

(1985) 07 CAL CK 0030
In the Calcutta High Court
Case No : A.F.O.O. No. 556 of 1972

The Commonwealth Assurance Co. Ltd.	APPELLANT
Vs	
Sm. Nilima Sarkar and Another	RESPONDENT

Date of Decision : 23-07-1985

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(2)

Citation : AIR 1986 Cal 254 : (1987) 62 CompCas 5 : 89 CWN 1083

Hon'ble Judges : Paritosh Kumar Mukherjee, J;M.M. Dutt, J

Bench : Division Bench

Advocate : Kedar Nath Sen, for the Appellant; Kalidas Basu and Nandalal Shaw, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—This appeal is at the instance of the New India Assurance Co. Ltd. and directed against the award dated January 15, 1972 of the Motor Accidents Claims Tribunal.

2. The respondent Sm. Nilima Sarkar filed three applications u/s 110A of the Motor Vehicles Act, 1939, hereinafter referred to as the Act, praying for an award of compensation for herself, her husband and her son. Her case was that her husband, late Sukumar Sarkar, was at the relevant time an Assistant Commissioner of Commercial Taxes, Singbhum Circle, Jamshedpur--under the Government of Bihar. He came to Calcutta along with his wife, the respondent and his children by road in his private Ambassador car during Christmas holidays. After spending the holidays, he was going back to Jamshedpur by road in the same car. Shorn of other details, it may be stated that when his car reached Samudrapur, a place within 10 miles off Kharagpur, along the Bombay Road, it came face to face with a Truck (WGB 1760) from the opposite direction which managed to escape a serious accident with Mr. Sarkar's Ambassador car excepting that the front side of the car touched or grazed the backside of the truck. The said truck was towing a tar-boiler connected to it with a piece of rope.

Due to the short impact between the truck and the car, the piece of rope gave way, thereby separating the offending car from the tar-boiler. As a result, the tar-boiler changed its direction by its own inertia and made a serious impact on the front portion of Mr. Sarkar's car, practically a head-on collision, giving rise to the most grievous accident on the 1st day of January. 1969. The respondent, Sm. Nilima Sarkar, the wife of the said Sukumar Sarkar, received serious injuries, while her husband, the said Sukumar Sarkar and her 12 year old son, a promising boy of an English School at Jamshedpur, named Subrata Sarkar, died soon after the accident on the same day. The three victims of the accident were removed to Midnapur Sadar Hospital, about 8/9 miles away, by an Ambulance and with the help of an Advocate, Mr. Sunil Kumar Sen, who per chance had been proceeding along the Bombay Road in his own car at a little distance away following the car of Mr. Sarkar.

3. The respondent had eventually survived the accident although she had to be treated for a long time for the serious injuries sustained by her. She claimed that her husband who died by the accident was due for promotion to the post of Deputy Commissioner of Commercial Taxes, and that he died at the age of 48 years, thereby suffering loss of 10 years of valuable service under the Government. She also claimed that her son, Subrata, aged about 12 years, who also died by the same accident, was a promising boy of an English School at Jamshedpur. In the three applications, she claimed compensation of Rs. 10,000/- for herself, Rs. 2,00,000/- for her deceased husband, and Rs. 50,000/- for her deceased 12 year old son, Subrata.

4. The learned Tribunal after considering the facts and circumstances of the case and evidence on record overruled the contentions of the appellant that the applications were not maintainable, and that the same were barred by limitation. The learned Tribunal found that the accident complained of resulted from the rash and negligent driving of the offending car towing the tar-boiler. The learned Tribunal directed that the respondent Mrs. Nilima Sarkar was entitled to a sum of Rs. 2,500/- on account of herself, Rs. 60,000/- and Rs. 5,000/- respectively for her deceased husband and 12 year old son, that is to say, she was entitled to a total sum of Rs. 67,500/-. Further, it was directed by the Tribunal that of the said sum of Rs. 67,500/- the appellant, the New India Assurance Co. Ltd., will pay Rs. 62,500/- and the owner of the truck, Bidhu Bhusan Saraswati, will pay a sum of Rs. 5,000/- to the respondent. An award was made, accordingly, by the learned Tribunal. Hence this appeal.

