
(1991) 06 MAD CK 0011
In the Madras High Court

The New India Assurance Co. Limited

APPELLANT

Vs

D. Kamalam and Others

RESPONDENT

Date of Decision : 11-06-1991

Acts Referred:

Motor Vehicles Act, 1988 — Section 96(2)

Citation : (1992) 2 ACC 277 : (1992) 1 MLJ 41

Hon'ble Judges : Ratnam, J

Bench : Division Bench

Judgement

Ratnam, J.—These appeals have been preferred by the New India Assurance Company Limited against the common award of the Motor

Accidents Claims Tribunal (District Court), Ramanathapuram at Madurai, in M.C.O.P. Nos. 481 and 480 of 1988 respectively. Briefly stated, the

circumstances giving rise to these appeals are as follows:

The first respondent in both the appeals is the widow of R. Durairaj. Respondents 2 to 4 in C.M.A. No. 313 of 1991 are the sons of R. Durairaj

and the first respondent in these appeals. The second respondent in C.M.A. No. 312 of 1991, who is also the fifth respondent in C.M.A. No. 313

of 1991, is the owner of the lorry bearing registration No. MDA. 6672, insured with the Oriental Insurance Company Limited, which is the fourth

respondent in C.M.A. No. 312 of 1991 and the seventh respondent in C.M.A. No. 313 of 1991. The third respondent in C.M.A. No. 312 of

1991, who is the sixth respondent in C.M.A. No. 313 of 1991, is the owner of the car bearing registration No. TNU 5580, insured with the

appellant in these appeals. On 11.3.1988, R. Durairaj with his wife, sons, uncle and other relations was proceeding in the car TNU 5580

belonging to his uncle I. Masilamani Nadar from Virudhunagar towards Sivakasi. When the car was just approaching Virudhunagar bye-pass road,

the lorry MDA 6672 proceeding from Sattur towards Madurai, according to the case of the first respondent and respondent 1 to 4 in C.M.A. No.

312 and 313 of 1991, was driven rashly and negligently by its driver and dashed against the car TNU 5580 on its left side. It was also alleged that

the driver of the car TNU 5580 had driven the car in a rash and negligent manner without observing the traffic rules and the accident took place as

a result of the rash and negligent driving of both the vehicles. In that accident, R. Durairaj died and his wife Kamalam, who is the first respondent in

these appeals, sustained some injuries. In M.C.O.P.No.480 of 1988 respondents 1 to 4 in C.M.A. No. 313 of 1991 claimed that the accident in

which. R. Durairaj lost his life was the outcome of the rash and negligent driving of both the vehicles and that deceased R. Durairaj , who was aged

about 57 years at the time of his death, commanded a large and lucrative practice as an Auditor and owing to his sudden death, respondents 1 to 4

in C.M.A. No. 313 of 1991 had lost the benefit of not only the earnings of deceased R. Durairaj for at least 15 years, but had also suffered severe

shock and agony resulting in loss of consortium to the wife and total loss of prospects to the sons of the deceased regarding their future in the

profession. Towards compensation for loss of expectation of life and future loss of income and future happiness etc., loss of consortium, mental

shock and agony and loss of social status and future prospects, etc., respondents 1 to 4 in C.M.A.No.313 of 1991 claimed that compensation in a

sum of Rs. 10,00,000 would be awardable, though they restricted their claim to Rs. 7,00,000. The first respondent in C.M.A. No. 312 of

1991, who sustained injuries in the very same accident, prayed in M.C.O.P.No.481 of 1988 that she should be awarded a sum of Rs. 50,000 as

compensation for the injuries sustained by her, pain and suffering, permanent disability resulting in her not being able to do household duties and

participate in Badminton tournaments etc.

2. In the counter filed by the appellant in M.C.O.P. No. 480 of 1988, it pleaded that the driver of the lorry bearing registration No. MDA 6672

drove the vehicle in a reckless manner without sounding the horn and observing the traffic rules and had entered the road junction in the

Virudhunagar bye-pass road without noticing the vehicle coming from his right side on the Virudhunagar-Sivakasi road and the accident had taken

place only owing to the rash and negligent driving of the lorry MDA 6672. Besides, the appellant also raised some objections regarding the

quantum of compensation claimed by respondents 1 to 4 in C.M.A. No. 313 of 1991. Likewise, the appellant, in his counter in M.C.O.P. No.

