

(1955) 10 MAD CK 0036
In the Madras High Court

The Premier Life and General Insurance Co. Ltd.	APPELLANT
Vs	
H. Krishna Shet and Others	RESPONDENT

Date of Decision : 10-10-1955

Acts Referred:

Motor Vehicles Act, 1988 — Section 96

Citation : (1956) 1 MLJ 408

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Division Bench

Judgement

Basheer Ahmed Sayeed, J.—On the facts of this case, I am satisfied that the ends of justice require that leave should be granted to the applicant, to file an appeal against the decision of the learned Subordinate Judge of South Kanara, at Mangalore.

2. The suit was brought by the first respondent to recover a sum of Rs. 10,000 from three defendants (respondents 2 to 4) by way of damages for injuries caused to the first respondent in a motor accident, which occurred on the 27th April, 1953, at about 8-30 P.M. The plaintiff-respondent was proceeding on a motor bicycle from Kadri side towards Shedigudde, when the motor car driven by the first defendant, and owned by the second defendant, dashed against him and caused him serious injuries. The third defendant is said to be the licensed permanent driver of the motor car. The first respondent is said to have suffered among other injuries a bone fracture of his right leg, which, besides causing physical pain, necessitated very prolonged treatment, and has also caused permanent infirmity of his leg. At the time of the suit it was stated that the first respondent was still undergoing treatment. The learned Subordinate Judge, who tried the suit found on issue No. 1, viz-, whether the first defendant or the third defendant was driving the car at the time of the collision, that it was the third defendant who was driving the car at that time. On issue No. 5, viz-, whether the suit was bad for non-joinder of the Premier Insurance Co., Ltd., who is the present petitioner, the learned Subordinate Judge found that the plaintiff-

respondent had sent notice through the Court to the petitioner, that the petitioner did not make his appearance to contest the claim, that u/s 96 of the Motor Vehicles Act the petitioner being an Insurance Company with whom the respondent was insured, was liable to pay damages if the car was insured for third party risk, which was actually the case. Therefore he held that the Insurance Company was liable to pay damages, and held that the suit was not bad for nonjoinder of necessary parties. The decree that was passed by the learned Subordinate Judge was to the effect that a sum of Rs. 8,000 was payable to plaintiff by defendants 2 and 3 as well as proportionate cost, and that the decree should be executed in the first instance against the Premier Insurance Co., Ltd., the petitioner herein, and that the defendants should bear their own costs.

3. It is true that the petitioner was notified through Exhibit No. A-33, about the Suit, and the petitioner also acknowledged the notice through Exhibit A-34 in the suit. The reason why the petitioner did not make appearance to contest the claim, is now explained as due to the fact that the notice acknowledged was mislaid, and for that reason, no action was taken in pursuance of the notice. But, when the petitioner found that a decree had been passed against him, he woke up to the situation and has now filed this application for leave to file an appeal against the decision of the learned Subordinate Judge of South Kanara. In his affidavit in support of his application, the petitioner has adduced many reasons justifying the grant of leave to appeal. He has drawn my attention to the case of the respondent, in the first instance, in the notice, that it was the first defendant, the brother of the second defendant, who was not in possession of a licence to drive the car involved in the accident, that drove the car and caused the accident, that this case was persisted in also in the plaint, but at the stage of trial, the first respondent did not pursue this case, and gave no evidence on the allegation that it was the first defendant that drove the car, that he was an unlicensed person, and that the accident was caused by reason of his negligent and rash driving.

4. The learned Counsel for the petitioner further contends that the judgment of the learned Subordinate Judge is not based on any evidence worth the name, in order to exonerate the first defendant and make the second and third defendants liable. He attacks the findings of the learned Subordinate Judge on issue No. 1, as being perverse, and without any sufficient basis. The learned Counsel for the respondent, however, invited my attention to allegations in his counter-affidavit, and he actually took me through all the relevant paragraphs. But I do not think the counter has met the case of the petitioner to any the least extent.

