

(1960) 01 MP CK 0015
In the Madhya Pradesh High Court
Case No : First Appeal No. 146 of 1956

The British India General Insurance Co. Ltd.	APPELLANT
Vs	
Seth Ramnath and Others	RESPONDENT

Date of Decision : 14-01-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33, 35
Motor Vehicles Act, 1939 — Section 95(5), 96(2), 96(6)

Citation : AIR 1962 MP 368 : (1960) ILR (MP) 88 : (1962) JLJ 1129 : (1962) 7 MPLJ 559

Hon'ble Judges : N.M. Golvalker, J;K.L. Pandey, J

Bench : Division Bench

Advocate : R.K. Thakur, for the Appellant; V.K. Sanghi and G.L. Phadke for Respondent No. 1, A.P. Sen and R.P. Verma, for the Respondent

Judgement

Pandey, J.

This appeal arises out of an action for damages amounting to Rs. 30,000/- for personal injuries sustained by the plaintiff as well as for the injury caused to this motor bicycle No. CPB 1114 in consequence of rash and negligent driving by the defendant 2 of a station wagon No. CPJ 1585 belonging to the defendant 1, who had insured it with the defendant 3 against third party risks. The lower Court accepted the claim in part and passed a decree for Rs. 15,250/- against the defendants 2 and 3. The defendant 3 has filed this appeal challenging the decree passed against it. The plaintiff has also filed Civil Appeal No. 192 of 1956 for being relieved of the liability to pay costs Rs. 811/11/- to the defendant 1 and a cross-objection claiming the amount disallowed by the lower Court namely Rs. 14,750/-. He has relied upon Order 41, Rule 33, Civil Procedure Code, for securing a decree for the full claim against the defendant 1. This Judgment will govern the two appeals and the cross-objection.

2 The plaintiff's case, briefly stated, was this. At about mid-day on 11th September, 1951, while the plaintiff was travelling on his motor bicycle towards

the east along the correct side of the main east-west road from the Civil Court at Seoni to the Seoni town, the defendant 2, who was driving the Station wagon belonging to the defendant 1 from the opposite direction, took at the crossing near the Tahsil office a sharp and sudden north-ward turn towards that office. In driving the station wagon in the manner he did, the defendant 2 acted rashly and negligently in that, while the station wagon was moving at a great speed, he took a sharp and sudden turn from the wrong side of the road without giving any warning. The consequence was that the station wagon dashed against the plaintiff's motor bicycle, which was thereby thrown away. The plaintiff also was thrown off and he sustained a compound fracture in his right leg. Despite repeated operations, the fractured bone did not unite even till the date of the suit and it was feared that the plaintiff might be permanently deprived of the usual use of his right leg. Accordingly he claimed Rs. 30,000/- out of the damages detailed as follows:

(i)

Rs. 12,093-9-0

on account of expenses of medical treatment detailed in schedule A.

(ii)

Rs. 10,000-0-0

on account of loss of business.

(iii)

Rs. 15,000-0-0

on account of permanent injury to the right leg, mental shock and bodily pain.

(iv)

Rs. 250-0-0

on account of damage caused to the motor bicycle.

3 According to the plaintiff, the defendant 2 was also liable for the claim because he was driving the station wagon with the permission and authority of the defendant 1 and the injuries were caused to the plaintiff while the defendant 2 was acting within the scope of his authority. The defendant 3 was impleaded in order to remove all doubts about the extent of, and the circumstances relating to, its liability for the claim.

4 The defendants 1 and 2 denied that, at the material time, the defendant 2 was driving the station wagon rashly or negligently in the manner alleged or that. It dashed against the plaintiff's: motor bicycle or that the plaintiff sustained injuries in consequence. According to them, the plaintiff himself drove his motor bicycle rashly and negligently and dashed against the station wagon. The

defendant 2 particularly pleaded that, while he was taking the station wagon along the road towards the north, which "branched off from the main east-west road, the plaintiff, who had swerved his motor bicycle to his extreme left of the main east-west road and speeded it in order to save a passer-by, dashed against the station wagon in an endeavour to pass it from the front side and, going further, dashed against a chabutara. Since the plaintiff himself was responsible for the collision which took place, he was disentitled to recover any damages. In any event, his claim must fail for the reason that he himself had contributed materially to the circumstances which Drought about the violent impact, while the defendants 1 and 2 pleaded that, in the event of the claim for damages being accepted, the defendant 3 as insurer would be responsible, they disclaimed their own liability and denied the damages particularised in the plaint.

