(1969) 07 MAD CK 0016

In the Madras High Court

Case No : Appeal No. 444 of 1963 and (Jr.) Appeal No''s. 159 and 160 of 1964

Queensland Insurance Co. Ltd. APPELLANT

Vs

Rajalakshmi Ammal and Others RESPONDENT

Date of Decision : 23-07-1969

Acts Referred:

Motor Vehicles Act, 1988 — Section 110A, 95(5), 96, 96(2)
Penal Code, 1860 (IPC) — Section 304A

Citation : (1970) ILR (Mad) 310 : (1970) 83 LW 65

Hon'ble Judges : Sadasivam, J;K.N. Mudaliyar, J

Bench : Division Bench

Advocate : M.P. Subramanian and K.L. Krishnan, for the Appellant; R. Ramamurthy Iyer, R. Srinivasan and T.N.C. Varahan, for the Respondent

Judgement

Sadasivam, J.—The appellant, the Queensland Insurance Co. Ltd., in these appeals, was the second defendant in the three suits, O.S. No.

132 of 1961 filed by Swaminatha Mudliar, O.S. No. 171 of 1962 filed by Lakshmi-kanthamma, wife of the said Swaminatha Mudaliar, and O.S.

No. 84 of 1962 filed by the legal representatives of Sivagnana Thevar, in the Court of the Subordinate Judge of Tiruchirapalli, for damages for rash

and negligent driving of the motor car, MSY 4891, by one Pitchai, who was employed as driver by one N. Radhakrishnan, the then owner of the

car, who was impleaded as the first defendant in all the suits, resulting in a serious accident causing injuries to Swaminatha Mudaliar and his wife,

Lakshmikanthamma, and the death of Sivagnana Thevar. It is not disputed that the driver, PItchai, dozed off while driving the car along

Tiruchirapalli-Turaiyur road and that this resulted in the car swerving from the road and dashing against the culvert near the milestone indicating 17 miles 2 furlongs. The driver of the car was prosecuted u/s 304-A, Indian Penal Code, convicted and sentenced.

2. There is no dispute about the quantum of damages assessed and decreed by the lower court in favour of the plaintiffs in each of the suits. One

M.A.M. Kasi was impleaded as the third defendant in each of the suits, but he was exonerated as he had only taken a hire purchase agreement for

the loan advanced by him to N. Radhakrishnan. A plea was raised in the lower court that it had no jurisdiction to try the suits and that the claims

should have been made before the Tribunal constituted u/s 110-A of the Motor Vehicles Act. But as the accident in this case occurred on

September 9, 1960, that is, prior to the constitution of the claims tribunal under the Motor Vehicles Act, the plea of jurisdiction was not pressed in

the lower court.

3. The appellant-insurance company put forward two contentions, namely, that the insurance policy issued by it to the original owner, T.M.

Radhakrishna Chetty, lapsed on his selling the car and hence the insurance company could not be called upon to indemnify the vicarious liability of

the first defendant, N. Radhakrishnan, for the rash and negligent driving of the driver, Pitchai, and that, even under the terms of the policy, there

could be no liability of the insurance company in view of the fact that the vehicle was hired by N. Radhakrishnan to Swaminatha Mudaliar to attend

a marriage. The learned principal subordinate judge negatived both the pleas of the appellant and decreed the suits against the appellant and the

owner, N. Radhakrishnan.

4. The appellant-company issued the policy, exhibit B-4, to the then owner of the car, A.K. Muthukumaraswamy Chetty, agreeing to indemnify the

insured in respect of his liability to third parties for death or bodily injury caused to persons by rash and negligent driving of the car. But the policy

does not cover the use of the car for hire. The period of the policy was from 18th May, 1959, to 17th May, 1960. Subsequently, A.K.

Muthukumaraswamy Chetty sold the car to T.M. Radhakrishna Chetty on Augusts, 1959, and intimated the same to the appellant, as evidenced

by exhibit B-19. T.M. Radhakrishna Chetty, in his turn, wrote the letter, exhibit B-30, to the appellant and the policy was transferred in his name,

as evidenced by exhibit B-22. Subsequently, T.M. Radhakrishna Chetty renewed the policy for another year from 18th May, 1960, to 17th May,

1961, subject to the conditions of policy already referred to in July, 1960. The first defendant, N. Radhakrishnan, purchased the car from one M.

Rajarathnam Pillai, who had purchased the car from T.M. Radhakrishna Chetty earlier on 23rd June, 1960. But he did not notify the insurance

company, or attempt to get any transfer of the policy in his name. In fact, even his vendor, M. Rajarathnam Pillai, did not notify his purchase of the

car to the appellant-company.

