehicle which may have caused the accident. This argument is, however, countered by the claimant on the plea that since the owner was not defending the claim and the defences available to the insurer were only confined to those as are mentioned in Section 96(2) the claimant was under a mistaken impression that he was not required to prove negligence on the part of the driver. After hearing the learned counsel for the appellant, we certainly find some force in this submission. On the face of evidence before us, we would have been inclined to dismiss the claim petition but in view of the fact that the claimant may have been under wrong impression in view of the limited pleadings by the Insurance Company that he was not required to prove negligence in this case and that may cause prejudice to the claimant, we are of the opinion that it would be fair to the parties if they are given an opportunity to prove this fact. The Tribunal had failed to frame an issue on the question which has caused this prejudice to the parties. We, therefore, frame the following issue :

"whether the accident was caused due to rash and negligent driving by the driver of the offending vehicle."

15. The above issue is remitted to the Claims Tribunal to decide the same within 3 months of the receipt of record by it after affording an opportunity to the parties to lead fresh evidence on this issue alone. Orders accordingly.