(1993) 01 AP CK 0004

In the Andhra Pradesh High Court

Case No : Appeal Against Order No. 345 of 1985 and Cross-Objections

The New India Assurance Company Limited	APPELLANT
Vs	
Mohd. Khaja Moinuddin and Another Mohd Khaja Moinuddin Vs The New India Assurance Co. Ltd.	RESPONDENT

Date of Decision : 27-01-1993

Acts Referred:
Motor Vehicles Act, 1939 — Section 15(2), 95(1), 95(2), 96(2)

Citation : (1993) 1 ALT 269 : (1993) 1 APLJ 223

Hon'ble Judges : Syed Shah Mohammed Quadri, J;B. Subhashan Reddy, J

Bench : Division Bench

Advocate : I.A. Naidu, in AAO No. 345/85 and A. Gopal Reddy, in Cross-Objections, for the Appellant; I.A. Naidu in Cross-Objections, A. Gopal Reddy, in AAO No. 345/85 and M. Narender Reddy, in AAO No. 345/85, for the Respondent

Judgement

B. Subhashan Reddy, J.

The important points which arise for consideration in this appeal are:

(1) as to whether the insurer can take defence other than enumerated under sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 (for short "the Act"); and

(2) whether the insurer can contract out to pay less amount than prescribed under the statute.

2. The facts, briefly stated, thus are:

A motor accident claim in O.P. No. 371/82 was laid on the file of the Motor Accidents Claims Tribunal-cum-District Judge, Medak at Sangareddy, by Mohd. Khaja Moinuddin with averments that while he was travelling in a motor vehicle viz., Tempo van bearing registration No. APB 2616, owned by the 2nd respondent and driven by the 1st respondent on 8 -2-1982, accident occurred near Korvipally village of Medak District at about 1 p.m. The accident is attributed to the anxiety to over-reach the RTC Bus to book the passengers and the consequent high speed. It is alleged that due to the said rash act in driving the vehicle at high speed, Respondent No. 1 lost balance and the vehicle dashed against a big tree resulting in grievous injuries to the petitioner. Apart from bleeding injuries, the petitioner suffered a fracture to his right leg. It is stated that he fell unconsicious and then was hospitalised firstly at Medak and later in Gandhi Hospital in Secunderabad and that as he was not treated well in Gandhi Hospital, he was forced to take treatment in a private nursing home by spending considerable amounts. It is also his case that movements of his fractured leg were impaired due to fracture apart from shortening of the leg and he suffered mental and physical agony and more so, being unmarried, his getting a good match was made difficult because of the said handicap and disablement. In total, a sum of Rs. 75,000/- was claimed towards compensation, but the Claims Tribunal has granted an amount of Rs. 35,000/- towards compensation with interest @ 9 per cent per annum from 7-8-1982, i.e., the date of the presentation of O.P.

3. Aggrieved by the said award, the insurer has filed this appeal making the petitioner-claimant and the owner of the vehicle as parties omitting the driver. The claimant-petitioner has preferred cross-objections aggrieved by the quantum claiming the entire amount of Rs. 75,000/- as was claimed in the O.P. But the insurer alone is made a party omitting the owner and driver of the vehicle. The parties are referred to as arrayed in the O.P.

4. This appeal and cross-objections firstly came up before our learned brother, Lakshman Rao J., and our learned brother has referred this matter to a Division Bench as important points arose for consideration and more so, in view of the later judgment of the Supreme Court in M.K. Kunhimohammed Vs. P.A. Ahmedkutty and Others, as against the earlier view expressed by a learned single Judge in The United Fire and General Insurance Co. Ltd. Vs. P. Parvathamma, and affirmed by the Full Bench of this court in M. Kondaiah v. Yaseen Fatima 1985 (2) ALT 88.

5. In so far as the factual aspect is concerned, nothing is canvassed on behalf of the appellant and the counsel for the appellant has canvassed only with regard to the maximum liability under the Act in an accident of this nature and also tried to defend that the figure of Rs. 5,000/- mentioned in the policy of Insurance is correct and that the claimant is bound by the same.

