(1985) 02 GAU CK 0009

In the Gauhati High Court

Case No : First Appeal MA (F) No. 25 of 1978

United India Fire and General Insurance Company — APPELLANT

Vs

Smt. Malati Bala Dutta and Another — RESPONDENT

Date of Decision : 18-02-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Motor Vehicles Act, 1988 — Section 110, 110A, 95, 95(2), 95(5)

Citation : (1985) 1 GLR 443

Hon'ble Judges : T.N. Singh, J;R.K. Manisana Singh, J

Bench : Division Bench

Advocate : D. Choudhury, for the Appellant; A.M. Lodh and H. Lodh, for the Respondent

Judgement

T.N. Singh, J.—The son died on 6.1.75-a bachelor, a promising young man, employed comfortably as an Agricultural Section officer under the Director of Agriculture, Government of Tripura. He died in an accident made by bus belonging to the 2nd Respondent, Tripura Road Transport Corporation, for short "T.K.T.C" which saw the death of the son. The mother who is 1st Respondent before us lodged a claim for herself and her husband for compensation in the Motor Accident Claims Tribunal, Tripura at Agartala, claiming Rs. 1,00,000/-for her son''s death, which occured according to her, due to rash and negligent driving of the bus.

2. The claimant examined as. many, as 7 witnesses in support of her case. Learned Presiding officer of the Tribunal on a careful consideration of all the materials on record reached the conclusion that there was negligence on the part of the driver in driving the vehicle in question the to which the accident occured resulting in the death of one of its passengers Debabrata, son of the 1st Respondent. The claim was contested before the Tribunal by the T.R.T.C. and also by the Insurer, the Appellant before us, by filing written statements. Learned Presiding officer passed the award in favour of the claimant Respondent allowing

her claim to the extent of Rs. 25,920/- and also allowing interest at the rate of 6% per annum on that amount from the date of application up to the date of realisation.

3. The owner of the vehicle, namely T.R.T.C., has not appealed against the award. The insurer, on the other hand, has come to this Court and in the course of hearing of the appeal learned Counsel Mr. D. Choudhury has raised two contentions before us in support of the appeal. His first contention is that there was no rashness or negligence on the part of the driver in driving the vehicle and the finding recorded to the contrary is against the weight of evidence. He next contended the Appellant''s liability in terms of Section 95 of the Motor Vehicles Act (here after the Act) extended only to Rs. 5,000/-and therefore, he cannot be charged with the duty of satisfying the entire liability incurred by the owner under the award passed by the Tribunal. In our opinion, his both contentions are meritless.

4. For the first contention we need not travel far, because, answer thereto is given by the statutory provision itself. We examine, therefore, Sub-section (2) of Section 96 of the Act to test counsel''s contention. On a plain reading of the provision it appears clear that the insurer was not liable to pay any sum determined as the owner''s liability arising from the accident unless 3 conditions were satisfied. Firstly, before or after the commencement of the proceeding in which the judgment is given the insurer must be given notice of the proceeding; secondly he must also be made a party to the proceeding; and thirdly, he shall have the right to defend the action on certain grounds as mentioned in Clauses (a) and (b) of Sub-section (2). Mr. Choudhury (sic)onedes that the first two conditions have been duly satisfied. However, he disputes Respondent''s objection to his challenging the award on merit, namely, finding of negligence, contending that Sub-clause (iii) of Clause (b) of Sub-section (2) gives him right to do so. We do not see any force in his contention for two reasons. We have perused the written statement of the insurer. We do not find any ground taken therein about breach of any condition of the policy or insurance by the owner of the vehicle. That apart, Sub-clause (III) on the face of it does not refer to a case of "rash or negligent" driving. The only liability that can be excluded under the clause is "liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion." We have no doubt that Section 96(2) contemplates that even by inserting a condition in the policy excluding liability accruing from "rash and negligent driving" the support cannot be achieved because such a condition would be illegal as it would not be covered by Clause (b) thereof.

5. Our attention was also drawn by Mr. Choudhury to Clause (c) which follows immediately Sub-clause (iii). Herein what can be pleaded is voidness of a policy on the ground that it was obtained by non-disclosure of a material fact or by a representation of fact which was false in some material particulars. We do not find any pleading in this case to suggest that the insurer did claim or can even now claim the benefit either of Clause (c) of Sub-clause (iii) of Clause (b) of Sub-

section (2) of Section 96 of the Act. In our opinion, legislative intent is boldly and clearly expressed in exclusionary terms to exclude all defences other than those appended to Sub-section (2) in the various clauses thereof. The Appellant''s case does not come under any of the grounds permitted by any of the Sub-clauses of Clause (b) or even of Clause (c) of Sub-section (2). Our attention has also been drawn to a decision of their Lordships of the Supreme Court in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, wherein in unequivocal terms it is held that the only manner of avoiding liability provided for in Sub-section (2), is through the defences therein mentioned." Law on this point is so firmly settled that we need not labour further to dispose of this contention of Mr. Choudhury. Accordingly, we hold that the Appellant (insurer) cannot challenge on merit the award on the ground that the accident did not occur due to rash and negligent driving of the vehicle. We say so because such a defence is barred to the insurer by the positive mandate of Section 96(2) which operates even in appeal and is not limited to trial. Because, the bar is at the threshold and also total.

