

(1985) 01 GUJ CK 0014
In the Gujarat High Court
Case No : First Appeal No. 139 of 1980

Shantilal Mohanlal and Another

APPELLANT

Vs

Aher Bawanji Malde and Others

RESPONDENT

Date of Decision : 31-01-1985

Acts Referred:

Motor Vehicles Act, 1939 — Section 103A, 31, 94, 95(1), 95(5)

Citation : AIR 1985 Guj 164 : (1985) 58 CompCas 717 : (1985) 1 GLR 465

Hon'ble Judges : P.S. Poti, C.J.;G.T. Nanavati, J;C. Bhatt, J

Bench : Full Bench

Advocate : C.K. Takwani, for M.C. Takwani, for the Appellant; B.N. Mehta and B.R. Shah and R.M. Vin, Govt. Pleader, for the Respondent

Judgement

Nanavati, J.—In view of the importance of the question as to whether a transfer of the vehicle by the insured, without intimation to the insurer, relieves the later from its obligation to indemnify against the loss or injury caused by the insured vehicle and the conflicting decisions given by different High Courts, tin Division Bench hearing this appeal felt that the question deserves to be answered by a larger bench. It has, therefore, raised the following question which we are required to answer.

" Whether the insurer is entitled to avoid liability against third party risk on the plea that the insured had sold the vehicle covered by the Insurance Policy before the date of the accident without intimation to the insurer?"

2. Before we proceed to consider the legal position, a few relevant facts may be stated. On 5-3-1978, motor truck bearing registration No. GTG 444 knocked down fatally one Kiritkumar Shantilal who was standing on one side of he road. His parents filed Claim Petition No. 58 of 1978 before the Motor Accidents Claims Tribunal, Jamnagar for recovering Rs. 1,00,000/- as compensation. It was their case that the said truck, at the relevant time, was driven by respondent No. 2 in a rash and negligent manner and as a result thereof it knocked down Kiritkumar who died on the spot. It was also their case that the said vehicle belonged to

respondent No. 1 and was insured with respondent No. 3 company. In his written statement respondent No. 1 denied ownership of the vehicle on the date of the accident and stated that respondent No. 4 was the real owner. It was further averred that the sale made by respondent No. 4 in his favour had not become complete as all the required formalities were not completed. In its written statement respondent No. 3 insurance company denied its liability on the ground that ownership having been transferred by respondent No. 4 to respondent No. 1 on 2-3-1978 without informing it or taking its consent, insurance policy in respect of the said vehicle had lapsed. There was no subsisting contract between it and respondent No. 1. The change was notified to it later on and transfer of the certificate of insurance and the policy, in favour of respondent No. 1, was made effective only from 15-5-1978. Respondent No. 4 denied his liability on the ground that having sold the truck on 2-3-1978, he was no longer the owner thereof. The Tribunal held that respondent No. 1 had become the owner of the vehicle on 2-3-1978; and, therefore, on the date of the accident, the vehicle belonged to him. It, therefore, held respondents Nos. 1, 2 and 5 liable for payment of compensation awarded by it. Respondent No. 5 is the firm of which respondent No. 1 is the partner. %I As regards the liability of the insurance company, the Tribunal held that it was not liable to indemnify respondent No. 1 to whom the vehicle was transferred, as there was no private contract between them and the insurance policy had lapsed upon transfer of the vehicle by respondent No. 4 to respondent No. 1. On these findings, the Tribunal awarded Rs. 36,200/- to the claimants and directed respondents Nos. 1, 2 and 5 to satisfy the said award. The claimants not being satisfied with the award regarding liability of the insurance company and the quantum of compensation have filed this appeal.

3. The Division Bench agreed with the findings regarding negligence and liability of respondents Nos. 1, 2 and 5. As regards the amount of compensation, it found that it was inadequate, and raised it to Rs. 50,000/-. While determining the liability of the insurance company, it considered the view taken by this Court in two earlier cases that a transfer of vehicle in breach of the terms of the policy merely enables the insurance company to avoid its liability, but does not have the effect of cancellation of the policy and therefore, it would not absolve the insurance company from answering the judgment relating to the claim of the third party. It also referred to the decisions of other High Courts wherein similar or contrary view is taken. It then observed that the view taken by this Court "is in consonance with the policy of legislation in its attempt to safeguard the interest of the third party, but at the same time, the approach of the contrary view is also basic to the principles of the law of contract." Feeling the necessity of a clear pronouncement by a larger bench, it has referred to us the above stated question.

