
(1973) 02 GAU CK 0005
In the Gauhati High Court
Case No : M. A. (F) No. 7 of 1971

The Motor Owners Insurance Co. Ltd	APPELLANT
Vs	
Srimati Renuka Roy and another	RESPONDENT

Date of Decision : 23-02-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33

Citation : AIR 1973 Guw 142

Hon'ble Judges : Baharul Islam, J

Bench : Single Bench

Advocate : K. L. Jain, for the Appellant; B. Das, for the Respondent

Final Decision : Dismissed

Judgement

Baharul Islam, J.—This appeal is u/s 110-D of the Motor Vehicles Act 1939 (hereinafter referred to as "the Act") by the insurer and is directed against the award of the Motor Accident Claims Tribunal, Jorhat in Motor Accident Case No. 87 of 1968. The facts of the case, briefly, are:

Gajendra Roy, deceased, was working as a Yard-master of the Assam State Transport at Jorhat at a monthly wage of Rs. 235/-, On 6-3-66 at night, while he was returning home by the Trunk road, he was knocked down by vehicle Number ASJ 7021 coming from the western side of the Jorhat town. Gajendra Roy died instantaneously at the spot. The vehicle was owned by opposite party Number 1, Bhagwandas Bawri of Assam Travels Private Limited, Jorhat. The police was informed over the phone, A G. D. entry was made by the police of the thana. Police visited the spot and took up investigation and seized the vehicle in front of Assam Travels. Jorhat. The claimant is the widow of Gajendra Roy and she has claimed Rs. 75,000/- against opposite party No. 1 and also has made appellant who is the insurer, opposite party No. 2 in her application.

2. The opposite parties filed written statements. They deny that the vehicle in question was involved in the accident and plead that the claim was highly

excessive.

3. The learned Claims Tribunal framed six issues of which we are concerned with four. They are:

"3. Whether the motor vehicle Number ASJ 7021 was involved in the accident in question?

4. Whether there is any cause of action as against opposite party No. 2 (Motor Insurance Company) or whether there is any cause of action at all for this case for compensation?

5. Whether the amount of compensation claimed is highly excessive?

6. To what relief, if any, are the parties entitled?"

The learned Claims Tribunal, after trial, awarded Rs. 14,000/- against the claim of Rs. 75,000/-. He held that the vehicle No. ASJ 7021 knocked down Gajendra Roy and caused his instantaneous death and that the vehicle was owned by opposite party No. 1.

4. Shri B. Das, learned counsel appearing for the claimant respondent, has raised the preliminary objection that the appeal by the insurer is not competent inasmuch as the grounds of the appeal are barred u/s 96 (2) of the Act and relies on a decision of this Court in Premier Insurance Co. Ltd. v. The Member, Motor Accident Claims Tribunal Jorhat M. A. (F) No. 56 of 1971 D/- 19-1-73 = (AIR 1973 Gau. 97). On the other hand Shri K. L. Jain, learned counsel for the appellant, submits that the above decision is no authority in support of the preliminary objection inasmuch as the point he is going to raise in the appeal was not raised in the above decision. Shri Jain relies on sub-Section (1) of Section 96 and submits that there is no valid judgment against the insured and in fact no judgment could at all be passed against the insured and therefore no liability of the insurer arises in the instant case.

5. The relevant portion of S. 96 of the Act may be quoted:

"96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks. - (1) If, after a certificate of insurance has been issued under sub-section (4) of Section 95 in favour of the person by whom a Policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under Clause (b) of sub-section (1) of Section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by any insurer under sub-Section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings or in respect of any judgment so long as execution is stayed thereon pending an appeal and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds....."

Then the grounds are enumerated.

Sub-section (1) makes the insurer liable to pay the amount awarded against the insured and in favour of the heirs of the deceased who might get the benefit of the insurance policy, provided the insurer had notice of the proceeding through court. The sub-section makes the insurer, as it were, a judgment-debtor and declares his liability to pay the amount awarded against insured, but not exceeding the amount covered by the policy of insurance. This sub-section does not give the insurer any right to challenge whether the judgment or decree or award passed against the insured is a good one. If no notice of the proceedings is issued to the insurer under sub-s. (2) no sum is payable by him under sub-s. (1) in respect of any judgment. If notice is served of the aforesaid proceedings, then he can appear and defend the action of the claimant on any of the grounds enumerated under sub-section (2).

6. Shri Jain, in support of his contention, submits that the impugned judgment was not a legally valid judgment, because, according, to him, - (1) the claimant has not proved negligence on the part of the driver of the vehicle in question, (2) that the posthumous son. Bipur Kumar, who was born three months after his father was killed, has not been made a party to the application and as such the award is vitiated or in any case the liability is to be reduced by one-third (there having been two claimants in the application): (3) that the claimant has not proved that Bhagawandas Bawri was the owner of the vehicle and that the evidence shows that the vehicle belonged to Assam Travels (P) Ltd., Jorhat: and (4) that the impugned award is not warranted by evidence on record and that the amount of award was excessive.

