

**(1989) 04 BOM CK 0062**  
**In the Bombay High Court**  
**Case No : First Appeal No. 234 of 1984**

|                                                      |            |
|------------------------------------------------------|------------|
| The Oriental Fire and General Insurance Company Ltd. | APPELLANT  |
| Vs                                                   |            |
| Rajrani Surendrakumar Sharma and Others              | RESPONDENT |

**Date of Decision :** 28-04-1989

**Acts Referred:**

Motor Vehicles Act, 1939 — Section 110C(2A), 110D, 96(2), 96(6)

**Citation :** (1990) ACJ 60 : AIR 1989 Bom 378 : (1989) 3 BomCR 326 : (1989) MhLj 735

**Hon'ble Judges :** Sujata Manohar, J;C.B. Dharmadhikari, J

**Bench :** Division Bench

**Advocate :** M.B. Kamat, for the Appellant; P.S. Parankar, for the Respondent

## Judgement

Sujata Manohar, J.—The original petitioners who are the respondents in the present appeal are the wife and seven children of Surendrakumar Sharma who died in an accident on the night of 21 st June 1980 and /or early morning of 22nd June 1980. The accident occurred in the morning at 0.30. hrs. of 22nd June 1980. It seems that late at night on 21st June 1980./22nd June 1980 Surendrakumar Sharma was proceeding on his motor cycle along Bombay Agra Road within the Municipal limits of Nasik. Between Dwaraka Hotel and Inayat Cafe on the National Highway No. 3 by which Surendrakumar was proceeding on his motor bike, there was a stationary tanker bearing No. MHL 4179 which was tail kept on the road unattended. There were no tail lamps on this vehicle which was kept on a jack. Surendrakumar dashed again this tanker and was killed on the spot. The petitioners filed Motor Accident Claims Petition No. 12 of 1981 before the Motor Accident claims Tribunal at Nasik. Opponents 1 and 2 were the drivers of the tanker , opponent 3 was the owner of the Vehicle while opponent No. 4 was the Insurance Company. Opponents 1 to 3 did not remain present at the time of the hearing of the petition. The petition against them therefore upheld the claim of the petitioners and awarded a total sum of Rs. 74,800/- in favour of the petitioners and against Opponents 1 to 4 in the award there is also a direction regarding the manner in which this amount is to be distributed

amongst the claimants.

2. The Insurance Company, the original Opponent No. 4 has filed the present appeal from the award of the said Tribunal. In this appeal Insurance company has challenged the award on merits. It has challenged the finding of the tribunal that there was negligence both on the part of the opponents 1 to 3 as well as Surendrakumar. The tribunal has apportioned the negligence as 75% on the part of the owner of the tanker and the drivers and 25% on the part of Surendrakumar. This apportionment of contributory negligence is also challenged in this appeal. The Insurance Company has challenged the quantum of compensation as well.

3. The first question that arises for consideration is whether it is open to the Insurance Company in this appeal to challenge the merits of the award so given.

4. As far back as 1959 the Supreme court in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, considered the provisions of S. 96 (2) and AS. 96 (6) of the Motor Vehicles Act . 1939 in this connection,.Under s. 96 (2) it is provided that " no sum shall be payable by an insurer under sub-sec. (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..... 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, namely ..... the specific grounds of the defence available to the Insurance Company are then set out in the Section.

5. Under s. 96(6) no insurer to whom notice referred to in sub-Section (2) has been given shall be entitled to the benefit of any such judgment as is referred to in sub-sec(1) otherwise than in the manner provided for in sub-sec/(2) In interpreting this provision the Supreme Court said that apart from this 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-sec (2) of S.96 however, gives it 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. It has held that the defences which the insurer can take are only those which are permitted under sub-sec.(2) Thus sub-sec.(2) of S.96 expressly enumerates these defences. No other defence can be raised by the insurer.

6. This decision of the Supreme Court has been followed in a number of decisions by several high Courts. For example, the Madhya Pradesh high court in a full Bench decision in the case of Mangilal Vs. Parasram and Others, , held that the insurer can only take such defences as are insurer can only take such defences as are open to the insurer under S. 96(2) . the full Bench of Orissa High court in the case of Arjuna Padhan Vs. Surendranath Satpathy and Another, , held also that an insurer can only take up defences under S,96 (2) of the Motor Vehicles Act and that even in appeal the insurer cannot take defences other than those