4. First contention raised on behalf of the appellants is that while deciding a claim under the Motor Vehicles Act, 1939 (hereinafter referred to as "the Act"), the Tribunal or the Court should proceed on the basis that the insurance policy is

with respect to a particular vehicle and its ownership during the subsistence of the policy is a matter of no relevance or consequence. The learned advocate for the appellants submitted that if the policy is in force on the date of the accident, it does not matter if any transfer of ownership has taken place during the intervening period; and it should not be open to the insurer to get rid of its liability to the third party on that ground. In support of his submission, he first referred to Ss. 42, 94, 123 and 125 of the Act. Section 42 provides that no owner of a transport vehicle shall use or permit the use of the vehicle in any public place, whether or not such vehicle is actually carrying any passenger or goods, save in accordance with the conditions of a permit. Section 123 makes contravention of some of the conditions of permit punishable with imprisonment or fine or both. Section 94 prohibits use by any person of a motor vehicle in a public place unless there is in force in relation to the use of the vehicle by that person a policy of insurance. Explanation to section 94(I) makes driving of a motor vehicle with knowledge or reasonable belief that there is no such policy in force, a contravention of that provision. A breach of this section is also made punishable u/s 125 of the Act. He then invited our attention to the following observations of the Supreme Court in *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, :

"(12) Chapter VIII of the Art, it appears from the heading, makes provision for insurance of the vehicle against third-party risks, that is to say, its provisions ensure that third-parties who suffer on account of the user of the motor vehicle would be able to get damages for injuries suffered and that their ability to get the damages will not be dependent on the financial condition of the driver of the vehicle whose user led to the causing of the injuries. The provisions have to be construed in such a manner as to ensure this object of the enactment.

(13) Section 94 prohibits, as a matter of necessity, for insurance against third-party risk, the use of a motor vehicle by any person unless there exists a policy of insurance in relation to the use of the vehicle by that particular person and the policy of insurance complies with the requirements of Chapter VIII. The policy must, therefore, provide insurance against any liability to third party incurred by that person when using that vehicle. The policy should therefore be with respect to that particular vehicle. It may, however, mention the person specifically or generally by specifying the class to which that person may belong, as it may not be possible to name specifically all the persons who may have to use the vehicle with the permission of the person owning the vehicle and effecting the policy of insurance. The policy of insurance contemplated by S. 94 therefore must be a policy by which a particular car is insured."

5. In our opinion, neither the said sections nor this decision of the Supreme Court support the contention raised by him. The policy of insurance is a result of a contract between the insurer and the insured under which the insurer agrees to indemnify the insured against the liability incurred by him. If it is in respect of a motor vehicle, then in view of subsections (1)(b) and (5) of section 95 of the Act,

it must cover any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place and it must 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. None the less the contract is between the insurer and the insured. The motor vehicle is no doubt the subject-matter of the contract and the liability which is sought to be indemnified is the one arising out of the use of that motor vehicle. Since, still however, it is the person in whose favour the policy is issued is indemnified and not the vehicle. This is the position under the general law and we do not, find anything in sections 94, 95 and 96 which would make the insurer liable to indemnify someone other than the insured. Section 96 which casts a legal duty on the insurer to satisfy judgments restricts it to those judgments which are obtained against persons insured by the policy. Therefore, we do not agree with the contention that the object and the relevant provisions of the Act require us to construe the policy in the manner suggested by him.