5. Even so, the decree of the learned Subordinate Judge directing that execution should proceed in the first instance against the petitioner, is questioned on the ground that a decree of this kind could not be passed against the petitioner when he was not a party to the suit and that, no decree could be passed against the petitioner to affect his rights without his being heard and given an opportunity to

defend himself. In this connection both parties have relied upon Section 96(2) of the Motor Vehicles Act, which deals with the duty of insurer to satisfy judgments against persons insured in respect of third party risks. The learned Counsel for the petitioner contends that under this section, Sub-clause (2), in view of one of the conditions included in the policy, namely, the one falling under Sub-clause (2) (b)(ii), he was entitled to defend the suit and ask for being exonerated from any liability, and also to insist that any liability determined should be confined only to the defendants and not to the petitioner. The learned Counsel for respondent, however, contended very vigorously, that an opportunity was afforded to the petitioner to make his appearance and defend himself, and that, he having waived that opportunity, cannot be heard once again in regard to his claim for defending himself, and particularly so, at a late stage when the suit itself has been decided, and when he seeks to file an appeal. He urges that if leave is granted to him to file the appeal, the result possibly would be that the decree in its entirety might be set aside, and a de novo trial might have to be ordered, which would, in turn, cause unnecessary and unjustifiable hardship to the injured person, the first respondent. Though there appears to be some substance in the contention of the learned Counsel for first respondent in this case, I am of opinion that in view of the attitude taken by the first respondent, both before the trial and during the trial of the suit, there is sufficient justification for the petitioner to make an application of the kind he has done, in order to vindicate justice. If the first respondent had, from the very beginning, taken the right course, and had not changed position solely with a view to steal an advantage over the petitioner by shifting the ground of this claim, it would have been a different matter. But, as it is, the conduct of the first respondent, it must be stated, has itself caused considerable prejudice to the case of the petitioner.

6. The learned Counsel for the first respondent, has, in support of his contention, that this is not a fit case for granting leave to appeal, relied upon the decision in *The Indian Bank Ltd., Madras v. Seth Bansiram Jeshamal Firm*, through its managing partner *Lilaram* (1953) 66 M.L.J. 532 : ILR 57 Mad. 670. No exception could be taken to the general principle laid down in that ruling. But I do not think on the facts of the present case that ruling could be said to be applicable to the present case. Even so, the learned Counsel for the respondent has invited my attention to *Sarupsing Mangatsing Vs. Nilkant Bhaskar*, . I have carefully perused the judgment cited by the learned Counsel for the respondent in that case, and I am once again of the view that judgment is not applicable to the present case, as the facts are not wholly ad idem. The decision in *Murfin v. Ashbridge & Martin* (1941) 1 All E.R. 231, has also been relied upon by the counsel for the respondent. Even this decision is not one that could be made applicable to the facts of this case. All that it says is that a person like the present petitioner, cannot be allowed to have resort to an interlocutory application. It does not decide as to whether the petitioner could be allowed to vindicate his rights as against a judgment which has been given against him without his being heard.

7. On the other hand, the learned Counsel for the petitioner has invited my

attention to Windsor v. Chalcraft L.R. (1939) 1 K.B. 279, The Province of Bombay Vs. Western India Automobile Association, , Ponnuswami Gounder Vs. Rengaswamy and Others, and Royal Insurance Co. Ltd. Vs. Abdul Mahomed Meheralli, . 19th July, 1955. In my view, the principle enunciated in these decisions apply fully to the facts of the case, and applying these principles, I think that there is every justification for me to allow the petitioner the right to appeal against the decree passed by the Sub-Judge. It cannot be disputed that u/s 2, Sub-clause (10) of the Civil Procedure Code, the decree that has been passed against the petitioner is one that affects him, and he is a judgment-debtor within the meaning of Sub-section (10) of Section 2 of the Civil Procedure Code. An order capable of execution against the present petitioner has been passed by the learned Subordinate Judge, and in that sense the petitioner is one who is affected by the order. In particular, with due respect, I fully agree with the ratio decidendi of the decision in Ponnuswami Gounder Vs. Rengaswamy and Others, , and I think this is a just and proper case for leave being granted to appeal.

8. There is of course one point which has to be considered, in this case, which is peculiar to this case only, viz., that the petitioner, as disclosed by the affidavit, slept over the opportunity that was made available to him to defend himself, and failed to take advantage of the same. Taking this aspect into consideration, I think, for his default and failure to do the right thing, at the proper moment, he must be deprived of costs not merely in this petition, which matters very little but also in the appeal itself, irrespective of the result. In the result this application is allowed and leave is granted.