6. As on the date of the judgment rendered by the court-below on 29-1-1985, the dicta laid down by the Supreme Court in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, was holding the field and the same was followed by a learned single Judge in The United Fire and General Insurance Co. Ltd. Vs. P. Parvathamma, and further affirmed by a Full bench in M. Kondaiah v. Yaseen Fatima 1985 (2) ALT 88. The reference to the said Full Bench for authoritative pronouncement was necessitated in view of the contrary view taken in 1972 (1) APLJ 47 and 1982 (1) APLJ 124 from the one taken in The United

Fire and General Insurance Co. Ltd. Vs. P. Parvathamma, . It is pertinent to mention that the judgment rendered by a learned single Judge in The United Fire and General Insurance Co. Ltd. Vs. P. Parvathamma, is based on the ratio decidendi of the Supreme Court in B.I.G. Insurance Co. v. Itbar Singh (4 supra). The Supreme Court has held that an insurer has no right to be made a party to the action brought by the injured person against the insured causing the injury, that sub-section (2) of Section 96 further gives him the right to be made a party to the suit and to defend it, that the right therefore, is created by statute and its content necessarily depends on the provisions of the statute. Interpreting sub-section (2) of Section 96, the Supreme Court held that the insurer cannot plead any ground apart from the grounds enumerated therein. Repelling the contention, advanced on behalf of the insurer that inasmuch as sub-section (2) of Section 96 entitles an insurer to be made a defendant to the action and the same implies that the insurer has a right to take all legal defences excepting those expressly prohibited, the Supreme Court held that when the grounds of defence have been specified, they cannot be added to and if that is done, it would amount to adding words to the statute and that the same was impermissible, and therefore, it cannot be said that in enacting sub- section (2) of Section 96, the legislature was contemplating only those defences which were based on the conditions of the policy. But, this dicta laid down by the Supreme Court was distinguished by this court in 1972 (1) APLJ 47. The Full bench while upholding the judgment rendered in United Fire & Gen. Insurance Co. Ltd. v. P. Parvathamma (2 supra), has reversed the judgments rendered in 1972(1) APLJ 47 and 1982 (1) APLJ 124.

7. When similar question came up for consideration before the Supreme Court in M.K. Kunhimohammed v. P.A. Ahmedkutty (1 supra), the view taken earlier in Sheikhupura Transport Co. Ltd. Vs. Northern India Transport Insurance Co., , was not accepted. The later Supreme Court judgment (1 supra) held that the insurer can take defence apart from what is enumerated under sub-section (2) of Section 96, thus, pleading the maximum liability of payment of compensation. At para 13 of the said judgment, the Supreme Court has ruled that "Having regard to the statute as it stood prior to the amendments by Act 47 of 1982, we hold that the insurer was liable to pay upto Rs. 10,000/- for each individual passenger where the vehicle involved was a motor cab and upto Rs. 5,000/- for each individual passenger in any other case". The same view was accepted by a later Supreme Court judgment in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, even though specific reference is not made to the said judgment (1 supra). In the said case, only two judgments were cited before the Supreme Court, one in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, and another in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, dealt with interpretation of Section 95(2) of the Act as to whether the insurer was entitled to enter into contract fixing maximum liability, the decision in Itbar Singh''s case (4 supra) as stated above dealt with interpretation of sub-

sections (2) and (6) of Section 96 of the Act with regard to defences available to the insurer. The Supreme Court distinguished its earlier judgment in B.I.G. Insurance Co. v. Itbar Singh (4 supra) on the ground that the words employed under sub-section (6) of Section 96 "to avoid his liability" are applicable to a case where the insurer wants to avoid his liability, but that does not bar the insurer when he is not seeking to avoid his laibility, but wants a determination of the extent of its liability which is to be determined, in the absence of any contract to the contrary, in accordance with the statutory provision contained in this behalf in clause (b) of sub-section (2) of Section 95 of the Act.

8. In the circumstances, we hold that in spite of the enumerated defences available for the insurer u/s 96(2) of the Motor Vehicles Act, the insurer is entitled to take defence that he is not entitled to pay the amount beyond what is specified u/s 95(2) of the Act, if he wants a determination of the extent of his liability, but not where he wants to avoid the liability totally. We make it clear that if the insurer takes up the plea that he is not at all liable to pay the compensation without seeking the determination of the extent of the liability u/s 95(2) of the Act, the only defences available to the insurer shall be those enumerated u/s 96(2) of the Act.

