

(1967) 03 DEL CK 0022

In the Delhi High Court

Case No : Regular First Appeal No. 73D of 1958

The Vanguard Insurance Co. Ltd.

APPELLANT

Vs

Savitri Suri and Others

RESPONDENT

Date of Decision : 27-03-1967

Acts Referred:

Citation : (1967) ACJ 414

Hon'ble Judges : M.K.M Ismail, J;I.D. Dua, J

Bench : Division Bench

Advocate : S.S. Chadda, for the Appellant; R.L. Aggarwal, B.D. Jain, P.K. Jain and H.S. Dhir, for the Respondent

Final Decision : Dismissed

Judgement

I.D. Dua, J.—Defendant No. 3 in the Court below, the Vanguard Insurance Company Ltd., has preferred this appeal from the judgment and decree of a learned Subordinate Judge 1st Class, Delhi granting to the Plaintiffs a decree for Rs. 49,214.25 paise with proportionate costs against the Defendants. The liability of the Appellant (Defendant No. 3 in the Court below) was limited to Rs. 20,000/- only and proportionate costs.

2. At the hearing, before the learned Counsel started his arguments in support of the appeal, Mr. H.S. Dhir tried to present to us an application on behalf of Defendants Nos. 1 and 2 in the Court below, for being transposed as Appellants in this Court, but we declined to entertain that application directly and at that late stage ; we observed that if Defendants Nos. 1 and 2 wanted to have this prayer considered, they should have applied much earlier because that prayer called for a judicial determination, after due notice to all the parties concerned, sufficient time before the hearing of appeal on the merits.

3. Before dealing with the appeal on the merits, it is necessary to give in brief the broad facts of the case. Ramji Dass Suri, husband of Plaintiff No. 1, father of Plaintiffs Nos. 2 to 5 and son of Plaintiffs Nos. 6 and 7, was involved in a fatal

motor truck accident on 3. 9. 54. The Plaintiffs instituted the suit, out of which the present appeal arises, for recovery of Rs. 50,000/-on account of damages against three Defendants, the first of whom was the owner of the vehicle in question, the second Defendant Sohan Singh the driver and the third Defendant the Insurance Company with whom the vehicle was insured. The trial Court in a fairly well considered judgment passed a decree for Rs. 49,214.25 Paise with proportionate costs in favour of the Plaintiffs against the Defendants, the liability of Defendant No. 3 being limited to Rs. 20,000/-only and proportionate costs. The company alone has appealed, the other Defendants presumably not feeling aggrieved by the judgment and decree of the Court below.

4. On behalf of the Plaintiff-Respondents, it has been pointed out that the Appellant which is only an insurance company cannot travel outside the scope of Section 96(2) of the Motor Vehicles Act (herein-after called the Act) for the purpose of contesting the Plaintiffs' claim arising out of the accident. Mr. Chadha, learned Counsel for the Appellant has, however, submitted that by virtue of condition No. 2 of the conditions contained in the policy of insurance, he is entitled to take up all the defences which were open to the insured and to attack on appeal the judgment and decree of the Court below on the merits, on all the points on which the insured could have done so. The argument is obviously founded on the Supreme Court decision in *British India General Insurance Co. Ltd. v. Captain Itbar Singh* AIR 1959 S.C. 133 L. At page 1335 of the report, the Court observed as follows:

We are furthermore not convinced that the statute causes any hardship.

First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do.

This decision was followed by the Mysore High Court in the *Concord of India Insurance Co. Ltd. v. L.J. Machado* 1966 A. CJ. 321.

5. We consider it necessary at this stage to reproduce condition No. 2 of the conditions as contained in the policy. Condition No. 2 reads as under:

2. No admission, offer, promise or payment shall be made by the insured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in his name for own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured shall give all such information and assistance as the company may require. If the Company shall make any payment in settlement of any claim and such payment includes any amount not covered by this policy the insured shall repay to the Company the

amount not so covered.

