
(1994) 09 AHC CK 0091
In the Allahabad High Court

Oriental Insurance Co.

APPELLANT

Vs

Anita and Others

RESPONDENT

Date of Decision : 12-09-1994

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 170

Citation : (1996) 2 ACC 671

Hon'ble Judges : S.S. Sodhi, C.J.; Sobha Dikshit, J; Brijesh Kumar, J

Bench : Full Bench

Final Decision : Disposed Off

Judgement

S.S. Sodhi, C.J.—The matter here concerns the defences available to an Insurance Company in a claim for compensation arising from a motor accident.

In dealing with the point in issue reference must, at the very outset, be made to the relevant statutory provisions, these being Sections 149 and 170 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") which are reproduced hereunder:

149, Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.—(1) If, after a certificate of insurance has been issued under Sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) is obtained against any person insured 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 this 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.

2. No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle:

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

3. Where any such judgment as is referred to in Sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocation country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in Sub-section (1), as if the judgments were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled

under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in Sub-section (2).

4. Where a certificate of insurance has been issued under Sub-section (3) of Section 147 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 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 147, 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 shall be recoverable by the insurer from that person.

5. If the amount which an 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 this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

6. In this section the expressions "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

7. No insurer to whom the notice referred to in Sub-section (2) or Sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in Sub-section (1) or in such judgment as is referred to in Sub-section (3) otherwise than in the manner provided for in Sub-section (2), or in the corresponding law of the reciprocating country, as the case may be.

Explanation: For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted u/s 165 and "award" means an award made by that Tribunal u/s 168.

170. Impleading insurer in certain cases:

Where in the course of any inquiry, the Claims Tribunal is satisfied that:

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

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

it may, for reasons to be recorded 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, without prejudice to the provisions contained in Sub-section (2) of Section 149, 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.

8. The corresponding provisions, which were in the same terms, under the Motor Vehicles Act, 1939 (for brevity referred to as "the Old Act") were Sections 96 and 110-C(2-A). It may be mentioned here that the said Section 110-C(2-A) was incorporated by the Amendment Act 56 of 1969 with effect from March 2, 1970. This would be relevant to bear in mind when we turn now to what must be taken to be the primary judicial precedent on the subject, namely, the judgment of the Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, , where the issue raised was precisely the one here, namely, the defences open to an insurer. In dealing with the matter it was held "Apart from the statute an insurer has no right to be made a party in the action by the insured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute" and consequently the insurer was held entitled to defend only on the grounds enumerated in Section 96(2) of the Old Act and none else.

9. A similar view is to be discerned in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, , wherewith regard to the rationale for third party insurance, it was said:

...the Legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 96 and by providing that except and save to the extent permitted by Section 96 it will be the obligation of the Insurance Company to satisfy the judgment obtained against the persons insured against third party risks (vide Section 96).

What has followed thereafter is a string of authorities of different High Courts taking the consistent view that the only defences open to an insurer are those, as are available to it, u/s 96(2) of the Old Act (now Section 149 of the Act). To begin with there is the judgment of the Division Bench of this Court in *Om Prakash and Another Vs. Smt. Rukmini Devi and Others*, , next *United India Fire & Genl.*

United India Fire and General Insurance Co. Ltd., Kanpur and Another Vs. Gulab Chandra Gupta, , then *Nachhan and Ors. v. New India Assurance Co. Ltd.* I (1984) ACC 413 and *New India Assurance Co. Ltd. v. Saira II* (1985) ACC 429 . There is then the judgment of the Orissa High Court in *The New India Assurance Co. Ltd. Vs. Sulochana Sahu and Others*, , of the High Court of Kerala in *The New Indian Assurance Co. Ltd. v. Avathan Veettil Ravindranathan II* (1989) ACC 95 ,

that of the Madhya Pradesh High Court in *United India Insurance Co. Ltd. Vs. Ismail and Others*, , of the Madras High Court in *The New India Assurance Co. Limited Vs. D. Kamalam and Others*, and of the High Court of Rajasthan in *United India Insurance Co. Ltd. v. Arjunlal II* (1991) ACC 671 , in *United India Insurance Co. Ltd. Vs. Shivraj and Others*, , in *New India Assurance Co. Ltd. Vs. Lad Kanwar and Others*, and *Narendra Kumar and Another Vs. Vares Hassan Farooqui and Others*, .

10. The discordant note, however, comes from the judgment of this Court in *Oriental Fire and Gen. Ins. Co. Ltd. v. Rajdendra Kaur* (1989) ACJ 961 : I (1989) ACC 103 (DB) Allahabad. There the insured had been proceeded against ex parte before the Tribunal and the award was made only against the insurer. A joint appeal was filed against this award by the insured and the insurer. It was held that the joint appeal was not maintainable and it was consequently treated to be that of the insurer alone. An objection was then raised with regard to the defences open to the insurer. The judgment of the Supreme Court in *Itbar Singh's* case (supra) was cited. Thus, the Division Bench proceeded to distinguish on the ground "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" and it was said, therefore, that the Supreme Court "did not lay down as to what grounds would be available to the insurer in an appeal u/s 110-D." The Court went on to hold that Section 110-D does not limit the grounds on which the insurer can assail the award in appeal and consequently "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." The provisions of Section 110-C(2-A) were also invoked to permit the Insurance Company to take up all defences.