481 of 1988, reiterated that the lorry bearing registration No. MDA 6672 was exclusively responsible for the accident by the rash and negligent

driving of its driver and that the compensation prayed for in respect of the injuries and disability at Rs. 50,000 was on the high side.

3. In the course of the proceedings before the Tribunal, the owner of the lorry MDA 6672, who is the second respondent in CM.A.No.312 of

1991 and also the fifth respondent in C.M.A. No. 313 of 1991 remained ex parte. The owner of the car TNU 5580, who is the third respondent

in C.M.A. No. 312 of 1991 and also the sixth respondent in C.M.A. No. 313 of 1991, initially filed a counter alleging that the driver of the lorry

MDA 6672 had by his rash and negligent driving caused the accident resulting in the death of his nephew R. Durairaj and injury to his wife and also

damage to the car and that even if any liability for payment of compensation was to be fastened on him, the appellant insurance company would be

liable to pay the same. However on 5.3.1990, on his counsel reporting no instructions and making an endorsement to that effect in the vakalat, he

was set ex parte.

4. Since both the claim petitions arose out of the same accident and the parties to both those petitions desired a conjoint consideration and

disposal of both the claims, the Motor Accidents Claims Tribunal enquired into the claims so made on the basis of the evidence of M.CO.P. No.

480 of 1988, which was also treated as the evidence in M.C.O.P. No. 481 of 1988. Before the Tribunal, on behalf of the claimants in both the

claim petitions, Exs. A-1 to A-36 were marked and P.Ws. 1 to 3 gave evidence, while, on behalf of others who contested that claims, Exs.B-1 to

B-6 were filed and R. Ws. 1 to 4 were examined. The Tribunal also deputed a Commissioner to make a local inspection of the place where the

accident took place and to submit a report as well as a plan and the report and the plan so submitted were marked as Exs.C-1 and C-2. On a

consideration of the evidence of P.Ws. 1 and 2 and R. Ws. 1 to 4 and the relevant documents, the tribunal found that the accident took place only

on account of the rash and negligent driving of the car bearing registration No. TNU 5580 by its driver without observing the rules of the road and

that the driver of the lorry MDA 6672 was not at all responsible for it. Dealing with the claim for payment of compensation in respect of the death

of R. Durairaj in that accident, the Tribunal took into account the age of the deceased at the time of his death, his income as reflected by the

Income Tax returns produceu and other circumstances as well and found ultimately that respondents 1 to 4 in C.M.A. No. 313 of 1991 were

entitled to be paid compensation in a sum of Rs. 5,00,000 in respect of the death of R. Durairaj , with interest at 12% per annum from the date of

the claim petition. In so far as the claim of the first respondent in C.M.A. No. 312 of 1991 for the injuries sustained by her in the accident was

concerned, the Tribunal found on the acceptance of the evidence of the doctor that serious injuries and disability had been sustained by her and

that in respect thereof, she deserved the award of compensation in a sum of Rs. 38,573 together with interest at 12% per annum form the date of

the claim petition. Finally, the tribunal passed an award directing the owner of the car TNU 5580 (the third respondent in C.M.A. No.

312of1991andthesixthrespondentin C.M.A. No. 313 of 1991) and the appellant insurance company to pay the amount of compensation awarded.

It is the correctness of the awards so passed by the Tribunal that is challenged by the appellant-insurance company in these appeals.

5. Learned Counsel for the first respondent in C.M.A. No. 312 of 1991 and respondents 1 to 4 in C.M.A. No. 313 of 1991 raised a preliminary

objection that these appeals, at the instance of the insurance company questioning the findings of the Tribunal on negligence and quantum of

compensation, cannot be entertained, as the defence of the insurance company in any proceeding claiming compensation is limited to those

enumerated u/s 96(2) of the Motor Vehicles Act (hereinafter referred to as "the Act") and that no such defence having been raised before the

Tribunal in the course of the proceedings before it, the appellant insurance company cannot now be permitted to canvass the correctness of the

awards passed by the tribunal either on the ground of negligence or even quantum of compensation. Reliance in this connection was also placed by

learned Counsel on the decision of the Supreme Court reported in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, .

