
(1978) 03 MAD CK 0065

In the Madras High Court

Case No : Appeal Against Order No. 459 of 1975

United India Fire and General Insurance Co. Ltd.

APPELLANT

Vs

Josephine Mary and Others

RESPONDENT

Date of Decision : 17-03-1978

Acts Referred:

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

Citation : (1979) 49 CompCas 875 : (1979) 92 LW 481

Hon'ble Judges : Balasubrahmanyam, J

Bench : Single Bench

Advocate : K.S. Narasimhan, for the Appellant; R. Balachander, for the Respondent

Final Decision : Dismissed

Judgement

Balasubrahmanyam, J.—This civil miscellaneous appeal raises a question of locus standi in proceedings before the Motor Accidents Claims Tribunals. The question is, whether insurance companies when given notice, in proceedings for adjudicating claims for compensation in motor accident cases are entitled to canvass before the Accidents Tribunals questions relating to quantum of compensation ?

2. Section 96(2) of the Motor Vehicles Act expressly sets out certain grounds of defence as being available to be raised by insurance companies in such proceedings, but those grounds do not include any question relating to quantum of compensation. The pertinent issue raised before me at the hearing of this appeal was whether it is open to an insurance company to object to the quantum of compensation awardable to third parties either before the Claims Tribunal or before the appellate authority ?

3. The facts of this case relevant for the consideration of the question of locus standi may be briefly stated. A motor lorry owned by one Malayap-pan and driven by his driver dashed against a bullock cart on a high road near

Tiruverambur and injured the cart driver. The injured cart driver later succumbed to the injuries. The deceased's widow, his aged mother and his (minor) son joined together and filed a claim for compensation before the Motor Accidents Claims Tribunal, Tiruchirapalli, contending that the accident which caused the deceased's death was due to the lorry driver's negligence. They claimed a compensation of Rs. 20,000 against the lorry owner, and also against the insurance company with whom the lorry had been insured, namely, the Madras Motor and General Insurance Company, later merged into the unit of the United India Fire and General Insurance Company. Notices of the claim application went from the Tribunal to both the lorry-owner and the insurance company. The lorry-owner remained *ex parte*. The insurance company entered appearance and resisted the claim for compensation on the ground that the accident was not due to the lorry driver's fault. The insurance company also objected to the quantum of compensation claimed as excessive. At the enquiry before the Tribunal, the claimants let in evidence both oral and documentary. While the insurance company participated in the enquiry, they did not mark any documents, nor call any witness on their side.

4. On the basis of the claimant's evidence, the Tribunal found that the lorry driver was negligent in driving the lorry. The Tribunal found that the cart driver died of injuries sustained in the accident. The Tribunal accordingly made both the lorry owner and the insurance company liable to pay compensation. As for the quantum of compensation, the Tribunal determined an amount of Rs. 9,000 to be paid to the deceased's widow, a sum of Rs. 9,000 to the deceased's minor son and a sum of Rs. 900 to be paid to the deceased's mother. It is against this award of the Tribunal that the present civil miscellaneous appeal has been brought. The appeal is by the insurance company. The heirs of the deceased cart driver to whom the Tribunal had awarded compensation are the contesting respondents.

5. The only ground urged by the insurance company in this appeal is that the quantum of compensation determined by the Tribunal in the aggregate sum of Rs. 18,900 lacks any legal basis, and is, in any event, excessive.

6. Learned counsel for the claimants, however, raised a preliminary objection to the maintainability of the appeal. He said that an appeal by the insurance company does not lie on, the question of quantum of compensation. The claimants, apparently, did not seek to raise a similar objection against the insurance company when the matter was before the Tribunal in the first instance. But on this ground I did not wish to prevent them from raising their preliminary objection, considering that it goes to the root of the whole question of *locus standi* in this matter.

7. The insurance company, for their part, met the preliminary objection with the submission that on the terms of the third party insurance policy which covered the lorry in question, they were entitled to canvass the quantum of compensation in the same way and to the same extent that the owner of the vehicle himself

could do. The policy of insurance was not on record before the Tribunal, but it has since been filed by the insurance company in this appeal, marked as Ex. B-t.