6. The observations of the Supreme Court in *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, cannot be read out of context. In that case, a car belonging to S was insured with New Asiatic Insurance Co. Ltd. At the time of the accident it was driven by P along with D and M. D died and M sustained injuries. P also owned a car which was insured with the Indian Trade and General Insurance Co. Ltd. The contention of the New Asiatic Insurance Co. Ltd. before the Supreme Court was that in view of paragraph 4 of P's insurance policy issued by the other insurance company, P was indemnified against any liability incurred by him while personally driving a private motor car not belonging to him and not hired to him under a hire-purchase agreement and, therefore, he was not included among the persons indemnified in para 3 of the policy issued by it to S because of proviso (a) to para 3 which read : "Provided that such driver is not entitled to indemnify under any other policy." Therefore, the question which had arisen in that case was quite different; and it was in the context of those facts that the Supreme Court observed that the policy issued by the appellant company was with respect to that particular vehicle which met with an accident, and not with respect to the persons specified in the policy.

7. The Andhra Pradesh High Court in *Zakaria and Others Vs. Naoshir Cama and Others*, was concerned with a case of succession and not transfer. Moreover, it held that on the death of the insured the rights under the policy, like other properties, devolved on his heirs by operation of law. The judgment was really based upon that finding. However, we would like to observe that we do not agree with the view expressed by the Andhra Pradesh High Court that in view of Ss. 94, 95 and 96 of the Act, the coverage is that of the car and not the insured and, therefore, the liability of the insurer would not cease with the death of the insured if the period of insurance is not over on the date of the accident.

8. For the reasons stated above, we reject the first contention raised on behalf of

the appellants.

9. It was next urged that section 31 of the Act prescribes a special mode of transfer of ownership of a motor vehicle; and, therefore, until all the formalities prescribed therein are complied with there can be no valid transfer. He further submitted that in view of the special provisions contained in the Act, with respect to sale of a motor vehicle, general provisions contained in the Sale of Goods Act would not apply. In support of his contention, he relied upon the decision of the Delhi High Court in *Vimal Rai v. Gurcharan Singh* 1967 Ace CJ 115. He also relied upon the decisions of the Orissa High Court in *Orissa Co-operative Society Ltd. v. Bhagaban Sahu*, 1971 Ace CJ 49, the Rajasthan High Court in *Smt. Padmadevi and Others Vs. Gurbakshsingh and Others*, and *Maina and Others Vs. Niranjana Singh and Others*, and the Delhi High Court in *Bhagwan Dass v. Kasturi Lal* 1974 Ace CJ 64. It is not necessary to deal with all these decisions and those wherein a contrary view has been taken, as the learned advocate for the appellants did not press this point after referring to some of them. We would only point out that the decision of the Delhi High Court in *Vimal Rai's* case was not followed by the Punjab and Haryana High Court in *Pull Bus Service v. Financial Commr.* 1968 Acc CJ 57 and by the Madras High Court in *V. Muthuswami Goundar v. Thulasi Ammal* 1970 Acc CJ 18; *Queensland Ins. Co. v. Rajalakshmi Ammal* 1970 Acc CJ 104 and *The South India Insurance Co., Bombay Vs. Lakshmi and Others*, The Delhi High Court itself reversed that decision in appeal, See *Insurance Company Limited Vs. Vimal Rai and Others*, The Rajasthan High Court in *Bhagwandas Vs. Nasir Mohd.*, and the Bombay High Court in *Gulab Bai Damodar Tapse v. Peter K. Sunder* 1975 Acc CJ 100 have also taken a contrary view. Agreeing with the Bombay High Court and other High Courts which have taken the same view, we hold that the provisions of law applicable to the sale of a motor vehicle are those contained in the Sale of Goods Act. As we do not find any substance in the second contention, the same is rejected.

10. Lastly it was urged by Mr. Takwani that a sale or transfer of the motor vehicle by the insured, even if it is without intimation to the insurer, does not relieve the insurer from its obligation to indemnify the owner against any loss or injury caused by the use of the insured vehicle; and in any case it is not open to the insurer to take up such a defense in view of section 96 (2) of the Act. In support of this contention, he first relied upon the decision of the Madras High Court in *Madras Motor Insurance Co. Ltd., Madras Vs. Mohamed Mustafa Badsha and Others*, , wherein it was held as under :

"Even if the insurer has some ground which would entitle him, as against the insured, to avoid the policy or to have it declared as void, that will not protect the insurer from liability to pay the victim of the accident. The sale of the vehicle by the insured during the currency of the policy will not, therefore, affect the liability of the insurer to the third parties injured by the accident."