On the other hand, learned Counsel for the appellant drew attention to Section 110-C (2-A) of the Act to contend that in this case, there was

collusion between the claimants and the owner of the car, who had also failed to contest the claims and, therefore, the appellant, as an insurer, had

the right to contest the claim on all or any of the grounds available to the owner of the car against whom the claims had been made. Attention in this

connection was also drawn to some decisions wherein Section 110-C (2-A) of the Act has come up for consideration.

6. Before proceeding to consider the aforesaid submissions, it becomes necessary to set out a few undisputed facts. The appellant-insurance

company figured as the fourth respondent in both the claim petitions, out of which these appeals have arisen, and after receipt of notice from the

Tribunal, had also contested the claim before it. From the counter filed by the appellant in the claim petitions, it is seen that it had not raised any of

the defences available to it u/s 96(2) of the Act, but had confined itself to challenging the aspects of negligence and quantum of compensation. The

owner of the lorry, who is the second respondent in C.M.A. No. 312 of 1991 and the fifth respondent in C.M.A. No. 313 of 1991, had remained

ex parte even from the outset. The owner of the car TNU 5580, who is the third respondent in C.M.A.No.312 of 1991 and the sixth respondent in

C.M.A. No. 313 of 1991 had initially filed a counter to the claim petitions, but had later chosen to remain ex parte on 5.3.1990, as could be seen

from paragraph 15 of the award. In the course of the proceedings before the Tribunal, at the instance of the appellant, there was no whisper or

suggestion of any collusion between the claimants and the owner of the car TNU 5580. The Tribunal, on a consideration of the materials, ultimately

awarded compensation amounts referred to earlier to the claimants, which, as could be seen from the memorandum of grounds of appeals, are

questioned on the ground of negligence and also as being excessive. It is in the aforesaid background that the preliminary objection has to be

considered.

7. u/s 96(2) and (6) of the Act an insurer, who has notice through Court either of the bringing of the proceedings claiming compensation or in

respect of any judgment, is entitled to be made a party to the proceedings and to defend the proceedings on all or any one of the grounds

enumerated u/s 96(2) of the Act, Sub-Section 6(9). Section 96 of the Act precludes the insurer from avoiding liability otherwise than in the manner

provided for in Sub-section (2). It has already been noticed that in this case, in the course of the proceedings before the Tribunal, the appellant-

insurance company did not at all put forward any defence, which, it is permitted to put forward u/s 96(2) of the Act. It would be useful in this

connection to refer to British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, . Though that decision had been rendered by

the Supreme Court in appeals arising out of suits for damages, Section 96(2) of the Act employs language like "Court" "Judgment" etc. and the

decision would, therefore, apply not only to suits for damages in civil courts, but also to the proceedings before the Motor Accidents Claims

Tribunals constituted u/s 110 of the Act for adjudicating claims for compensation. The Supreme Court, in the decision referred to earlier, points out

that apart from statute an insurer has no right to be made a party to an action by an injured person against the insured causing the injury and that

though a right to be made a party to a proceeding and defend it is conferred u/s 96(2) of the Act, such a right is essentially a creature of statute and

the content of that right depends on the provisions of the statute. Interpreting the scope of Section 96(2) and (6) of the Act, the Supreme Court

further pointed out that an insurer is entitled to defend an action on any of the grounds enumerated and no others and if it was the intention that

other grounds would be available, there was no need for enumeration and when specific grounds of defence have been set out, that cannot be

added to and to do that, would be adding words to the statute. Referring to Section 96(6) of the Act, the Supreme Court laid down that it

indicated how Section 96(2) of the Act should be read and pointed out that it should be read in such a manner as laying down that the insurer

cannot avoid his liability, except by establishing such defences provided for under Sub-Section (2) of Section 96 of the Act and Sub-Section (6)