8. The question raised before me falls to be decided, primarily, on the terms of Section 96 of the Motor Vehicles Act, 1939. This section deals with the obligation of an insurance company to satisfy a judgment against persons insured in respect of third party risks. Sub-section (1) of this section lays down that the insurers shall be liable to satisfy a judgment obtained against the insured as if the insurer were the judgment-debtor in respect of that liability. Sub-section (2) of the same section, however, provides that the insurer is not liable to pay any amount in respect of any judgment concerning the liability under a policy 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. The same sub-section also provides that the insurer to whom notice of the proceedings had been given shall be entitled to be made a party to the proceedings and also to defend the action on certain grounds, which are set out in Clauses (a) to (c) of that sub-section. Briefly stated, the grounds which are open to the insurance company to urge under the aforesaid clauses for resisting the liability are:

(a) that the insurance policy already stands cancelled by mutual consent before the accident happened ; (b) that there had been a breach of some special condition of the policy ; and, (c) that the policy had been obtained by false representation or non-disclosure of any material fact or particular.

9. The specifying in Section 96(2) of the above grounds of defence as being available to the insurance companies in itself would, in my opinion, seem to be a sufficiently clear indication of Parliament's intention to exclude from the defence other grounds not so specified : *Expressio unius est exclusio alterius*. But the intention is made explicit beyond doubt by Sub-section (6) of the same section, which is in the following terms ;

" No insurer to whom the notice referred to in Sub-section (2)..... has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in Sub-section (1)..... otherwise than in the manner provided for in Sub-section (2)....."

10. These provisions came up for consideration before the Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, . The case before the Supreme Court arose by way of an appeal from a regular suit for damages for negligent driving of a motor vehicle. The victims of the accident asked for relief not only against the owner of the motor-car, but also against the insurance company. The insurance company filed a written statement putting forward various defences. The question before the court was, whether the insurance company was entitled to raise defences other than those set out in Section 96(2) of the Motor Vehicles Act. The court answered the question in the negative, relying on the words of Sub-section (2) as well as Sub-section (6) of

the Act.

11. As I have earlier pointed out, the case before the Supreme Court arose in a regular suit for damages. Section 96(2), indeed, employs language which is appropriate only to a suit for damages in, a civil court. Observe, for instance, the use of such words in the section as " court", " judgment " and the like. It is, however, now settled law that notwithstanding the phraseology of Section 96(2), it applies not only to suits for damages in civil courts, but also to proceedings before the Motor Accident Claims Tribunals . wherever constituted by the State Government u/s 110 of the Motor Vehicles Act for adjudication of claim for compensation. See, for instance, the decisions in Madras Motor and General Insurance Co. Ltd. Vs. Jagadeeswari and Others, , Queensland Insurance Co. Ltd. v. Rajalakshmi [1969] 39 Comp Cas 911 ; [1970] ACJ 104 and Hukam-chand Insurance Co. v. Subhashini Roy [1971] ACJ 156 (Cal). A contrary view was expressed by a Bench of this court in an earlier case in K. Gopalakrishnan Vs. Sankara Narayanan and Others, . But this decision is now regarded as laying down the law incorrectly. See the discussion in Madras Motor and General Insurance Co. Ltd. Vs. Jagadeeswari and Others, .

12. Learned counsel for the insurance company, however, submitted that Section 96(2) can by no means be regarded as a complete and exhaustive code on the subject of the defences available to an insurance company in any action or claim for compensation. He said that nothing in the Motor Vehicles Act would prevent the insurance company and the assured, as parties to a contract of insurance, from inserting appropriate terms in the insurance policy itself which would have the effect of enabling the insurance co'mpany to raise all manner of defence against a claim for compensation without being confined to those set out in Section 96(2) of the Act. The argument, in other words, was that the insurance company can contract itself out of Section 96(2) and out of the interdict contained in Section 96(6). To support this argument, learned counsel placed reliance on the very decision of the Supreme Court I have earlier cited, British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, . I must, however, reject this contention as untenable. The language of Section 96(6) read with Section 96(2) is clear and inexorable. No insurance company can contract itself out of those provisions. This is because the whole matter of coverage of risks of third parties in motor accidents is now governed by statute. The crucial terms of the policy are statutory. The defences open to an insurance company are also statutory. In these circumstances, the terms of the policy of insurance, as a piece of contract, cannot override the clear provisions of the statute. It may be observed, in this connection, that elsewhere in the statute. Parliament has provided for certain exceptional cases, under a separate provision, Section 110C(2A), which has the effect of enlarging the insurance company's grounds of defence to a claim for compensation. I shall advert to this special provision presently. This provision apart, which would come in for application only in certain exceptional circumstances, the normal rule under the law is that an insurance company cannot defend itself against a claim for compensation except

on one or other of the grounds set out in Section 96(2).