The defendant 1 also averred that he agreed in November 1950 to sell his station wagon to the defendant 2 and delivered possession of the vehicle to him on condition that, upon payment of the full price, the vehicle would be sold to him. Since the defendant 2 was a qualified and experienced driver, the station wagon was thus lent to him for his own purposes. That being so, the defendant 2 was, at the material time, acting on his own for his own purposes and was not acting under the permission, authority or control of the defendant 1, who was therefore not at all liable in damages for the incident.

The defendant 3, while contesting the claim on merits, pleaded inter alia that, in November 1950, the defendant 1 actually transferred the station wagon to the defendant 2 who was, at the material time, driving the vehicle as its owner. According to the defendant 3, this fact by itself excluded its liability. Further, when the defendant 1 renewed the policy for 1951-52, he had not only no insurable interest but he also obtained renewal by falsely representing that he was the owner and by suppressing the fact that he had transferred ownership and possession of the vehicle to the defendant 2. Therefore, the insurance policy and the renewal were void and the defendant 3 was free from all responsibility under the insurance contract.

The lower Court held that the defendant 2 drove the station wagon rashly and negligently and dashed against the plaintiffs motor bicycle with the consequence that the plaintiff sustained inju"ries and his motor bicycle was damaged. It was also found that the insurance policy was not void and continued to subsist because the defendant 1, who had not transferred the ownership of the vehicle and who was also an unpaid vendor, had an insurable interest. [However, while the defendant 1 was wholly exonerated from all liability, a decree was passed against the defendants 2 and 3 for damages assessed at Rs. 15,250/-.

In regard to the appeal filed by the plaintiff, which relates to costs awarded to the successful defendant 1, we are asked to substitute our own discretion for that of the lower Court. As provided by section 35 of the Code of Civil Procedure, costs are in the discretion of the Court. In the special circumstances of this case, the plaintiff sought to make the defendant 1 liable because it was alleged that,

with his permission and authority, and within the scope of such authority, the defendant 2 was driving the station wagon at the material time. This plea was covered by an issue which was decided against the plaintiff. There is no question that, in the circumstances of this case, the defendant 1, is not answerable for the tortious acts of the defendant 2, who was at the material time acting on his own for his own purposes. That being so, the lower Court properly exercised its discretion in awarding to the defendant 1 his costs of the suit.

We have next to consider the cross-objection filed by the plaintiff against the 3 defendants. Since only the defendant 3 has appealed, the question is whether the cross-objection against the other two defendants, who are co-respondents, is competent. It is now well settled that the right of the respondent to urge a cross-objection is generally limited to his urging it against the appellant: *Chandiprasad v. Jugul Kishore* ILR (1948) Nag 340 : (AIR 1948 Nag 377). The contrary view taken in *Munisamy (Mudaly v. Abbu Reddy)* ILR 38 Mad 705 : (AIR 1915 Mad 648 (FB)), has been overruled in *Venkateswarlu v. Ramamma*, ILR 1950 Mad 874 : (AIR 1950 Mad 379) (FB). The consensus of judicial opinion is that, generally speaking, a cross-objection is not maintainable against a co-respondent. It was not argued before us that there were exceptional circumstances for holding the cross-objection to be maintainable and all that was urged was that the claim against the defendant 1 should, in the interests of justice, be considered under Order 41, Rule 33, Civil Procedure Code. We would presently deal with that aspect of the case. In our view, the cross-objection, in so far as it is directed against the non-appealing defendants 1 and 2, is incompetent.

