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**(1974) 04 MAD CK 0047**  
**In the Madras High Court**

The General Assurance Society Ltd.

APPELLANT

Vs

Jayalakhmi Ammal and Others

RESPONDENT

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**Date of Decision :** 10-04-1974

**Acts Referred:**

Motor Vehicles Act, 1939 — Section 95

**Citation :** (1975) ACJ 159 : (1975) 88 LW 758 : (1975) 1 MLJ 148

**Hon'ble Judges :** C.J.R. Paul, J

**Bench :** Single Bench

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**Judgement**

C.J.R. Paul, J.—This appeal by the Insurance Company with which the vehicle-lorry MSM. 1078 belonging to the third respondent Babu Reddi and which was involved in an accident on 25th May, 1970 at about 3-30 P.M. on the Poonamalle High Road which resulted in the death of one Chandran, the husband of the first respondent and father of the second respondent was insured. The Claims Tribunal awarded a sum of Rs. 10,000 as compensation to be paid to the first and second respondents and the Insurance Company, the appellant herein was directed to pay the compensation.

2. It is contended in this appeal that the Tribunal erred in finding that the accident was due to the negligent driving of the vehicle by the driver of the vehicle and it also erred in awarding such a huge sum as Rs. 10,000 as compensation and thirdly that the liability of the appellant as the insurer was limited to the extent of the liability arising under the Workman's Compensation Act. On the question as to whether there was adequate proof before the Motor Accidents Claims Tribunal for the rash or negligent driving of the lorry by the employee of the third respondent, the finding of the Tribunal has not been seriously challenged in this appeal. Moreover, the appellant Insurance Company is precluded from raising that defence by reason of Section 96(2) of the Motor Vehicles Act where the insurer can defend the action only on the grounds specific 1 in that sub-section. This has also been made clear by the Kerala High Court by the decision in Kesavan Nair Vs. State Insurance Officer and in the decision in

British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, and Mangilal Vs. Parasram and Others, , In Orissa Co-operative Ins. Society Ltd. Vs. Bhagaban Sahu and Others , it was held that the Insurance Company is not allowed to raise any plea outside the scope of the pleas specified in Section 96 (2) of the Motor Vehicles Act; but if it has reserved a right in the policy to defend an action in the name of the insured it can raise all the pleas that may be open to the insured, with the permission of the Tribunal. In the case now before me, however, there is no such reservation of right in the policy in question. Therefore in this case the insurer was not entitled to contend that the accident was not due to rash and negligent driving of the lorry by the third respondent's employee. In Howrah Insurance Company Ltd. v. S. Sundaram See (1974) T.N.L.J. 58, also it has been made clear that the effect of Section 96 (2) and Sub-section (2-A) in Section 110C of the Motor Vehicles Act is that the Insurance Company would normally be confined in its defence to the grounds specified in Section 96 (2). But under the exceptional circumstances contemplated in Sub-section 2-A, they would have the additional privilege of raising the defences which are normally available only to the person against whom the claim has been made, if either of the two conditions precedent are satisfied viz., (1) there is collusion between the person making the claim and the person against whom the claim is made; or (2) the person against whom the claim is made has failed to contest the claim. But where neither of these two preconditions exists, the insurer would be confined in his defence to the grounds that have been enumerated in Section 96 (2) which imposes a statutory embargo upon insurance companies raising any defence to the action similar to the ones raised in that appeal which was that the accident was not due to rashness or negligence of the driver of the vehicle. In the case now before me none of these two preexisting conditions exists.