13. Learned counsel has plainly misconceived the purport of the discussion found in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, , on the special terms that an insurance policy may hold. The Supreme Court did not lay down in that decision that an insurance company can circumvent the restrictions and prohibitions of Section 96(2) and (6) by the simple expedient of inserting liberal enabling clauses in the contract of insurance. The passage relied on by the learned counsel is as follows (p. 67) :

" 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..... 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."

14. All that the Supreme Court say in this passage is that although the insurance companies are strictly limited only to those defences which Section 96(2) makes available to them, yet they are not prevented by the Motor Vehicles Act from acting as the agent or representative of the vehicle-owner and in that capacity proceed to put forward any defences which the vehicle-owner himself may raise on his own. This position, with respect, is understandable on the general principle of agency. Whatever a principal can plead, his agent can do. But then, the jural position of an insurance company as an insurer is different from that of an agent. This is why the Supreme Court have insisted that even for enabling an insurance company to act as the mouthpiece of the assured in any action for compensation, it is necessary that there must be express authority in that regard to be found in the very terms of the insurance policy. The Supreme Court have further insisted that the insurance company must, even in those circumstances, act only in the name of the assured. The implication is that the insurance company cannot put forward these defences on its own.

15. In the present case, it is not pretended that the insurance company is fighting the battle of the lorry driver ; it is fighting its own long battle. The lorry owner, as earlier mentioned, was impleaded as a party in his own right, but did not appear before the Tribunal. However, the fact that he had remained ex parte cannot, on that account, make the insurance company his mouthpiece, or spokesman. Indeed, the complaint of the insurance company in this case has been that his remaining ex parte was wilful and was with a view to collude with the claimants. This being so, the position of the insurance company cannot be brought within the ruling of the Supreme Court. On their own pleadings, the insurance company do not purport to act " in the name " of the lorry owner. The insurance policy in this case, Ex. B-1, cannot, therefore, be relied on by the insurance company for any purpose.

16. A look at the relevant clauses in the policy only tends to confirm my conclusion. Clause 4 relied on by learned counsel enables the insurance company

only to " undertake " the defence of proceedings in any court of law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under the policy. " Undertaking " the defence, in my view, can only arise with reference to another's defence, not with reference to one's own defence. Clause 2 in the conditions attached to the policy provides that the insurance company " shall be entitled, if it so desires, to take over the conduct in the name of the insured the defence or settlement of any claim or to prosecute in the name of the insured for its own benefit any claim for indemnity or damage or otherwise ". The words, " take over the conduct " and " in the name of the insured " are an echo of the observations made by the Supreme Court in the passage earlier quoted. These clauses can only serve the insurance company if it, avowedly, enters the defence as the agent or spokesman of the vehicle owner, not when it seeks to negate its own liability under the statute.

17. Learned counsel for the insurance company then invoked Section 110C(2A) of the Act, saying that this provision applied to the circumstances of the present case. Section 110C(2A) is found enacted in the following terms :

" Where in the course of any enquiry 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 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."

18. The scheme of the section is clear. It can be invoked by an insurance company in two exceptional kinds of cases. One is a case where the insurance company is in a position to allege that the insured vehicle owner is colluding with the claimants before the Tribunal in the matter of compensation. The other exceptional case is where the insurance company alleges that the vehicle owner has failed to contest the claim for compensation. Where either of these allegations is made, then it is the duty of the Claims Tribunal to go into it. If the Tribunal is satisfied about the existence of any collusion between the insured vehicle owner and the claimants or if it is satisfied that there was a failure on the part of the insured owner to contest the claim for compensation, then the Tribunal can record its satisfaction to that effect. This alone will entitle the insurance company to proceed to enter its defence on the merits as against the claim application pending before the Tribunal, and while doing so, to put forward any and every defence that may be open to the vehicle owner himself to raise. This, as I understand it, is the whole scheme of the exceptional provision contained in Section 110C(2A).