permitted under S. 96(2) . A. Full Bench of the Jammu and Kashmir high Court in the case of United India Fire and General Insurance Co. Ltdv. Lakshmi Shori Ganjoo reported in 1982 Acc CJ 470 : AIR 1982 J&K 105 has also taken a similar view, Calcutta Allahabad, Orissa, Rajasthan as well as Patna High court have taken the view that even in appeal the insurer cannot take defences other than those permitted under S.96 (2) . Sec in this connection Kantilal and Bros. and Another Vs. Ramarani Debi and Others, , United India Fire and General Insurance Co. Ltd., Kanpur and Another Vs. Gulab Chandra Gupta, , New India Assurance Co. Ltd. and Others Vs. Smt. Shakuntalabai and Others, , The New India Assurance Company Ltd. Vs. Smt. Sulochana Sahu and Others, , United India Insurance Co. Ltd. Vs. Ismail and Others, , National Insurance Co. Ltd., Jaipur Vs. Smt. Tulsi Devi and Others, , National Insurance Co.Ltd v. Shamim Ahmad . The Insurance Company has been permitted to take other difference available to the insured only when it is so authorized by the insurer on behalf of the insured.

7. In a recent case however, of Hemendra Dutta choudhury v. Arun Kumar Bordoloi reported in 1988 A CJ 813 the Gauhati High Court has differed from this view. It has relied upon the provisions of s.110D of the Motor upon the provisions of S.110D of the Motor Vehicles Act 1939. The said Section reads as follows:-

"110-D. appeals-(I) Subject to the provisions of sub-sec. (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of award, prefer an appeal to the High Court:

provided that the High Court may entertain the appeal after expiry of the said period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a claims Tribunal, if the amount in dispute in the appeal is less than two thousand rupees."

Gauhati High Court has held that the right to file an appeal is given to a person aggrieved. This right cannot be curtailed by the provisions of S.96 (2). It has held that although the Insurance Company cannot take up before the Motor Accidents Claims Tribunal any defence other than those available to it under S.96(2), this restriction does not apply in appeal since the insurer is a person aggrieved by the award of compensation which it is liable to pay. It can challenge in appeal this award on all grounds and not merely those grounds open to it under S.96(2). This decision of the Gauhati High Court, with respect, does not appeal to us.

8. Under S.110-D there is nothing which indicates that the Insurance Company gets more rights in appeal than the rights which it originally possessed. An appeal after all is a re-hearing of the original plaint or suit. In appeal the appellant cannot raise defences which were not available to the appellant at the trial stage. The fact that an insurance company is a person aggrieved who can file an appeal does not give to the Insurance Company more rights in appeal than it

originally possessed. The judgment of the Gauhati High Court is contrary to the decision of the Supreme Court and the decisions of a number of High Courts in different parts of the country. It is true that the Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, was not dealing with the right of the Insurance Company to raise contentions in an appeal. But S.110-D does not enlarge in any manner the right to defend given to an Insurance Company under S.96(2). As the Supreme Court has observed, but for the provisions of the statute, an Insurance Company would not have had any right to appeal and be heard at the trial of any accident claim. The rights of the Insurance Company are governed by statute. Section 110-D does not in any manner enlarge the right of the Insurance Company which is confined within its bounds by S. 96(2).

9. IN the present case however, the owner of the vehicle and the two drivers, being opponents 1 to 3 did not appear or defend the action. The case against opponents 1 to 3 proceeded ex parte. Now under S.110-(2A) of the Motor Vehicles Act 1939 it is provided as follows:

"110-C(2-A) Where in the course of any inquiry, the Claims Tribunal is satisfied that-

(i) there is collusion between the person making the claim and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed to contest the claim.

It may, for reasons to be recorded by it in writing, 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 there upon 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."

Therefore if the person against whom the claim is made has failed to contest the claim the insurer gets a 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. Section 110-C (2A) provides that in such a case if the insurer is not a party the court may, for reasons to be recorded by it in writing, direct that the insurer who may be made liable in respect of such a claim shall be impleaded as a party. The insurer so impleaded thereupon gets the right to contest the claim on all grounds available to the person against whom the claim is made. In case where the insurer is already a party there is no question of the court recording any reasons in writing and directing the insurer to be made a party. The insurer is already a party. Therefore, by virtue of the provisions of S.110-C(2-A) once the insurer is a party- whether pursuant to a notice of the court or otherwise, and the person against whom the claim is made, does not, inter alia, contest the claim, the insurer gets a right to contest this claim on all grounds available to the person against whom the claim is made. By virtue of S.110-C(2-A), therefore in the present case the insurer is entitled to contest the claim made by the claimants

on all grounds available to the person or persons against whom the claim is made. In other words since the claim is made. In other words since the claim has proceeded ex parte against opponents 1 to 3 the Insurance Company is entitled to challenge the award on all grounds available to opponents 1 to 3 the Insurance Company is entitled to challenge the award on all grounds available to opponents 1 to 3 in the present appeal.