9. A perusal of the Insurance policy, Ex.B-1, dated 22-7-1981 reveals that the insurance was operative for the period from 14-7-1981 to 13-7-1982 (both days inclusive) and the date of accident being 8-2-1982, the said accident is covered by insurance as contemplated under sub-section (1) of Section 95 of the Act. With regard to quantum payable, as is manifest from the said insurance policy, the same is limited to Rs. 5,000/- in respect of any one person and Rs. 50,000/- in respect of any number of persons and the type of body is mentioned as Van with carrying capacity of 7 persons in all. While it is contended on behalf of the Respondent No. 3 appellant that inasmuch as Ex.B-1 fixes the maximum liability as Rs. 5,000/- in case of injury to individual passenger, the petitioner is bound by the same and that nothing more than that can be awarded to the petitioner. This argument is in support of the plea taken in the counter filed against the claim made before the Claims Tribunal that Respondent 3-appellant, in any event, is only liable to pay Rs. 5,000/- as mentioned in the policy and not otherwise. The argument advanced on behalf of the petitioner is to the effect that the vehicle being a motor cab, the liability fixed under the Act is Rs. 10,000/ -. In the light of the contentions mentioned supra, two aspects need adjudication, namely, (i) whether the parties can contract out fixing the maximum liability to less than Rs. 10,000/- for each individual passenger in case of Motor cab and Rs. 5,000/- in any other case and (ii) whether the vehicle involved in the accident is a motor cab.

10. For better appreciation, extraction of Section 95(2)(b), as it stood before the amendment in the year 1982 and was in operation as on the date of accident, is relevant and pertinent which reads: "95(2): Subject to the proviso to sub-section (1) a policy of insurance shall cover any liability incurred in respect of any one

accident upto the following limits, namely:-

(a) xxx xxx xxx (b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuant of a contract of employment-

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers;-

(1) a limit of fifty thousand rupees in all where the vehicle is registered to carry not more than thirty passengers;

(2) a limit of seventy-five thousand rupees in all where the vehicle is registered to carry more than thirty but not more than sixty passengers;

(3) a limit of one lakh rupees in all where the vehicle is registered to carry more than sixty passengers; and

(4) subject to the limits aforesaid, ten thousand rupees for each individual passenger where the vehicle is a motor cab, and five thousand rupees for each individual passengers in any other case;"

It is evident from a reading of Section 95(2)(b)(ii)(4) of the Act that statutory limit in case of a motor cab was Rs. 10,000/- for each individual passenger and was Rs .5,000/- in any other case. The language employed under sub-section (2) "subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident upto the following limits" makes it abundantly clear that the statutory provision is mandatory based on public policy fixing the liability by the statute itself and as such, the said liability is unalterable and the parties are incompetent to contract out of the said mandatory statutory provision. However, the parties can contract out making insurer liable to pay amount in excess of the statutory limits mentioned above. This view of ours is fortified by the verdict of the Supreme Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, and followed in Jugal Kishore''s case (5 supra).

11. Dealing with the second aspect, the Insurance Policy, Ex.B-1, mentions the registration number, make, type of body, Horse Power, year of manufacture of the vehicle and the type of liability as "Act only" and carrying capacity "7 in all". This word ''7 in all'' includes the driver and it amply fits in the definition of Motor cab in sub-section (15) of Section 2 of the Act which reads:

''"motor cab'' means any motor vehicle constructed adapted or used to carry not more than six passengers excluding the driver, for hire or reward;"

12. Coming to the cross-objections, as the owner and the driver are not made parties, and the insurer being the only party, the claim beyond the statutory limits cannot be countenanced.

13. In the circumstances, we hold that the appellant was liable to pay the amount of Rs. 10,000/- to the 1st respondent on account of the insurance coverage in favour of the 2nd respondent for the vehicle concerned. However, in view of the fact that the 1st respondent has already withdrawn half of the award amount which even though in excess of Rs. 10,000/- we are not inclined to make the 1st respondent suffer of refunding the excess amount withdrawn by him, and the appellant shall not be entitled to the refund of any amount in excess of Rs. 10,000/- drawn by the 1st respondent pursuant to the interim orders in the interests of justice.

14. In the result, the appeal is allowed in part, while the cross-objections are dismissed. Each party shall bear their own costs.