19. In this case, the insurance company have not alleged any collusion between the lorry owner and the claimants. Learned counsel, however, relied on the circumstance that the lorry owner had remained ex parte in the enquiry before the Tribunal. He urged that from the very fact that the insured had remained ex parte, the court must draw the inference that he had " failed to contest " the claim within the mischief of Section 110C(2A). I am afraid, I cannot follow the line suggested for drawing the crucial infer-ence requisite under the statute. As I earlier pointed out, the statutory pre-conditions for invoking Section 110C(2A) are either evidence of collusion between the insured and the claimants or evidence of failure on the insured's part to contest the claim. In the absence of proof of either circumstance, the insurance company cannot seek to transcend the limitations of Section 96(2) in drawing up its defence. Collusion, as a factual circumstance, cannot be presumed ; it must be proved. Likewise, failure to defend the action for damages must be proved ; it cannot be presumed.

20. Failure to contest the claim pre-supposes that the claim is eminently, or even arguably, contestable. The insured owner of a vehicle may in any given case prefer not to contest the claim, because he may be satisfied, either on the basis of legal opinion or otherwise, that he has no defence worth putting forward. His driver, for instance, might have admitted his fault as the cause of the accident. Or the state of the available evidence of the accident, as evaluated by the owner or his advisers, may be such that he might consider it inexpedient to contest the claim, thereby saving for himself a pretty penny by way of costs. These and a hundred and one other reasons there might be which may weigh with a vehicle owner while he takes a decision not to contest the claim. He may put into effect his decision either by entering appearance before the Tribunal and admitting Ms liability at the enquiry, or by simply absenting himself from the enquiry and remaining ex parte. Whatever may be the mainspring of his action and, however it may manifest itself, the essential thing for the insurance company to establish u/s 110C(2A) is that there had been a " failure " on the part of the assured, to contest the claim.

21. The fact that the insured car owner remains ex parte in the proceedings before a Claims Tribunal does not, in my opinion, in itself, or necessarily, lead to the one and only inference that there had been a failure to contest the claim on the owner's part. Sheer non-appearance, when the case is called, may lead to the party being declared ex parte, but it cannot per se lead to the inference that he wilfully defaulted in appearance in order to allow the claimants to have their own way. It is in every case essential for the insurance company to satisfy the Claims Tribunal that there had been a failure to contest the claim on the part of the insured. The Tribunal, while deciding this question, will naturally have to pay regard not only to the nature of the claim and the circumstances of the accident, but also to the reasons which may reasonably be attributable to the omission of the insured vehicle-owner to contest the claim. These are matters for evidence and for evaluation of evidence.

22. At the time when this case was before the Claims Tribunal, the insurance company made no attempt whatever to advert to these considerations, much less satisfy the Tribunal that the lorry owner had deliberately absented himself from the proceedings so as to allow a good defence to go by default. I have no materials in this case on, the basis of which I can hold that there has been a failure on the part of the lorry owner to contest the claim. From the mere circumstance that he had remained ex parte, I cannot conclude that the pre-condition in Section 110C(2A) must be held to have been satisfied.

23. It remains to notice two decisions which learned counsel brought to my notice in the course of arguments, both decisions of this court, one of a Division Bench and the other of a learned single judge.

24. The Division Bench decision is *Madras Motor and General Insurance Co. Ltd. Vs. Jagadeeswari and Others*, , which I had noticed in an earlier part of this judgment in another context. In this case, the accident occurred on October 11, 1968, It was a fatal accident. The heirs of the victim .filed a claim for compensation before the Claims Tribunal against the owner of the vehicle and also the insurance company. It was found that there was an express clause in the policy which enabled the insurance company to put forward all possible defence to an accident claim. The insurance company entered appearance before the Tribunal and entered its defence under various heads. The vehicle owner also entered appearance, but did not contest the claim. The Tribunal went into the evidence led by the claimants and found the driver of the vehicle to be at fault when the accident occurred and when the deceased was run over. The Tribunal fixed the compensation as Rs. 33,120. The insurance company appealed, questioning the quantum of compensation. The claimants objected to the maintainability of this appeal.