This Court in M. A. (F) No. 56 of 1971 = (AIR 1973 Gau. 97) (supra) held:

"Sub-sections (2) and (6) of S. 96 were exhaustively dealt with and considered by the Supreme Court in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, ; it has been held:

"The contention of the appellants is that when an insurer becomes a party to an action under sub-section (2), he is entitled to defend it on all grounds available at law including the grounds on which the assured himself could have relied for his defence and that the only restriction on the insurer's right of defence is that he cannot rely on the conditions of the policy which sub-section (3) makes as of no effect. This is the contention which we have to examine in these appeals.

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-s. (2) of Section 96, 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.

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 defence have been specified, they cannot be added to. To do that would be adding words to the statute.

Sub-section (6) also indicates clearly how sub-section (2) should be read. It says that no insurer to whom the notice of the action has been given shall be entitled to avoid his liability under sub-section (1) "otherwise than in the manner provided for in sub-section (2)". Now the only manner of avoiding liability provided for in sub-section (2) is by successfully raising any of the defences therein mentioned. It comes then to this that the insurer cannot avoid his liability except by establishing such defences. Therefore sub-section (6) clearly contemplates that he cannot take any defence not mentioned in sub-section (2). If he could then he would have been in a position to avoid his liability in a manner other than that provided for in sub-section (2). That is prohibited by sub-section (6).

We therefore think that sub-sec. (2) clearly provides that an insurer made a defendant to the action, is not entitled to take any defence which is not specified in it".

The object of the notice to the insurer under sub-section (2) of Section 96 is that as under sub-section (1) the insured is made as if it were, a judgment-debtor and liable to pay the award passed against the insured he should be in a position to see that there is no collusion between the insured and the claimant. And if he chooses to defend himself then his defence must be confined to the grounds enumerated under sub-section (2) of Section 96. There is no doubt that the liability of the insured to the claimant arises under torts, and the liability of the insurer to the claimant arises out of the policy issued to the insured, accepting a third party risk. The claimant may set an award for damages under torts against the insured for an amount exceeding the amount covered by the insurance policy but the insurer's liability will be only to the extent of amount covered by the policy. In the instant case the claim of the claimant for damages was Rupees

75,000/-. The amount awarded is Rupees 14,000/-. The insurer under the policy accepts a liability to the extent of Rupees 20,000/-. Therefore if the impugned order is maintained, the insurer's liability will be limited only upto Rs. 14,000/- and if a sum exceeding Rs. 20,000/- be awarded the insurer's liability will be limited to only Rs. 20,000/-.

As the grounds of appeal taken by Shri Jain, as mentioned above, are not any of the grounds enumerated under sub-section (2) of Sec. 96, these grounds are not permissible under law. So this appeal is not competent. The preliminary objection therefore, prevails and the appeal is dismissed with costs.

7. There is a cross-objection. I have stated above that the claim for damages made by the claimant was Rs. 75,000/- but the amount awarded was Rs. 14,000/-. In the cross-objection the claimant-respondent has claimed Rupees 50,000/-.

8. Shri Jain raises a preliminary objection to the maintainability of the cross-objection. He submits that there is no provision under the Motor Vehicles Act for preferring a cross-objection.

9. Section 110-D of the Act Provides for an appeal to the High Court by any person aggrieved by an award of a Claims Tribunal to be filed within 90 days from the date of the award, provided that the High Court may entertain the appeal after the expiry of the aforesaid period if it is satisfied that appellant was prevented by sufficient cause from preferring the appeal in time. In the instant case the award was made on 29-9-70 and the cross-objection was filed on 30-3-71, after the receipt of the notice of the appeal, as submitted by Shri Das. Shri Das could not point out any provision of the Act under which he could file the cross-objection. He, however, submits that Order 41, Rule 22 Civil Procedure Code, provides for filing a cross-objection and that the spirit of order 41 should be invoked in disposing of an appeal even under the Act. Rule 20 of the Assam Motor Accidents Claims Tribunals Rules, 1960 has made certain provisions of the CPC applicable to the trial of a claim under the Act. The Rule is as follows:-

"20. CPC to apply in certain cases: - The following provisions of the first Schedule to the Code of Civil Procedure, 1908, shall so far as may be apply to proceedings before the Claims Tribunal, namely. Order V Rr. 9 to 13 and 15 to 30; Order IX, Order XIII Rules 3 to 10; Order XVI. Rules 2 to 21; Order XVII; and Order XXIII, Rules 1 to 3".

It is clear that Order 41 Civil Procedure Code, has not been made applicable to the proceedings before the Claims Tribunal or to the appeal before the High Court. That being the position the cross-objection is clearly incompetent.

10. Shri Das, then, submits that even if the cross-objection is held to be incompetent, the High Court can increase the quantum of the award under O. 41, Rule 33 Civil Procedure Code. This submission again cannot be accepted on the ground that the submission pre-supposes invocation of Order 41, which, as I

have already held, is not made applicable to an appeal u/s 110-D of the Act.

11. In the result the cross-objection also has no merit and is dismissed but without costs.

12. In the result the appeal is dismissed with costs and the cross-objection is dismissed without costs.