It is, however, not disputed that in the trial Court, the Company did not express its desire to take over and conduct in the name of the insured the defence of the Suit. It is also not the Appellant's case that the present appeal has been preferred by the Company in the name of the insured. It is again not suggested that the Company desired to take over and conduct in the name of the insured the present appeal against the impugned order. Our attention has of course been drawn to the prayer clause in the memorandum of appeal in this Court. It is added there inter alia that benefit of this appeal may be given under Order 41, Rule 32 CPC to the first Defendant also and that the suit Of the Plaintiff-Respondents against the Appellant may be dismissed. The first Defendant is Messrs Gurbachan Singh Surjit Singh, the owner of the vehicle in question. Rule 32 of Order 41 is in the following terms:

32. The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or if the parties to the appeal agree as to the form which the decree in appeal shall take or as to the order to be made in appeal, the appellate Court may pass a decree or make order accordingly.

On the basis of this provision, it is sought to be contended that the Appellant-company had desired to take over and conduct in the name of the insured the appeal from the judgment and decree of the Court below. We are unable as at present advised to sustain this submission. Mention of Order 41, Rule 32, in the prayer clause in the memorandum of appeal does not appear to us to bring the Appellant's case within the fold of condition No, 2 of the conditions contained in the policy because it does not convey the exercise of the Appellant's right to take over and conduct in the name of the insured the appeal against the impugned judgment and decree. Mr. Chadha has, however, submitted that the desire to take over and conduct in the name of the insured the defences of a claim does not require to be expressed by the insurance company in any particular form and such desire may well be inferred from the manner in which the defence of the suit has been conducted by the Company. Reference has been made in this connection to a recent decision by us in the case of Premier Insurance Co. Ltd., Madras Vs. Swaran Kaur and Others, in which we referred to several decisions including a Bench decision of this Court in New Zealand Insurance Co. Ltd. Vs. Kalu Ram and Others, In that case, it was argued that consent of the insured is necessary if the company chooses to take over and conduct in the name of the insured the defence of the claim in the suit and on appeal, but we were doubtful if such a consent was necessary. The right created by the clause in the insurance policy does not have the effect of any assignment to or devolution on the insurer of the right of the insured, but it vests in the insurer the option to be exercised in order to protect its interests under the insurance policy, which is not dependent on the consent of the insured. The decision in the case of New Zealand Insurance Co. Ltd. Vs. Kalu Ram and Others, does not, in our opinion, lay down any rule of law that consent of the insured is

necessary in order to entitle the insurance company to take over and conduct in the name of the insured the defence of the claim in the suit.

6. In the present case, however, we do not think it is possible on the present record to hold that the Appellant is shown ever to have desired to take Over and conduct in the name of the insured the defence of the suit. It is quite clear that the suit in the trial Court was concluded and even the present appeal was preferred in the Court long before the decision of the Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, was reported. It thus seems to us that the effect of the inclusion in the insurance policy of the clause like the one relied on by the Appellant was perhaps not fully realised by the Appellant and the requisite steps for exercising the desire in accordance with the said clause were not taken. Now if this clause is not utilized, then as observed in *Vanguard Fire and General Insurance Co. Ltd. Vs. Sarla Devi and Others*, ; Sub-section (6) of Section 96 of the Act read with Sub-section (2) thereof would seem to debar the Appellant from defeating the Plaintiffs' claim on any other grounds except those covered by them.

7. The learned Counsel has next attempted to bring the Appellant's case within the terms of Section 96(2) of the Act. This provision, so far as relevant, may also be read:

96 (2) No sum shall be payable by an 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, namely -

(a) That the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of Section 105; or

(b) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of vehicle (a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or (b) for organized racing and speed testing, or (c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle; or (d) without side-car being attached, where the vehicle is a motor cycle ; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification ; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or (c) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by representation of fact which was false in some material particular.