25. The Division Bench which dealt with the appeal, however, held that the appeal was competent, relying on the rights conferred by the policy on the insurance company to contest the claim for compensation on all grounds open to the assured himself. In the course of the argument, the Division Bench's attention was drawn to Section 110C(2A), although, it might be mentioned, this provision came to be inserted in the statute and became law only on March 2, 1970, long after the accident had occurred in that case, which was on October 11, 1968. The Bench did not feel called upon to deal with Section 110C(2A) in the case before them, although not for the reason that the provision became law only later and had no retrospective application. The observations of the Division Bench were AIR 1974 Mad :

" Mr. Chinnaswami, learned counsel for the respondents, referred to the recent amended Section 110C(2A) and submitted that the Claims Tribunal may direct impleading of the insurer as a party to the proceedings when it finds 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. It was submitted that only when the court gives such a finding the

insurer can be added as a party, and otherwise the insurer is not a proper party. It is unnecessary for us to examine this question."

26. Whether the actual decision of the Division Bench was not correct does not arise for consideration by me. It is, however, necessary to state that the Division Bench had not to apply Section 110C(2A) of the Act in the case before them. It may be further stated that the Division Bench only purported to apply the law laid down by the Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, , which again, was decided with reference to an accident to which, Section 110C(2A) was not applicable. It seems to me that what the Supreme Court had laid down as being within the scope, and within the limitations of Section 96(2) must now be applied more strictly than ever before, now that Section 110C(2 A) contains the only enacted exceptions to Section 96(2) and (6), I can find no observations to the contrary expressed by the Division Bench in *Madras Motor and General Insurance Co. Ltd. Vs. Jagadeeswari and Others*, .

27. The other judgment referred to by learned counsel is that of Paid J. in *General Assurance Society Ltd. Vs. Jayalakshmi Ammal and Others*, , Section 11QC(2A) does not, however, find a place in the discussion of the case, even though the accident had occurred on May 25, 1970. The question for decision before Paul J. was as to the scope of the defences which an insurance company can raise against a motor accident claim. On the facts of that case it appeared that the insurant policy did not contain any special provision enabling the insurance company to raise defences other than those allowed by Section 96(2) of the Motor Vehicles Act. While pointing to this significant omission in the terms of the insurance policy Paul J. referred to the law laid down in the decision of the Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, and other cases. My only comment with respect, on the summary, or restatement, of the law rendered by Paul J., concerns the following observation which occurs in his judgment.

"the insurance company is not allowed to raise any plea outside the scope of the pleas specified in Section 96(2) of the Motor Vehicles Act ; but if it has reserved a right in the policy to defend an action in the name of the insured, it can raise all the pleas that may be open to the insured, with the permission of the Tribunal."

28. It seems to me that the rider, " with the permission of the Tribunal " is not a requirement of the law as laid down by the Supreme Court. What the policy, even under a special clause confers, is a right to raise pleas in defence in the name of the insured.

29. I have earlier said that this kind of clause in a policy makes the insurance company a mere mouthpiece, or alter ego, if you like, of the insured. This being so, no leave of the Tribunal would be required for an insurance company to voice the insured's defences, because the insured himself can do so directly without

any such leave. But where the insurance company wants to stand on its own legs and voice nobody's defence but its own, the position is different and it is subject to the muzzles which are found in Section 96(2) and (6), and it can only ignore them by bringing itself under one or the other of the circumstances set out in Section 110C(2A) of the Act.

30. As I understand the broad underlying concept of third party insurance, it is, in essence, a contract of indemnity. The indemnifies¹ is liable if the principal is liable. The only safeguard the indemnifies requires under the law is to see that he is not put to any unwarranted loss owing to the default or collusion of the principal. This is the protection which Section 110C(2A) of the Motor Vehicles Act affords to the insurer. In other respects, the insurer is strictly limited by the terms of Section 96(2) of the Act.

31. For all the above reasons, this civil miscellaneous appeal must be dismissed as not maintainable. It is, accordingly, dismissed. There will, however, be no order as to costs.