6. The next question concerns the quantum of the compensation. Mr. Choudhury contends that the liability to be discharged under the impugned award passed in the instant case has been limited by the statute to Rs. 5,000/. For this also we do not find any warrant on a plain reading of the provisions of Section 95(2) of the Act, Indeed, this question came for consideration of two Division Benches of this Court in (1) Smt. Narmada Choudhury and Others Vs. Motor Accident Claims Tribunal and Others, and (2) Ghisalal Durga Dutta, v. Smt Bina Das (1984) 1 GLR 32 . In both decisions this Court considered what their Lordships in the Supreme Court held in Motor Owners'' Insurance Company Limited Vs. Jadavji Keshavji Modi and Others, on which reliance is placed by Mr. D. Choudhury. In Smt. Narmada (supra) a Division Bench of this Court held that by virtue of the provisions of the first part of Clause (b) of Sub-section (2) and also Sub-section (5) of Section 95 of the Act the claimants were entitled to have payment made to them by the insurer, in terms of Section 96, of the entire amount of Rs. 15,000/- of the award which was within the "limit" of the statutory liability of the insurer which was fixed at Rs. 20000/- by the Act. We may mention in this connection that in that case the liability accrued in 1962 under the unamended provision when the limit was Rs. 20,000/- which has been raised by amendment to Rs. 50,000/-. In Ghisalal Durga Dutta (supra) another Division Bench of this Court held that Sub-clauses (1), (2), (3) and (4) of Sub-Section 2(b)(ii) of Section 95 lays down a total or outer limit as well as an inner limit and that the later has a special and not a general or overriding purpose like the former. Further, it was held that in every case the court must answer the question as to whether both or only the general limit is applicable to the facts of the case. It was held that the first limit fulfils the general purpose of providing a compulsory liability of the insurer arising out of "any one accident" in respect of the motor vehicle and must in all cases prevail unless a case is made for the application also of the special limit. The second or special limit is meant merely to determine the liability of the

insurer in respect of "each individual passenger" should occasion therefore arise in any case. This construction followed, the Bench held, from what was stated in Motor Owners'' Insurance Company (supra) because legislature did not intend that an affluent victim will virtually monopolise the compensation by getting lion''s share in it thereby adding insult to the injury caused to the heirs of the indigent litigants. "The second limit cannot be derogative of the first or the general limit which fixes the compulsory limit of liability of insurer in respect of "any one accident". It was further held that the benefit of the second or the inner limit applicable in case of "each individual passenger" is available to an insurer only in a case where it can show that application merely of the outer or overriding limit had become irrelevant as a result of several claims arising out, of the same accident. In that case the insurer was held not entitled to the benefit of special limit as no case therefore was made out. The same position prevails in the instant case as appears from a perusal of the Appellant''s written statement. Accordingly, the question of quantum of liability must also be decided against the Appellant as the facts of this case are on all fours with that of Ghisalal (supra).

6A. In this case award against the owner has been passed for Rs. 25,920/ - which is apparently within the first or general or other limit of Rs. 50,000/- fixed by the statutory provision. As such we hold that the owner''s liability under the award must be satisfied to the full extent by the Appellant.

7. The next question is about interest. Learned Presiding officer of the Tribunal had allowed 6% interest while in this Court Mr. Lodh for the Respondent urges strongly that the case is one which pre-eminently warrants maximum interest to be awarded and not minimum. Because, the insurers have paid the poor, old and ailing claimants a paltry sum of Rs. 5,000/- although by obtaining a stay older from this Court. Counsel''s submission is true. It is also true that the appeal has been pending in this Court for the last 3 years since the stay order was rendered on 18.3.80. The hands of this Court are not tied by the provisions of Section 34 of the CPC which does not in terms, applv to the proceeding u/s 110A of the Act. Yet guidance therefrom is not denied to the Tribunal entertaining claims u/s 110A of the Act. For award of interest Section 110cc enjoins a special provision vesting jurisdiction in the Tribunal to "direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf. In Narmada (supra) this Court allowed 12% interest and in this case we find no reason as to why the same interest should not be allowed to the claimants because the nature of the liability in both the cases is the same. The Tribunal has not given reasons why only 6% interest could be awarded although even u/s 34 CPC higher interest could be awarded. This part of the award being, therefore, not in accordance with law is being modified by us specifying the interest judiciously at 12% taking into account the facts and circumstances of the case as also the proviso, to Section 34 Code of Civil Procedure. It is necessary for us to correct Tribunal''s mistake in this respect by applying our mind to the facts and circumstances of the case as regards specification of interest.

8. In the result, this appeal falls. But the award is nevertheless modified to make it conform to the statutory liability saddled on the Appellant. The Appellant shall pay the balance amount due on the award of Rs. 20,920/- together with 12% interest from the date of application till the date of payment. Further condition we impose is that the Appellant must make payment of the amount decreed within three months from this date. We assess a cost of this appeal at Rs. 200/- which shall be paid to the Respondent in addition to the sum awarded and interest.