3. Even assuming that he has a right to raise such a defence, there is however over-whelming evidence in this case to prove that the accident which resulted in the death of the first respondent's husband, and father of the second respondent was due to the rash or negligent driving of the lorry. The facts which emerge from the evidence adduced before the Tribunal are that on 25th May, 1970, R.W. 2 the driver of the lorry which belongs to the third respondent was driving the lorry at about 3.30 P.M. along the Poonamallee High Road. The deceased Chandran was also travelling in the lorry; and he was also working at the time as an employee under the third respondent. According to P.W. 2 who claims to have been standing outside a tea-shop on the Poonamallee High Road, the lorry was proceeding at a fast speed and at that time a car from the opposite side came and this lorry after moving to a distance of 2 furlongs capsized and overturned. R.W. 2's explanation for the accident was that at the time of the occurrence, a lorry came in front of him and there was a skidding and since the front left wheel moved into a pit of mud the lorry overturned. This is a case in which the doctrine of *res ipsa loquitur* was invoked.

4. In Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others, it was held by the Supreme Court in terms that where such an inanimate injuries

agency and the surrounding circumstances are all entirely within the defendant's control and the accident takes place which ordinarily could not happen if the defendant had taken proper care or had not remained negligent the doctrine of *res ipsa loquitur* applies, where the event charged as negligence tells its own story of negligence on the part of the defendant. In this case the inference is that the defendant is liable unless he in the first instance discharges the burden to disprove his liability by saying that the accident could reasonably happen without negligence on his part. In *Henderson v. Henry E. Jenkins and Sons* (1969) 3 All E.R. 756, Lord Pearson made this distinction between evidential burden of proof and formal (or legal or technical) burden of proof in such negligence cases. The learned Judge observed that in any action for negligence, the plaintiff must allege and has the burden of proving that the accident was caused by the negligence on the part of the defendant. This is the issue throughout the trial and the formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raise a *prima facie* inference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiff's favour, unless the defendant by his evidence provides some answer which is adequate to displace the *prima facie* inference. It is in this situation that it is said that the evidential burden of proof rests on the defendant in such cases.

5. In *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, , the bus was going along a road which passed over a culvert and then, took a sharp bend with a downward gradient and the bus after crossing the culvert crashed against one of a number of stones which marked off a drain and then the bus hit against a tamarind tree which was at a distance of 20 or 25 feet from the stone but travelled some more distance before it came to rest. Their Lordships of the Supreme Court have stated that these facts give rise to a presumption that the accident was caused by the negligence of the driver, and that the events which happened tell their own story and there is a presumption that the accident was caused by negligence on the part of the appellant.

6. In *Jagat Singh and Others Vs. Sawal Singh* , this doctrine was invoked where a cow strayed into the road, the driver swerved the vehicle which went off the road and turned turtle and it was held that the negligence could be inferred and that the driver ought to have driven the vehicle with sufficient control. In the case now before me the lorry which was being driven by R.W. 2 on the Poonamallee High Road which appears from the evidence is a cement road and which was taking a curve at a particular point in the road had skidded and left the road and rolled into an adjacent pit. It cannot be said that this accident was due to *vis major*. No doubt, it appears that there were heavy rains. In the counter filed before the Tribunal there was no mention that owing to heavy rains and bad condition of the road, the lorry skidded and overturned. Anyway, it is admitted however, that the lorry had skidded, left the road and had fallen into an adjacent pit and capsized. These facts would certainly show that the driver did not have control over the vehicle at that time and must have been driving it at an

excessive speed. The explanation given by R.W. 2 for the accident is totally unacceptable. If he had driven at a slow speed and if he had applied the brakes the lorry would not have left the road and fallen into a pit. Therefore the finding of the Tribunal that the death of the deceased Chandran was due to rash and negligent driving of the lorry by the driver employed by the third respondent is quite correct.

7. The next question is whether the liability of the appellant as the insurer was limited to the extent of the liability arising under the Workmen's Compensation Act. It is argued on behalf of the appellant that the appellant cannot be made liable to pay more than the statutory liability in terms of Schedule IV to the Workmen's Compensation Act of 1923 which in this case is limited to Rs. 3,600 and in any event the amount of Rs. 10,000 awarded is excessive. It must be noted that this contention was not raised before the Tribunal at all and was raised for the first time only before me.