That decision, as fairly pointed out by Mr. Takwani, was subsequently overruled by that Court in *M. Bhoopathy (Died) and Others Vs. M.S. Vijayalakshmi and*

Another, .

11. He then relied upon the following observations made by this Court in First Appeal No. 775 of 1970 :

"But the aforesaid General Exception No. 4 does not have the effect of canceling a policy; it had the effect of enabling the insurance company to avoid its liability. A distinction is made between the cancellation of a policy and the avoidance of a liability. The cancellation of a policy is something which is available against a third party, whereas the avoidance of liability is a matter of contract inter se between the parties and it cannot be enforced against a third party. Whereas cancellation of a policy stood on a higher footing on account of the statutory recognition accorded to it, the avoidance of liability under an insurance policy stood on a lower footing inasmuch as it is only a term of the policy enforceable by the insurer against the insured. If the contention based upon Exception 4 was well founded, the Insurance Company could sue the insured for reimbursement but it would not absolve the insurance company from answering the judgment relating to the claim of the third person.

"These observations are, in the first place, obiter dicta, as the Division Bench had already come to the conclusion on facts that the sale as alleged had not taken place on the date of the accident. Secondly, the Division Bench was required to consider only the effect of one of the exceptions contained in the policy. It specifically observed that it was not considering the legal contention that the original insured and the insurer were not liable as the insurable interest of the insured had come to an end, on the date of the accident. Therefore neither that decision nor the decision in First Appeal No. 114 of 1972 wherein the earlier decision was followed can help the appellants.

12. Next case on which reliance was placed is H. G. Ins. The Hindusthan General Insurance Society Ltd. Vs. P.R. Narsa Reddi and Others, . That decision does not contain any independent reasoning. It merely followed the decision of the Madras High Court in Madras Motor Insurance Co. Ltd."s case which came to be overruled by the Madras High Court subsequently in M. Bhoopathy"s case. Moreover, in that case sale was not proved and the finding of the Tribunal on that point was confirmed by the High Court. Therefore, the observations made therein are really obiter dicta.

13. As pointed out earlier, the decision of the Madras High Court in Madras Motor Insurance Co."s case was overruled subsequently by the same Court in M. Bhoopathy"s case (supra). after considering the provisions contained in sections 950)(b) and 96 of the Act, it observed as under :

"Even apart from the statutory provisions a contract of insurance is between the insurer and the insured and its subject-matter is the car specified in it and it is the risks arising out of its use that the insurer undertakes to compensate against. Where such a contract provides for indemnity to the assured against third party risks, the third party, who is a stranger to the contract, cannot

enforce it himself against the insurer. Neither the general principles of law relating to contracts nor the common law give a third party a cause of action against the insurer. If a third party risk arises under the policy, it is entirely a matter between the insurer and the insured governed by the terms of the policy."

"..... In our opinion, there is nothing in S. 96 of the Motor Vehicles Act which warrants a view that a sale or transfer of an insured car by the insured during the currency of the policy does not terminate the policy. Outside the statutory provision, when the motor car specified in the policy is the very subject matter of the insurance, with its disappearance on the insured parting with it by sale or transfer of ownership the policy must necessarily lapse."

"After the insured has parted with his car, he has no longer any insurable interest to which the policy in his favour can relate and continue to have force. The basis of the contract of insurance is affected but also the specified car to which the indemnity relates, as will be clear from the details required of the car which are set out in the schedule to the policy. It is with reference to those details and the history of the vehicle and its owner including claims or no claims, the premium payable on the insurance is determined and the contract is formed. It follows, therefore, that in the absence of an express stipulation to the contrary in the policy, the moment the insured parts with his car, the policy relating to it lapses, because as we said, the car is the subject-matter of insurance, or the very foundation of the contract of insurance."

In coming to this conclusion, the Madras High Court relied upon some English decisions and the decision of the Punjab High Court in *Des Raj v. Concord of India Insurance Co.* AIR 1951 Punj 114.