The principle generally applicable is that a decree binds the parties unless, in appropriate proceedings, it is set aside or modified. A party desiring to have the decree modified must file an appeal or cross-objection where permissible. It follows that, generally speaking, the appeal Court should not reverse or vary a decree in favour of a party who has not appealed. It is true that in exceptional cases Order 41, Rule 33, Civil Procedure Code, enables the Court to pass such a decree as ought to have been passed or as the nature of the case requires even in favour of a party who has not appealed. But this is restricted to cases where, as a result of interference in favour of the appellant, further interference is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. In *Wist. Beni Begam v. Nathmal*, First Appeal No. 18 of 1939, D/-17-9-1946, Bose and Sen, JJ. observed:

"The cases cited in Mulla's Civil Procedure Code, 11th Edn., pages 1199, 1200 and 1201 show that though the rule is widely expressed the discretion it confers must be exercised with caution and only in cases where the ends of justice would otherwise be defeated. Now, the ends of justice do not, in our opinion, require a Court to deprive a party of a valuable right which he has obtained against an opponent who has not appealed within limitation. The rule can only come into operation where it would otherwise be impossible to give a party who has

appealed the relief to which he is entitled and which he has claimed. Cases sometimes arise where adequate and proper relief cannot be given to a party who has appealed unless the decree of the lower Court against some other party who has not appealed is suitably modified. Then only does the power conferred by Order 41, Rule 33, Civil Procedure Code, come into play."

In the instant case, in our opinion, there is no scope for invoking the power conferred by the rule. The plaintiff contends that, although he has not appealed, the appeal filed by the defendant 3 should be dismissed and, in order to sustain the decree already passed against the defendant 3, a decree should also be passed against the defendant 1. It is now well settled that where there is no interference in favour of the appellant, the decree already passed should not be reversed or modified. We are of the view that, even if we allow the appeal of the defendant 3, interference against the defendant 1 is, in the circumstances of this case, not necessary. The plaintiff has also not satisfied us that he had any reason for not filing an appeal against the defendant 1 in regard to the claim which was dismissed against him. On the other hand, although the plaintiff did file an appeal against the Defendant 1, he intentionally relinquished all claims except in regard to costs which were awarded to that defendant. In the circumstances, we are of opinion that, in this case, the power under Rule 33 *ibid* should not be used to modify the lower Court's decree against the defendant 1.

In regard to the appeal filed by the defendant 3, its scope is clearly restricted to the grounds mentioned in Sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 (IV of 1939). This is made clear beyond doubt by Sub-section (6) of that section, in this connexion, we may also refer to the latest decision of the Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, .

The liability of the defendant 3 under the policy of insurance is provided in Sub-section (5) of Section 95 of the Motor Vehicles Act, 1939, which reads as follows:--

"Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes or person 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 person."

It is manifest that the obligation is to indemnify the Insured person against any liability which the policy purports to cover. It is for this reason that, when certain conditions are satisfied, the insurer has to satisfy as provided in Section 96 of the Motor Vehicles Act, 1939, judgments obtained against the insured person in respect of third party risks.

The relevant provisions of the insurance policy Ex. 1-D-3 are these:

"Subject to the Limit of Liability the Company will indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle in a

public place against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of death of or bodily injury to any person.

The Company will pay all costs and expenses incurred with its written consent.

In terms of and subject to the limitations of this policy the Company will indemnify any Driver who is driving the Motor Vehicle on the Insured's order or with his permission provided that such Driver:--

(a) is not entitled to indemnify under any other policy.

(b) Shall as though he were the Insured observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply."

Since the insured, that is, the defendant 1, has been exonerated from liability and the decree of the lower Court to that effect has become final, the appealing insurance company, whose liability does not extend beyond that of the insured, is also not liable to compensate the plaintiff for the injuries sustained by him. In this connection, we may refer to *Neptune Insurance Co. Ltd. v. Lakhiram*, First Appeal No. 17 of 1951, D/- 20-8-1957 (MP), where Sen and Shrivastava JJ. took a similar view.