11. A similar conclusion, namely, that the Insurance Company may take up all pleas in appeal, though on some what different reasoning, was arrived at by the Division Bench of the High Court of Gauhati in *Hemendra Dutta Choudhury v. Arun Kumar Bordoloi II* (1988) A.C.J. 813 : I (1989) ACC 86 (DB) Gauhati. There it was held that the owner of the offending vehicle was not a "person aggrieved" as he had not been saddled with any liability. The Insurance Company having been held liable to pay the amount awarded, the owner, it was said, could not, therefore, have any real or genuine grievance. He was thus not entitled to file an appeal against the award of the Tribunal. The judgment of the Supreme court in *Itbar Singh's* case (supra) was consequently distinguished on the ground that the insured was not a party in the appeal. The plea that an appeal was a rehearing of the original petition was also negatived for the same reason, that the insured was not a party to the appeal. The Court then went on to hold that the insurer being a "person aggrieved" could take up all defences.

12. We are constrained, with respect, to hold that the judgment of this Court in *Rajendra Kaur's* case (supra) as also that of the High Court of Gauhati in *Hemendra Dutta Choudhury's* case (supra) do not lay down correct law. It is well

settled that an appeal is a rehearing of the original petition. If this is so, it does not stand to reason that a plea not open before the Tribunal, can be permitted to be taken up in appeal. As for Section 119-D of the Old Act, a plain reading of it would show that what it deals with is the person who can file an appeal and not what pleas can be raised in the appeal. In other words, the fact that an Insurance Company can file an appeal cannot be construed to mean that it can take up any defence other than those available to it u/s 149 of the Act.

13. Further, in so far as the provisions of Section 170 of the Act, or Section 110-C(2-A) of the Old Act, are concerned, they come into play only when the conditions set out therein are satisfied. This provision, at any rate cannot be construed to mean that the restriction on the pleas open to an Insurance Company before the Tribunal, cease to be operative once the matter goes up in appeal. On the face of it, such a contention cannot but be held to be wholly untenable.

14. Turning to Hemendra Dutta Choudhury's case (supra) the view that the owner would not be a "person aggrieved" as he had not been burdened with any liability and could not thus file an appeal, is again one which we cannot, with respect, accept or subscribe to, as the very rationale for the liability of the Insurance Company is founded upon the liability of the owner. It is to discharge this liability that the Insurance Company comes in. In this context, the owner cannot but come within the purview of the expression "person aggrieved". This being so, it takes away the very premise adopted to distinguish Itbar Singh's case (supra) as also to render inapplicable the concept of an appeal being a rehearing of the original petition. Seen in this light, this judicial precedent is clearly of no avail to the Insurance Company.

15. Dissent from Hemendra Dutta Choudhury's case (supra) also comes in the judgment of the High Court of Bombay in Oriental Fire and General Insurance Company Ltd. Vs. Rajranisurendra Kumari Sharma and Others, , it being observed there:

Under Section 110-D there is nothing which indicates that the Insurance Company gets more rights in appeal than the right which it originally possessed. An appeal after all is a rehearing of the original plaint or suit. In appeal the appellant cannot raise defences which were not available to the appellant at the trial stage. The fact that an Insurance Company is a person aggrieved who can file an appeal does not give to the Insurance Company more rights in appeal than it originally possessed. The judgment of the Gauhati High Court is contrary to the decision of the Supreme Court and the decisions of a number of High Courts in different parts of the country. It is true that the Supreme Court in Itbar Singh's Case 65 1958 ACJ 1 (SC), was not dealing with the right of the Insurance Company to raise contentions in an appeal. But Section 110-D does not enlarge in any manner the right to defend given to an Insurance Company u/s 96(2). As the Supreme Court has observed, but for the provisions of the statute, an Insurance Company would not have had any right to appear and be

heard at the trial of any accident claim. The rights of the Insurance Company are governed by statute. Section 110-D does not in any manner enlarge the right of the Insurance Company which is confined within its bounds by Section 96(2).

Keeping in view what has been discussed, there can be no escape from the conclusion that except in a case which falls u/s 170 of the Act and an order is passed thereunder permitting the insurer to contest the claim on all or any of the grounds available to the person against whom the claim has been made, the only defences open to an insurer, both before the Tribunal as also in appeal, are those available to it u/s 149 of the Act. In other words, the insurer cannot challenge the finding of negligence recorded against the driver or owner of the vehicle nor can it question the quantum of compensation awarded to the claimants.

16. We would further add that it is open to the insured too to file an appeal against the award of the Tribunal even though the entire liability for payment of the compensation awarded is fastened upon the insurer.

17. This reference is answered accordingly. This matter is now remitted to the Division Bench for decision on merits.