5. The only point that has been urged in this appeal on behalf of the appellant, the New India Assurance Co. Ltd., is that the liability of the appellant, the insurer, could not under any circumstance exceed the sum of Rs. 20,000/- in view of Sub-section (2)(a) of Section 95 of the Act before it was amended on March 2, 1970. Under Sub-section (2)(a) of Section 95, before it was amended, the liability of the insurer was fixed at Rs. 20,000/-. By virtue of the amendment of Sub-section (2)(a) of Section 95, the liability of the insurer had been raised to Rs. 50,000/-.

It is submitted on, behalf of the appellant that as the accident had happened before Sub-section (2)(a) amended, the limit of the liability of the appellant was Rs. 20,000/-

6. In support of the said contention, the learned counsel appearing on behalf of the appellant has placed reliance upon a decision of the Supreme Court in Padma Srinivasan Vs. Premier Insurance Company Limited, . In that case, it has been laid down by the Supreme Court that since the liability of the insurer to pay a claim under a motor-accident policy arises on the occurrence of the accident and not until then, one must necessarily have regard to the state of the law obtaining at the time of the accident for determining the extent of the insurer's liability under a statutory policy. Accordingly, in the instant case, it is urged on behalf of the appellant that the learned Tribunal was not at all justified in awarding a total sum of Rs. 62,500/- against the appellant in violation of the provision of Sub-section (2)(a) of Section 95 of the Act as it stood on the date of the accident.

7. On the other hand, it is contended on behalf of the claimant respondent that section 95(2)(a) has fixed the minimum liability of the insurer. Such liability can be enhanced by mutual agreement in the policy of insurance". It is submitted that as the appellant had not proved by the production of the policy that the liability of the appellant was not enhanced beyond what is provided in Sub-section (2)(a) of Section 95 of the Act, the contention of the appellant is without any substance.

8. It is not in dispute that the insurance policy has not been filed by either party before the Tribunal, nor has the appellant taken any steps to file an application under Order 41, Rule 27 of the CPC praying for adducing by way of additional evidence the policy of insurance. We are unable to accept the contention of the learned Counsel for the appellant that Sub-section(2)(a) of Section 95 lays down the maximum liability of the insurer. There can be no doubt that in the absence of any contract to the contrary, the liability of the insurer will be that as provided for in Subsection (2)(a) of Section 95. But it cannot be said that the liability of the insurer cannot be increased by mutual agreement and embodied in the policy of insurance. In Sheikhpura Transport Co. Ltd. Vs. Northern India Transport Insurance Co., , Hegde J. who delivered the judgment of the Court observed as follows :

"In the present case we are dealing with a vehicle in which more than six passengers were allowed to be carried. Hence the maximum liability imposed u/s 95(2) on the insurer is Rs. 2,000/- per passenger though the total liability may go up to Rs. 20,000/-. This is also the view taken by the High Court, The limit of insurer prescribed u/s 95(2)(b) of the Motor Vehicles Act can be enhanced by any contract to the contrary."

Thus it is clear from the above observation of the Supreme court that the limit of the liability as specified in Section 95(2) can be enhanced by a contract to the contrary.

9. A Division Bench of the Allahabad High Court in *National Insurance Co. Ltd. Vs. Narendra Kumar and Others*, has taken the same view. It has been observed in that case that where there is a contract to the contrary and the Insurance Company has insured the owner of the vehicle for a higher amount of policy than one prescribed by Section 95(2)(a), the liability of the Insurance Company will extend to the higher limit contained in the policy. Further, it has been held in that case that where the claimant claimed by way of compensation an amount larger than the amount prescribed under the Act against the insurer, the insured and the driver, but the Insurance Company failed to disclose the amount of insurance policy and bring on record the policy, it would not be possible to presume the absence of any contract to the contrary so as to limit a liability of the insurer to that prescribed by the provision of Section 95(2)(a). A similar view has been taken by a learned single Judge of Delhi High Court in *Satya Wati Pathak Vs. Hari Ram and Others*, .

10. It has been stated already that the appellant had failed to bring on record in the Tribunal below or in this Court, the insurance policy. We respectfully agree with the view expressed in the *National Insurance Co. Ltd. (AIR 1980 All 377)* (supra) and *Satya Wati Pathak Vs. Hari Ram and Others*, that it is not possible to presume the absence of any contract to the contrary where the insurer has not placed on record the policy of insurance.

11. For the reasons aforesaid, we affirm the award of the Tribunal and dismiss this appeal.

There will, however, be no order as to costs. Drawing up of formal decree is dispensed with.

Paritosh Kumar Mukherjee, J.

12. I agree.