contemplated that defences not mentioned in Sub-Section (2) cannot be taken as otherwise, the insurance company could avoid its liability in a

manner other than that provided for in sub-Section (2), which, stood prohibited by Sub-Section (6). Ultimately, the Supreme Court laid down that

an insurer made a party to the action, is not entitled to take any defence, which is not specified in Section 96(2) of the Act. Applying the aforesaid

principle to the case on hand, it is seen that the appellant did not at all raise any defence appropriately falling u/s 96(2) of the Act and if the

defences permitted under the provisions of the Act have not been so raised and the raising of other defences is also prohibited u/s 96(2) of the Act,

then, we do not see how the appellant can now be permitted to raise any objection with reference to the findings of Tribunal on the questions of

negligence and quantum of compensation. It is true that u/s 110-D of the Act, any person aggrieved by an award of a claims tribunal may prefer an

appeal, but, with reference to the insurance company, it must be an aggrieved person in the context of an adjudication relating to the right to

contest on all or any of the grounds conferred u/s 96(2) of the Act and not in cases like this, where, the appellant had not raised any defence at all

u/s 96(2) of the Act. To permit an appeal under See 110-D of the act, even in cases where no defence u/s 96(2) of the Act is raised, would be to

nullify Section 96(6) of the Act and also to enlarge the scope of a defence, which, otherwise is restricted to cases falling u/s 96(2) of the Act.

Perhaps, realising this difficulty, learned Counsel resorted to Section 110-C (2-A) of the Act.

8. Whether See 110-C (2-A) of the Act could be relied on by the appellant to maintain these appeals, may now be considered. That section

inserted by Act 56 of 1969 relates to the power of a Tribunal, as distinguished from the right of a party to defend an action, pending before the

Tribunal. Earlier, it has been seen that Section 96(2) of the Act is exhaustive of all defences, which could be raised by the insurer and that no

defence outside that can be entertained by virtue of the prohibition contained in Section 96(6) of the Act. Section 110-C (2-A) of the Act,

however, provides that if, in the course of any enquiry, the Claims Tribunal is satisfied that there is collusion between the person making the claim

and the person against whom the claim is made, or the person against whom the claim is made has failed to contest the claim. the Tribunal, for

reasons to be recorded in writing, may direct that the insurer, who may be liable in respect of such claim, shall be impleaded as a party to the

proceeding and the insurer so impleaded, shall thereupon have the right to contest the claim on all or any of the grounds that are available to the

person, against whom the claim has been made. The aforesaid provision is in the nature of a power exercisable by the Tribunal in the course of any enquiry in a proceeding before it. The requirements to be fulfilled, before the Tribunal can permit the insurer to contest the claim, on all or any of the grounds that are available to the person against whom the claim has been made, are these: (1) the Tribunal should be satisfied that there is collusion between the claimants 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; (3) the Tribunal should record reasons in writing for directing that the insurer should be made a party to the proceeding: and (4) on such impleading, the insurer shall have the right to contest the claim, on all or any of the grounds that are available to the person, against whom the claim has been made. It has already been seen that there was no plea of collusion between the claimants and the owner of the car, put forward by the appellant. The only other circumstance is that the owner of the car, though initially had filed a counter, had subsequently remained ex parte. By the filing of a counter, the owner of the car had contested the proceedings, whatever be the nature of the contest. This cannot therefore, be regarded as a case of a failure, on the part of the owner of the car, to contest the claim. It is true that the owner of the car, which was involved in the accident, had subsequently remained ex parte. The circumstances that the owner of the car remained ex parte in the proceedings before the Tribunal does not, in our view, either by itself or even necessarily lead to the sole inference that there had been a failure to contest the claim on his part. By mere non-appearance on a particular date on which the case is posted, a party may be set ex parte, but that by itself, would not lead to the conclusion that there was a wilful default in appearance with a view to allow the claimants to succeed in the claim petition. It is, therefore, essential for the insurance company to satisfy the Tribunal that there had been a failure to contest the claim and in the course of dealing with this question, the Tribunal necessarily will have to go into the nature of the claim and the circumstances of the accident, as well as the reasons which may probably be attributed to the omission of the owner of the vehicle to contest the claim, which would essentially be matters of evidence. We may point out that when the matter was before the Tribunal, no attempt was made by the insurance company to advert to these considerations,