10. On merits the appellant Insurance Company has challenged the apportionment of negligence between the opponents 1 to 3 and the deceased Surendrakumar. From the evidence on record it seems that the tanker was parked on the main road itself and not on the side "Kachha" or untarred portion of the road. The evidence shows that although the tanker was on the correct side of the road it was parked in such a way that there was to its left towards "Kachha" side of the road more than 1-1/2ft. of tarred road. In other words, the tanker was not parked on the extreme left of the road but it was in the line of traffic. The tail-lamps were also not switched on. The tanker was on a jack and was unattended. In these circumstances the tribunal has rightly held opponents 1 to 3 guilty of contributory negligence for leaving the tanker on the road unattended without any warning lights at night.

11. Under Rule 271 of the Motor Vehicles Rules it is provided as follows:

"271. Use of lamps when vehicle at rest-

(1) If, within the limits of any municipal corporation, municipality or cantonment, a motor vehicle is at rest within the house during which lights are required, at the left-hand side of any road or street or elsewhere in any duly appointed parking place, it shall not be necessary for the motor vehicle to exhibit any light save as may be required generally or specially by the Commissioner of Police, in Greater Bombay, and, elsewhere by the District Magistrate.

(2) Outside the limits of any municipal corporation, municipality or cantonment, if motor vehicle is at rest within the hours during which lights are required in such a position as not to cause danger or undue inconvenience to other users of the road, it shall not be necessary for the motor vehicle to display any lights."

In the present case the vehicle was not parked in any duly appointed parking place or on the left-hand side portion of the road where a vehicle can be parked. Nor was it parked in a manner so as not to cause danger or inconvenience to other users of the road. It was, therefore necessary for the vehicle to display light. It did not display any light.

12. The tribunal has also held that after dashing against the tanker the motor cycle on which the deceased were travelling, travelled about 130 ft. Before, stopping, which indicated that it was going at some considerable speed. The tribunal has taken into account the fact that it was a dark night. Nevertheless from the light of the motor-cycle Surendrakumar could have seen the vehicle in front of him at some distance. However, he was not able to stop the motor-cycle

in front of him at some distance. However, he was not able to stop the motor-cycle in time. Therefore the tribunal has held Surendrakumar guilty of contributory negligence. Looking to the fact that a person driving a motor-cycle within the municipal limits of Nasik would not expect a tanker to be parked in the middle of the left lane, without any lights on, the tribunal has rightly apportioned negligence in the ratio of 75% on the owner and drivers and 25% on the deceased.

13. It was submitted by the appellants that the negligence should be apportioned in the ratio of 50:50. In our view the reasoning of the tribunal appears to be justified. Looking to the conduct of opponents 1 to 3 we therefore do not see any reason to intervene in this connection.

14. The appellant has also challenged the quantum of compensation which has been awarded. The tribunal has relied upon the Income Tax assessment of the deceased which is at Exhibit 41. This is the Income Tax Assessment order for the year 1979-80. This shows the annual income of the deceased at Rs. 11,367/-. The deceased was running a motor garage cum workshop known as "Sharma Auto Engineering Works". On the basis of the assessment order the monthly income of Sharma has been assessed at Rs. 1000/- per month. Looking in the fact that the deceased had to support a family of wife and 7 children the tribunal has held that Surendrakumar's own share in this income would be Rs. 200/- per month while Rs. 800/- per month was his contribution for his dependants. This appears to be a reasonable estimate. Surendrakumar was 48 years old at the time of his death. The learned Judge has taken his working age up to the age of 60 Hence he has used the multiplier of 12 to arrive at the compensation. This multiplier of 12 also appears to be reasonable; because looking to the fact that the deceased was carrying on business, there is no reason to expect that he would stop earning any income after the age of 60. There was no question of any age of retirement in his case. The life expectancy at 12 years therefore appears to be very reasonable.

15. From the lumpsum amount so arrived at which comes to Rs. 1,15,200/- (Rs. 9,600x12) the tribunal has deducted 25% of the amount as contributory negligence of the deceased leaving the balance amount of Rs. 86,400/-. From this amount taking into account various contingencies in life and the fact that the amount is being paid in one lumpsum, a further amount of 25% has been deducted by the tribunal. Thus the tribunal arrived at the final figure of Rs. 64,800/- as the quantum of compensation to be paid to the claimants. In addition it has also granted a sum of Rs. 10,000/- for non-pecuniary loss such as loss of consortium and general damages. The total figure awarded to the claimants thus comes to Rs. 74,800/-. We do not see any reason to reduce the amount of compensation so awarded. On merits therefore, there is no reason to alter the award in any manner. The appeal is therefore dismissed with costs.

16. Appeal dismissed.