5. As soon as he came to know of the accident, the first defendant, N. Radhakrishnan, sent the telegram, exhibit B-25, to the appellant. The

branch manager of the appellant-company tried unsuccessfully to contact T.M. Radhakrishna Chetty on the phone and subsequently sent the letter,

exhibit B-27. The appellant-compny sent D.W. 3, Saunders, automobile engineer, to inspect the vehicle and make local enquiries. T.M.

Radhakrishna Chetty sent the letter, exhibit B-2B, to the appellant stating that he had sold the car to M. Rajarathnam Pillai even on 23rd June,

1960, and handed over the insurance policy along with the other documents to the buyer and that the entire risk was on the buyer. D.W. 3,

Saunders, contacted the first defendant, N. Radhakrishnan, and learnt from him that he had lent the car on hire to the occupants of the car at the

time of the accident.

6. The learned advocate for the appellant relied on the Bench decision of this court in M. Bhoopathy (Died) and Others Vs. M.S. Vijayalakshmi

and Another, where it has been held, overruling the earlier decision of a single judge in Madras Motor Insurance Co. Ltd., Madras Vs. Mohamed

Mustafa Badsha and Others, that the insurer is not liable to the transferee for damages awarded to a third party for injuries caused by rash and

negligent driving of the car on a date subsequent to the transfer of ownership. Sri R. Ramamurthi Iyer appearing for the respondents-plaintiffs urged

that the Bench decision is only obiter as the policy in that case had expired prior to the date of the accident and an attempt, to renew the policy

was made only a day after the accident. But the principles enunciated in that decision are correct and there is no reason to doubt the same.

7. It is clear from paragraph 855 at page 373 of Chitty on Contracts (volume 2), that a contract of insurance will normally be construed as a

contract of indemnity. It is clear from paragraph 913 of the same volume 2 at page 403 that the main cover will usually be by reference to a

specified car, owned by the policy-holder and the whole policy will then only remain effective while he retains an interest in that car. It is stated that

even if it contains an extension in respect of the use by the policy-holder of any car being used at the time of the accident, "" instead of the insured

car "", this extension will cease to be effective once he has parted with, the car insured. This statement of the law is based on Rogerson v. Scottish

Automobile and General Insurance Co. Ltd., [1931] All E.R. 606 Lord Macmillan has pointed out in the decision that the assured cannot, within

the meaning of the policy, use another car instead of the insured car after he has parted with the property in the insured car. He has observed that if

the assured has parted with the property in the insured car and buys another car, he cannot be said to be using his new purchase instead of the car

he has sold and that he is using the new car in succession to the insured car, not instead of it. It is clear from paragraph 913 of Chitty on Contracts,

volume 2, referred to above, that a complete change of ownership of a vehicle will put an end to the policy. In Peters v. General Accident & Life

Assurance Corporation Ltd., [1937] 4 All E.R, 628 it has been held that when the vendor sold the car, the insurance policy automatically lapsed.

It is clear from the decision that an insurance policy is a contract of personal indemnity and the insurers cannot be compelled to accept

responsibility in respect of a third party who may be quite unknown to them. The following passage at page 634 of the judgment is relevant for the

present discussion ;

I have no doubt, therefore, that you cannot assign a motor policy in the way that it is suggested it was done here. If you sell your car, you cannot,

merely by handing over your car and saying : '' Take this policy and do what you can with it; I assign it to you '', put the underwriters under an

obligation to indemnify the purchaser, when they have agreed only to indemnify the vendor. Consequently, on all grounds here the action, in my

opinion, fails. Sorry as I am for Mr. Peters, he is thus left with an award of damages and costs amounting to some ï¿½ 500, and only somebody

who has not 500s. to proceed against. In this case, I cannot say that the person who injured him was insured. The fact was that he was driving an uninsured car. Whether he knew it or not, I do not know. I should think he probably did know it, inasmuch as his vendor gave him a form to fill in.

However, that is not a matter with which the defendants are concerned. They are quite entitled to say, and do say : '' We know nothing of Mr.

Pope. He is not on our books, and, so far as we are concerned, he is an uninsured person ''.