much less satisfy the Tribunal that the vehicle owner had absented himself with a view to allow a good defence to go for default. There are no

materials on the basis of which we can hold that there has been a failure on the part of the owner of the car to contest the claim. From the mere

circumstance that the owner of the car had remained ex parte, it cannot be concluded that the condition in Section 110-C (2-A) of the Act has

been satisfied. We may also observe that the power of the Tribunal u/s 110-C (2-A) of the Act can be properly exercised in cases, where the

insurance company has not already been impleaded as a party to the proceedings, but an attempt is made collusively by the claimants and the

owner of the vehicle to secure an award fastening liability on the insurance company, without even so much as being heard. If the insurance

company is already a party to a claim petition, then as pointed out earlier, its defences would be restricted to the grounds specified in Section

96(2) of the Act. If, however, the insurance company, for some reasons, is not made a party to the claim petition, but yet there is an attempt by the

claimants and the owner of the vehicle to mulct the insurance company with payment of compensation collusively, then, the insurance company,

which may be made liable to pay compensation as a result of the collusion between the claimants and the owner of the vehicle, is enabled to be

impleaded as a party to the claim petition and on being so impleaded, the insurance company has the right to contest the claim on grounds available

even to the owner of the vehicle, apart from the defences statutorily made available u/s 96(2) of the Act. The use of the words, "that the insurer

shall be impleaded as a party to the proceeding" contemplates cases where, in the course of an enquiry, the tribunal realises that as a result of

collusion between the claimants and the owner of the vehicle, liability for payment of compensation is sought to be fastened on the insurance

company in its absence and in such a case, the Tribunal is enabled to exercise its powers u/s 110-C (2-A) of the Act to implead the insurer as a

party to the proceedings, for reasons to be recorded in writing, and the right of defence available to the insurer so impleaded would include those

grounds available to the owner of the vehicle against whom the claim has been made. We are, therefore, of the view that the power conferred u/s

110-C (2-A) of the Act on the Tribunal is in the nature of a special power exercisable on the fulfilment of the conditions enumerated therein and

not in a case like this, where there was no whisper of any collusion between the claimants and the owner of the car or that there was a failure on the part of the person against whom the claim has been made to contest it. We may also observe that when the object of the exercise of the power of a Tribunal u/s 110-C (2-A) of the Act is to prevent collusion between the claimant and the owner of the vehicle against whom the claim is made, which may lead to the passing of an award against and fastening of liability on an insurance company, even when it is not arrayed as a party before the tribunal, we do not see any serious objection to the Tribunal so exercising its power in a case where the insurance company is already a party to the proceedings and there is an established collusion between the claimant and the owner of the vehicle and a deliberate failure to contest the claim to secure an award against the insurance company, though in such cases, it may incidentally widen the scope of the defence beyond what is provided for u/s 96(2) of the act, but such enlargement of the scope of the defence is attributable only to the exercise of the power of the Tribunal on its being satisfied that collusion or a failure to contest the claim has been made out, and not otherwise. However, in such cases where the insurer is already a party to the proceedings, in order to widen the scope of its defence, it would be necessary for the insurer to satisfy the Tribunal, in the course of the proceedings before it that the requirements of Section 110-C (2-A) of the Act are fulfilled and seek an order permitting the insurer to raise other pleas open to the owner of the vehicle against whom the claim has been made and then proceed to resist the claim on other grounds available to the owner of the vehicle, against whom the claim is made. Whatever that may be, on the facts and circumstances of this case, we are of the view that the appellant certainly cannot have recourse to Section 110-C (2-A) of the act at all. Though our attention was drawn to several decisions, in the view we have taken above, we have found it unnecessary to refer to any of them. No other point was urged. The Civil Miscellaneous Appeals are, therefore, dismissed. There will be no order as to costs.