It was urged that the defendant 2 should be regarded as "a Driver who was driving the motor vehicle on the Insured's order or with his permission". The facts found, which are not disputed before us, are these, in November 1950, the defendant 1 agreed to sell His station wagon to the defendant 2 who made part payment of the price and took possession of the vehicle. It was also agreed between them that, upon payment of the price remaining unpaid, in 4 or 6 months, the registration certificate would be transferred to the defendant 2. In view of the agreement, the registration of the station wagon continued to be in the name of the defendant 1, who, without disclosing the bargain he had made or the possession of the vehicle he had transferred to the defendant, secured for the year 1951-52 renewal of the insurance policy. On his part, defendant 2 started using the vehicle as his own for his own purposes without any reference to the defendant 1. Thus the defendant 2 made changes in the body of the vehicle. When it was damaged by one Gopikishan, the defendant 2 received the compensation paid for it and appropriated it to himself (Ex. 3-D-4). He used it for taking friends to Nagpur for a cinema show, for carrying members of a marriage party to Betul and also during the general election of 1951, all without inference to the defendant 1. Since property in the goods passes at such time as the parties to the contract intend it to be transferred and the parties here appear to have intended that it should pass only on payment of the full price, we agree with the lower Court that, at the material time, title to the vehicle resided in the defendant 1.

Even so, it is manifest from the evidence and the circumstances of the case that, after November 1950, the defendant 2 was using the vehicle in any manner he

liked for his own purposes without reference to the defendant 1. We are of the view that the expression "a Driver who was driving the motor vehicle on the Insured's order or with his permission" covers cases where the owner of the vehicle retains dominion over it and has a right to control its movements. It does not include a case like the one here. That being so, the defendant 2 was not, in our opinion, merely a driver driving the motor vehicle on the order or with the permission of the defendant 1. He did so as the purchaser of the vehicle of which he had obtained possession by paying the price in part. Consequently the policy did not cover the risk of use of the vehicle made by him in the manner disclosed above.

We also think that the defendant 3 is entitled to disown liability on account of the failure of the defendant 1 to disclose a material fact at the time when he secured renewal of the insurance policy from 15 June 1951 to 14 June 1952. Here the person insured was the defendant 1 and the contract was one of personal indemnity to that defendant. If he dealt with the vehicle as he did in this case and had thereby virtually constituted the defendant 2 as its owner, that was a material fact which he must have disclosed to the insurance company. The Company always want to know the previous driving history of the proposer to decide whether they would take him and, if so, at what premium. It may be that if he had a bad driving record, they may not accept him at all. It is true that when they insure a particular person, they also extend the insurance to any driver, driving the vehicle on the order or permission of such person and thereby take the risk of entrustment of the vehicle even to a reckless person. It would however appear that they trust the insured person himself to exercise reasonable care and decide whom to entrust his vehicle. The point we wish to lay stress upon is that, in a situation like this, the defendant 1 had to disclose the contract of sale of the vehicle he had made and the further fact that, in pursuance thereof, he had parted with possession of the vehicle to be used, without reference to him, by the defendant 2 in any manner he liked. In our opinion, by reason of nondisclosure of this material fact, the defendant 3 is entitled to avoid the contract of insurance and disclaim liability thereunder.

16-24. In the view that we have taken of this case, it is not necessary for us to consider the other points involved in the case. Even so, we propose to do so in order to complete the record. We have carefully considered the question whether, on the material occasion, the defendant 2 drove the station wagon rashly or negligently. In our opinion, the lower Court's finding, based as it is on the evidence of the plaintiff and his witnesses and reached in disregard of certain obvious facts, is clearly wrong,

(After discussion of evidence His Lordship proceeded).

Looking to the manner in which the plaintiff drove his motor bicycle, the route that he took, the place at which he hired the station wagon, and all other circumstances of the case, we are clearly of opinion that he was rash and negligent in driving his vehicle and therefore he alone must be regarded as

responsible for the misfortune. We also hold that the defendant 2 was neither rash nor negligent in driving the station wagon and he is not liable in damages either for the personal injuries sustained by the plaintiff or for the injury caused to his motor bicycle.