8. It is clear from the facts of this case that the appellant gave the policy only to T.M. Radhakrishna Chetty agreeing to indemnify him in respect of

any liability that he may incur to third parties by reason of rash or negligent driving of the car. Neither the iirst defendant, N. Radhakrishnan, nor

even the prior owner, M. Rajaratbnam Pillai, made any attempt to get a transfer of the policy. The first defendant, N. Radhakrishnan, did not get a

transfer of the policy in his favour at any time prior to the accident. Even the prior owner, M. Rajarathnam Pillai, did not attempt to get the policy

transferred in his name, though it was handed over to him by the previous owner, T.M. Radhakrishna Chetty, as seen from exhibit B-28. But the

mere handing over of the policy cannot impose any liability on the appellant and this is clear from the passage quoted abeve.

9. It should be noted that the policy issued by the appellant does not specifically provide for transfer, though such transfers are usually done by the

company at the request of the policy-holder on payment of the prescribed fee.

10. Shri R. Ramamurthi Iyer relied on the decision in Bir Singh and Another Vs. Sm. Hashi Rashi Banerjee and Others, where an insurance

company was made liable both on the ground that it had failed to prove that there was a Clause in the policy requiring the insured to obtain the

assent of the insurer of the change of ownership of the vehicle and also on the ground that the insurer failed to prove by producing the necessary

documents that the transfer was notified and recorded by it. The actual decision proceeds on the basis that the insurer kept back the register of

policies, and that it should therefore be presumed that the transfer of ownership had been notified to the insurer and it had admitted the same. It is

clear from the decision that the policy issued to cover third party risks is a policy of indemnity of the person named in the policy. In other words,

the concluding words of Subsection (5) of Section 95 of the Motor Vehicles Act refer to indemnity only of the person or classes of persons specified in the policy and the nature of the policy of guarantee depends upon the terms of the contract read along with the provisions of the Act. It

has been held in the above decision, that if there be in the policy a provision which requires a transfer of ownership of the vehicle to be assented to

by the insurer and only on proof of such a fact the cover will enure to the benefit of the transferee from the owner who had taken out the policy,

such a provision will not militate against any of the existing provisions of the Motor Vehcles Act and that the law does not make any provision to

counteract the effect of such a clause. It has been further held in that decision that if such a restrictive Clause as regards the rights of a transferee

from the previous owner of the motor vehicle is found in a third party insurance policy, and no approval of a transfer is obtained from the insurer

but the motor vehicle is registered by the transport authorities, the result is that the vehicle runs without the cover of a policy. This decision does not

lay down that in the case of policies issued to a particular person containing indemnity Clause in his favour alone and not providing specifically for

transfer with the assent of the insurer, the policies will not lapse by transfer of ownership of the car of the assured. If it purports to lay down such a

principle, it will be clearly wrong.

11. Sri R. Ramamurti Iyer relied on the decision in Vanguard Fire and General Insurance Co. Ltd. Vs. Sarla Devi and Others, and the decision of

the Supreme Court in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, . in support of his contention that an insurer is

entitled to depend only on those grounds mentioned in Sub-section (2) of Section 96 of the Motor Vehicles Act, and no other. It is clear from

Section 95(5) of the Motor Vehicles Act that a person issuing a policy of insurance under the section shall be liable to indemnify the person or

classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of

persons. Section 96 of the Motor Vehicles Act refers to the duty of insurers to satisfy judgments against persons insured in respect of third party

risk. Thus, if the appellant-company had been impleaded as one who had issued an insurance policy to the first defendant in respect of third party

risk, it would be entitled to put forward only the defences mentioned in Section 96(2) of the Act. But the appellant in this case has not issued any such insurance policy to the first defendant and it is certainly open to the appellant-company to plead that it has not issued any policy to cover the

liability of the first defendant, N. Radhakrishnan, and that the policy issued by the company to T.M. Radhakrishna Chetty had lapsed and cannot

be availed of by the first defendant. It follows that the policy issued by the appellant-company to T.M. Radhakrishna Chetty had lapsed and it

cannot be availed of by the first defendant to indemnify the claim made against him by the plaintiffs in these suits.