It is argued by Mr. Chadha that the vehicle in question was not owned by Defendant No. 1 and it was misrepresented to the Appellant company at the time of obtaining the policy that it was so owned by him. Our attention has been drawn to paragraph 8 of the written statement filed by Defendant No. 3 in which it is denied that the truck bearing No. DLB 5115 was owned by Defendant No. 1 at the time of the accident. We have also been referred to paragraph 21 in the additional pleas in this written statement in which breach of the following specified conditions of the policy is pleaded as a ground for excluding the Company's liability:

(a) The vehicle was not being used under a public carrier's permit and to use it for transporting ice was to use the same for hire or reward,

(b) the vehicle was being used at the time of the alleged accident for a purpose not allowed by the permit under which the vehicle was being run as it was a goods vehicle,

(c) the driver of the vehicle at the time of the accident was not duly licensed to drive heavy transport vehicle, and

(d) the policy became void as the first Defendant did not disclose all material facts at the time of getting it insured.

In so far as the plea of suppression of material facts is concerned, it is obvious that the written statement does not conform to the provisions of Order 6, Rule 4, Code of Civil Procedure, and therefore, Clause (d) of Paragraph 21, devoid of particulars as it is, can safely be ignored as a plea without substance. But in any event, all that has been urged on behalf of the Appellant is that Defendant No. 1 was not the owner of the vehicle and that he had transferred it to Pritam Singh, with the result that the insurance policy was obtained on a misrepresentation of the ownership of the vehicle. In support of this submission, reference has been made to the statement of Gurbachan Singh himself appearing as D.W. 4. We are wholly unimpressed by this testimony and are not prepared to place any reliance on his evidence in support of the plea raised before us. The evidence of D.W. 1, Lila Kishan, Clerk, Motor Registration and Licensing Authority, also controverts D.W. 4. The Court below has dealt with this question at length and nothing cogent or convincing has been urged against its conclusion. The plea that the driver was duly licensed to drive a heavy vehicle at the time of the accident has not been seriously pressed and the finding of the Court below seems to us on

this point to be unexceptionable. The evidence of Om Parkash, Clerk, Motor licensing Authority, D.W. 5, clearly negatives this plea. The learned Counsel for the Appellant has next contended that the vehicle in question was being used for the purpose of carrying ice whereas it was licensed only for carrying building material. It is also added that the vehicle in question was being used for hire or reward which violates "limitations as to use" contained in the Schedule attached to the insurance policy. Therein clause No. (iii) which is the relevant clause it is stated that the vehicle is to be used only under a public carrier's permit within the meaning of the Motor Vehicles Act, 1939 and the policy does not cover use for organized racing or speed testing. Reliance has been placed on the statement of Chela Ram P.W. 3 who has deposed that his company had taken on hire this truck from 19.5.54 to 6.9.1954 for delivery of ice from the factory to their customers. Sohan Singh, according to his statement, was the driver of this truck which met with the accident on 2nd or 3rd of September, 1954. The Appellant's challenge before us is mainly founded on the testimony of Gurbachan Singh, Co-proprietor of Defendant No. 1 appearing as D.W. 4. This witness has gone to the length of making a self-serving statement that he was not the proprietor of the truck in question at the relevant time in September, 1954. According to him, this truck was being used by Pritam Singh in August and September, 1954. He has of course deposed that Defendant No. 1 had a building material carrying permit but that permit has not been produced. The Court below has given a finding that it is not proved that the permit in question was for carrying building material only. It is not shown that this conclusion is erroneous or is unsustainable on the record.

7.1 The Appellant's learned Counsel has, however, laid great stress on another grievance. He has complained that adequate opportunity was not afforded to the Appellant-company to bring on the record the permit for the vehicle at the relevant time and the evidence as to in what manner the vehicle was being used at the time of the accident. Our attention has been drawn to the Appellant's application dated 19.7.1957 in the trial Court summoning, inter alia, the Clerk of Transport Authority, Sohan Singh driver and Pritam Singh with the relevant records. Reference has also been made to another application dated 22.11.1957 seeking to summon the above witnesses.