14. Same view has been taken by the Jammu and Kashmir High Court in *Rosanna Bhalla v. Sudeshkumar* 1968 Ace CJ 63 : (AIR 1968 J & K 2) by the Madras High Court in *Queensland Ins. Co. v. RajalakshmiAmmal* 1970 Ace CJ 104, by the Punjab High Court in *Himachal Govt. Transport v. Joginder Singh* 1970 Ace CJ 37, by the Delhi High Court in *Insurance Company Limited Vs. Vimal Rai and Others*, , by the Orissa High Court in *The South India Insurance Co. Ltd. Vs. Purna Chandra Misra and Others*, and by the Andhra Pradesh High Court in *Ind. Mutual Ins. Co. v. Vijaya Ramulu* 1978 Ace CJ 366.

15. A Division Bench of the Bombay High Court has also considered this question exhaustively in *Gulab Bai Damodar Tapse v. Peter K. Sunder* 1975 Ace CJ 100 and held that there is no provision in the Motor Vehicles Act which would support the contention that even if the insured transfers a vehicle, the insurance company continues to remain liable. Kerala High Court in *National Insurance Co. Ltd. Vs. Thekkeyil Rajan and Others*, had also to deal with the case where the accident had happened subsequent to the transfer of ownership of the motor vehicle. The question which had arisen for its consideration was whether the policy lapsed on the transfer of the vehicle and the insurance company was discharged from its liability. Kerala High Court held that on transfer of the

vehicle, the policy lapsed and the insurance company was discharged from its liability. It pointed out that under the insurance policy, what the insurance company had undertaken was to indemnify the insured, inter alia, "against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place." The contract of insurance is a contract of personal indemnity and, therefore, the insured cannot transfer -the benefits under a policy so long as such benefits are contingent. In short an insurance policy cannot be transferred by the insured without the consent of the insurer. It also pointed out that on the insurer agreeing to such a transfer there is a novation of the contract by which the original assured is substituted by the new assured, the transferee to whom the policy has been transferred Kerala High Court also considered the effect of section 103A of the Act and pointed out that it does not go the whole way and still something more is required to be done by the legislature if the insurer is to be made liable even after a transfer of the vehicle.

16. We are in respectful agreement with the view expressed by the Division Bench of the Madras High Court in M. Bhoopathy's case (supra), and other High Courts which have taken the same view. We hold that the policy lapses on a sale or transfer of the insured vehicle and the liability of the insurer ceases unless there is an express stipulation to the contrary in the policy or the benefit conferred by section 103A of the Act is available.

17. On the question as to whether such a defense can be taken by the insurer or not, our attention was invited to the following observations of the Supreme Court in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, :

"(5) To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of section " % 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. The question then really is, what are the defences that sub-section (2) makes available to an insurer? That clearly is a question of interpretation of the sub-section.

(6) Now the language of sub-section (2) seems to us to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action has been given "shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely", after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defense have been specified, they cannot be added to. To do that would be adding words to the statute."

18. The above observations were made by the Supreme Court in the context of a subsisting policy, between the insurer and the insured. Obviously, so long as the policy subsists, it cannot be permitted to raise defences other than those which are specified in sub-section (2) of section % of the Act. We do not think that the Supreme Court intended to lay down such a wide proposition as canvassed by the appellants. We fail to appreciate why the insurer cannot take up a defense that it had not at all entered into any contract of insurance with the person who is said to have been insured and that the policy of insurance is not a genuine one. There can be other defences. Thus, there is no substance in this contention also and it must be rejected.

19. In this case, the original insured had transferred the ownership of the motor truck on 2-3-1978 without the consent of the insurance company or without even informing it. The change was notified to it later on and the policy in favour of respondent No. I had become effective only from 15-5-1978. There being no subsisting contract between the insurance company and the transferee, the insurance company was not liable to indemnify the transferee and, therefore, the claimants are not entitled to recover any compensation from the insurance company. The finding recorded by the Tribunal in this behalf is, therefore, correct; and we confirm it. That is our answer to the question referred to us by the Division Bench. The matter will now go back to the Division Bench for finally disposing of the same.

20. Answer accordingly.