12. The only other point urged in these appeals is that even under the terms of the policy, the appellant cannot be made liable as the car had been

hired by the first defendant to Swaminatha Mudaliar, who travelled in the car at the time of the accident. The learned subordinate judge did not

accept the plea of the appellant that the first defendant had hired the car to P.W. 2, Swaminatha Mudaliar. It is difficult to expect the appellant to

adduce direct evidence to prove that the first defendant, N. Radhakrishnan, hired the car to Swaminatha Mudaliar. But, in our opinion, the learned

subordinate judge has not given due weight to the admission of the first defendant spoken to by D.W. 3 and the strong pieces of circumstantial

evidence supporting the claim of the appellant. The first defendant, N. Radhakrishnan, admitted in cross-examination that he was a bus conductor

in V.T. Transport, Tiruchi, on a basic salary of Rs. 55 and a monthly allowance of Rs. 35. He does not own any immovable property and he is

residing in his mother''s house. He ceased to be a conductor only six months prior to his giving evidence on December 15, 1962, that is long after

the occurrence in this case. He is employed temporarily to drive cars. According to him, he borrowed Rs. 6,500 from the third defendant, under a

hire-purchase agreement, and with a sum of Rs. 3,000 kept by him purchased a car from M. Rajarathnam Pillai. In respect of the said loan taken

under the hire purchase agreement, he made two payments of Rs. 355 each under exhibits B-1 and B-2 in August and September, 1960. He

claims to have discharged the loan under the hire-purchase agreement by paying Rs. 4,500 by the sale of the car after the accident. He was paying

Rs. 60 per month as salary for the driver of the car. Having regard to the above facts, it is highly probable that he used the car by letting it out for

hire, though he denied the suggestion. He denied the suggestion that he gave the car on hire to P.W. 2. In his chief-examination he stated that as

P.W. 2 was well-known to him, he lent the car and that he did not give it to him for hire or reward. But his plea in his written statement in O.S. No.

84 of 1962 is totally different. In the other two suits he merely pleaded that the lower court had no jurisdiction to try the suit. In his written

statement in O.S. No. 84 of 1962 he has stated that on May 8, 1962, he directed the driver, Pitchai, to take the car to workshop as it was

consuming lot of oil and that the driver unauthorisedly appears to have taken Swaminatha Mudaliar and his family in the car to Thuraiyur and that

on the way the car met with the accident. Thus his plea is that the accident having resulted during a trip undertaken by Pitchai contrary to the

express direction given by him to take the car to the workshop, he cannot be held liable at the instance of Swaminatha Mudaliar or his wife or the

plaintiffs in O.S. No. 84 of 1962.

13. P.W. 2, Swaminatha Mudaliar, the plaintiff in O.S. No. 132 of 1961, on the file of the lower court, has stated in his written statement that he is

the proprietor of Messrs. Peacock & Co., a high class cigar manufactory at Woriyur, that he is a landlord and a honorary magistrate of the town

Bench Court at Tiruchirapalli and the vice-president of the Woriyur Cigar Manufacturers'' Association and a member of the Tamil Chamber of

Commerce, Madras, and that he is an Income Tax assessee. It is difficult to believe that he had freely taken the car from a conductor to attend a

marriage at Thuraiyur, Thus the circumstantial evidence strongly support the claim of the appellant that Swaminatha Mudaliar, the plaintiff in O.S.

No. 132 of 1961, took the car on hire from the first defendant, N. Radha-krishnan, for attending a marriage at Thuraiyur. In fact, there is the

evidence of D.W. 3, Saunders, automobile engineer, deputed by the appellant to make enquiries about the accident, that the first defendant, N.

Radha-krishnan, admitted that he had purchased the car under the hire purchase agreement and that he was hiring out the car arid paying to the

lender in instalments as he was not in affluent circumstances and that he had hired the car to the persons who were occupants of the car at the time

of the accident. It is true D.W. 1, N. Radhakrishnan, was not specifically cross-examined as to whether he made any of the admissions to D.W. 3,

Saunders, as spoken to by the latter. But suggestions have been made to D.W. 1 that he used to let the car on hire and that he gave the car to

Swaminatha Mudaliar for hire. D.W. 3, Saunders, is a respectable witness and we see no reason for not accepting his evidence.

14. Thus, on the admission of the first defendant to D.W. 3, Saunders, and the other pieces of circumstantial evidence referred to above, we have

no hesitation in finding that the first defendant had hired the car, MSY 4891 to Swaminatha Mudaliar, the plaintiff in O.S. No. 132 of 1961, to

enable him to go to Thuraiyur to attend a marriage. Thus, even if the first defendant could claim the benefits under the policy given by the appellant

to the prior owner, T.M. Radhakrishna Chetty, the terms of the policy prohibiting the hiring of the vehicle will disentitle him to any indemnity.

15. In the result, the decree and judgment of the learned principal subordinate judge in so far as it makes the appellant liable for the claims in the

three suits are incorrect and they are set aside and the appeals are allowed with costs. It is needless to state that we do not interfere with the

decree and judgment of the lower court made against the first defendant in all the suits.