Having regard to the view we have taken in the last paragraph, the claim for damages is not sustainable even against the defendant 2. However, since he has not appealed, the power of this Court under Order 41, Rule 33, Civil Procedure Code, should not be exercised in his "favour.

From what we have said in paragraph 11 above, the defendant 3 can challenge the lower Court's decree only on the grounds mentioned in Section 96(2) of the Motor Vehicles Act. It is not open to it to question the damages awarded as excessive. At the same time, the plaintiff is entitled to press his cross-objection for the full claim against the appealing defendant 3. In the circumstances, the question which survives for consideration is whether the claim for damages in excess of Rs. 15,250/- is well founded.

The lower Court has allowed the following amounts:

- (i) Rs. 250/- on account of the injury to the plaintiff's motor bicycle.
- (ii) Rs. 5000/- on account of expenses for medical treatment.
- (iii) Rs. 3000/- for loss of business.
- (iv) Rs. 7000/- for mental shock, bodily pain and permanent injury to the right leg. Only the last 3 items have been questioned in the plaintiff's cross-objection.

It is accepted that, as a consequence of the collision, the plaintiff sustained a compound fracture of the right tibia. The plaintiff proceeded to Nagpur and his fractured bone was set by Dr. Shrinivasan and put under plaster. It would, however, appear that the operation at Nagpur was not sufficiently skilful and the plaintiff was required to go to Dr. Chari of Jabalpur, who again performed an operation, set the bone and put it under plaster. Even this did not cure the defect, though the plaintiff started walking with the help of crutches, then, in 1952, he went to Miraj and was freshly operated upon. He revisited Miraj 3 times more and Dr. Fletcher had to do bone grafting. Thus the prolonged treatment continued from September 1951 to January 1954. A simple operation for setting the tibia, if properly and skilfully performed, was all that was required. The necessity of repeated operations does indicate want of care. Another such indication is that the wound became septic. Finally, as pointed out by the lower Court, the plaintiff's own carelessness delayed his recovery,

For all these reasons, the plaintiff is not entitled to get all the expenses he claimed to have incurred for his medical treatment. It would also appear that whenever he went out for treatment, he took with him a large retinue of attendants and he has claimed the expenses of all those attendants. The lower Court itself disallowed a part of these expenses as being unreasonable. We also

think that the plaintiff's normal boarding charges have to be excluded. In this view, we consider that even Rs. 5,000/- allowed for medical expenses is excessive. That being so, there can be no question of allowing on this account any expenses over and above Rs. 5,000/-.

Damages in the shape of loss of business had to be proved before they could be allowed. In view of the lower Court's finding that it could not be said what loss was actually suffered owing to the plaintiff's inability to attend to his business, damages should not have been awarded on this account. The declining taxable income as evidenced by the assessment orders of the Income Tax authorities were indicative of a slump in the hemp business. In our view, the plaintiff is disentitled to any damages on account of loss of business.

We also consider that, in the circumstances of this case the general damages allowed, namely Rs. 7,000/-are excessive. We cannot help feeling that the plaintiff has grossly exaggerated the damages with the object of securing as large an amount as possible. In the result, our conclusion is that the plaintiff is not at all entitled to any damages over and above Rs. 15,250/-.

This appeal (146 of 1956) succeeds and is allowed. The other appeal (192 of 1956) and the plaintiff's cross-objections fail and are dismissed. The decree of the lower Court, in so far as it affects the defendant 3, is set aside. The plaintiff shall pay to the defendant 1 his costs of First Appeal No. 192 of 1956 and of the cross-objection. The plaintiff shall also pay to the defendant 3 his costs of the lower Court, the costs of First Appeal No. 146 of 1956 and of the cross-objection. Other costs of the lower Court as ordered by that Court and of this Court as incurred. Counsel's fee in the two appeals and the cross-objection according to schedule.