8. In order to appreciate this point the learned Counsel for the appellant has produced the insurance policy under which this vehicle was insured. Now, this policy clearly shows that under Endorsement No. 16 attaching to and forming part of the policy, it is stated:

In consideration of the payment of an additional premium it is hereby understood and agreed that notwithstanding anything contained herein to the contrary the Company shall indemnify the insured against his legal liability under the Workmen's Compensation Act, 1923 and subsequent amendments of that Act prior to the date of this Endorsement the Fatal Accidents Act, 1855 or at common law in respect of personal injury to any paid driver (or cleaner or conductor or person employed in loading and/or unloading) whilst engaged in the service of the insured in such occupation in connection with the Motor Vehicle....

Further the policy states under the heading "Limits of Liabilities" thus;

Limit of the amount of Company's : liability u/s II-1 (i) in respect of any one accident--Such amount as is necessary to meet the requirements of" the Motor Vehicles Act, 1939.

Limit of the amount of the Co.s liability u/s II-I (i) in respect of any one claim or series of claims arising out : of one event--Rs. 20,000.

Further it is stated that an extra amount has been paid for wider cover to paid, driver and cleaner etc.

9. In Venkataraman and Anr. v. Abdur Munaf Sahib (1970) A.C.J. 77, it has been held by this Court that it was open to the Claims Tribunal to determine the liability under the Workmen's Compensation Act and award the amount so determined against the insurance company. In that case, however, the policy of insurance provided, that the company will indemnify the insured against all sums which the insured has become legally liable to pay in respect of (i) death of or bodily injury to any person caused by or arising out of the use-of the motor

vehicle and there were seven provisos to this clause of which proviso (b) runs as follows:

Except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939, the company shall not be liable in respect of death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment.

and proviso (c) runs as follows:

Except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939, in relation to liability under the Workmen's Compensation Act, 1923, the company shall not be liable in respect of death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises.

10. The effect of this exception was that the Company undertook to indemnify the insured to the extent necessary to meet the requirements of Section 95 of the Motor Vehicles Act in relation to liability under the Workmen's Compensation Act. But in the case now before me, the policy of insurance contained provisions which certainly make the insurer liable to indemnify the insured against the legal liability under the Workmen's Compensation Act as also at common law and for that wider coverage an additional sum has been paid.

11. Therefore the contention raised on behalf of the appellant cannot be accepted.

12. With regard to the amount of compensation which has been awarded it is seen from the judgment of the Tribunal that the deceased was aged about 25 years and it was claimed that his income was Rs. 200 per month. The Tribunal, however, did not accept the evidence of P.W. 1 the first respondent that her husband was having a monthly income of Rs. 200. From the evidence furnished by P.W. 2 that he was receiving Rs. 15 per week and was working in a brick kiln the Tribunal came to the conclusion that it was reasonable and proper to hold that the deceased was earning on an average Rs. 60 per month at the rate of Rs. 15 per week and it was also safe to conclude that he would have been paying about Rs. 50 per month to P.W. 1 for the family which income has been lost to the respondents 1 and 2 due to his death. The Tribunal also found that normally the deceased would have lived upto 60 years and would have been earning for about 35 years and as such the loss of annual income for 35 years would come to Rs. 21,000. Deducting 20 per cent of this for the contingencies and uncertainties of life and other conditions including lump sum payment, he arrived at the figure of Rs. 4,200 and deducting that amount from the aforesaid amount of Rs. 21,000 the Tribunal had arrived at the figure of Rs. 16,800 and taking into consideration the fact that the first respondent is young and is eking out her livelihood as cooly and is able to work, the Tribunal found that compensation of

Rs. 10,000 claimed is reasonable and awarded that amount. I do not find that the Tribunal erred in awarding that amount.

13. In the result, I find that this appeal is devoid of merits, and it is dismissed with costs.