8. Let us now see how far this grievance is justified. The Plaintiff's evidence was closed on 26.6 1957 and the Court fixed 9.8.1957 for the Defendant's evidence and for Plaintiff's rebuttal evidence. The Appellant company Defendant No. 3 applied as late as on 29.7.1957 for summoning the witnesses. On 9.8.1957, the Court observed that the witnesses could not be served for want of time. The case was adjourned to 17.10.1957 but that day having been declared a holiday, the case was adjourned to 20.11.1957. On that the date the Court noted that the addresses of Sohan Singh and Pritam Singh were not sufficient for tracing them and the Defendant's counsel undertook to produce Gurbachan Singh on his own responsibility. Fresh summons were directed to go for Sohan Singh and Pritam Singh for 20.12.1957. On that date the counsel for Defendant No. 3 stated that he had not been able to obtain correct addresses of his witnesses in time and,

therefore they could not be served for that date. He prayed for a short adjournment undertaking to produce them on his own responsibility, as he had by then secured their correct addresses. Case was accordingly adjourned to 16.1.1958, in view of the statement of the counsel for Defendant No. 3 on 19.1.1958. Only Om Parkash D.W. 5 was examined, no other witness having been served or brought. The case being more than 2 years old, further adjournment was declined by the Court below and the evidence of Defendant No. 3 closed. After recording the evidence of Lila Kishan P.W. 13 the case was adjourned to 29.1.1958 for arguments, but on that day, inspection of the spot was considered necessary. This was done on 5.2.1958 and the case was adjourned for arguments to 15.2.1958. On that date, Defendant No. 3 presented another application for permission to summon from the State Transport Authority the original file of the Public and Private Carriers permits of the vehicle in question and the original application for transfer to Pritam Singh. This was declined by the Court and, in our opinion, rightly. The foregoing discussion shows that no fault can be found with the Court below and the Appellant cannot have any legitimate grievance against the order dated 16.1-1958 and there is no ground made out for interference on appeal with the decision of the Court below which does not seem to be tainted with any infirmity.

9. Mr. Chadha has, however, relied on condition No. (iii) mentioned above, according to which the vehicle is required to be used under a Public Carriers' Permit within the meaning of the Act. Section 54 (c) of the Act which is cited in this connection reads as under:

54. Application for public carrier's permit—An application for permit to use one or more motor vehicles for the carriage of goods for hire or reward (in this chapter referred to as a public carrier's permit), shall, as far as may be, contain the following particulars, namely,

* * * *

(c) the nature of the goods it is proposed to carry.

It is argued that, among other things, the nature of goods to be carried is to be mentioned in the application. Section 56 of the Act is cited in support of the contention that the Regional Transport Authority may attach to public carrier's permit any one or more of the conditions specified in Sub-section(2) including the condition that goods of specified nature shall not be carried. Reference has then been made to Rule 4.8 of the Delhi Motor Vehicles Rules, 1940, according to which six forms of permits are specified, the public carrier's permit being in form P.C. In this form our attention is invited to Clause 10 which permits the vehicle authorised by the permit to be used by a holder as a private carrier within the area to be specified therein for the purpose of carrying the goods to be specified therein. It is not understood how this clause can be of any help because it merely allows the vehicle under the public carrier's permit to be used in a limited way as a private carrier. These provisions of the Act and the Rules made thereunder do

not seem to us by any means to support the Appellant's argument that the vehicle in question was used contrary to any condition contained in the insurance policy. The non-production of the permit was due entirely to the default and lapse on the part of Defendant No. 3 Appellant and, in the absence of the permit, it is not possible to draw any inference in favour of the Appellant's pleas. The conclusion of the Court below cannot be considered to be erroneous or faulty on the material on the record, which conclusion, deserves to be upheld.

10. In the final result, the appeal fails and is dismissed with costs.