

(1954) 01 BOM CK 0021
In the Bombay High Court
Case No : O.C.J. Suit No. 1065 of 1953

Vimlabai D. Vashishtha

APPELLANT

Vs

General Assurance Society Ltd.

RESPONDENT

Date of Decision : 25-01-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 151
Motor Vehicles Act, 1939 — Section 96, 96(1), 96(2)

Citation : AIR 1955 Bom 278 : (1954) 56 BOMLR 1013

Hon'ble Judges : Tendolkar, J

Bench : Single Bench

Advocate : H.D. Banaji, for the Appellant; M.P. Laud, for the Respondent

Judgement

1. This is a notice of motion which raises a question of law of great practical importance to insurance companies who insure third party risks in respect of motor vehicles.

2. u/s 96, Motor Vehicles Act, Sub-section (1) casts a duty upon such insurers to satisfy judgments passed against the insured in respect of third party risk. Sub-section (2) of that section provides, however, that such liability shall not attach to the insurer unless before or after the commencement of the proceedings in which a judgment is obtained a notice has been given to the insurer through the Court of the bringing of the proceedings, This Sub-section further provides that an insurer on whom notice has been served shall be entitled to be made a party thereto and to defend the action only on any of the grounds therein enumerated.

3. Now, in the present case the suit is filed by the mother of a young lady, by the name of Prabha who .received serious injuries by reason of a motor accident and ultimately died, to recover a sum of Rs. 1,00,000 from defendant No. 1 who was the owner of the said motor car. On 23-11-1953, the requisite notice u/s 913(2) was served upon the insurance company, as a result of which if a decree is obtained in this suit by the plaintiff the insurance company will have to satisfy the decree. It is also common ground that none of the grounds enumerated in

Section 96(2) exist which would entitle the insurance company to be made a party to the suit and to defend the suit. Under these circumstances the insurance company has made this application for an order that they should be allowed to defend the suit in the name of defendant No. 1 and to do all necessary acts for the purpose of such defence, or in the alternative that they should be added as party defendants.

4. Now, in so far as the alternative prayer for being made party defendants is concerned, the matter appears to me to be concluded by Section 96(2), Motor Vehicles Act, 1939, which provides the grounds on which an insurer is entitled to be made a party, and as obviously the present case does not fall within any of those grounds, there is no question of the insurer being made a party to the suit. The question, therefore, that remains for determination is whether under the circumstances of the case the Court has jurisdiction, and if so whether it ought to allow the insurer to defend the suit in the name of defendant No. 1.

5. In -- *Sarupsing Mangatsing Vs. Nilkant Bhaskar*, a Division Bench of this Court had to consider the position of an insurance company under the provisions of Section 96, Motor Vehicles Act, and the learned Chief Justice in delivering judgment in that case pointed out that except in the cases enumerated in Section 96(2), Motor Vehicles Act the insurance company was not entitled to be made a party under Order 1, Rule 10, Civil P. C. The learned Chief Justice further pointed out that the insurance company could defend the suit through the insured; and that normally would undoubtedly be his remedy. If he offers a proper indemnity to the insured, in a normal case the insured will defend the suit or rather the insurer would be enabled to defend the suit through the insured. But what happens if the insured unreasonably refuses or neglects to defend the suit? is the insurer, who is liable ultimately to satisfy the decree if passed in the suit, not entitled to obtain a hearing from the Court in any manner that it may be possible to bear him in that suit and in effect submit to a decree which can be executed against him without his being heard? The fundamental principles of natural justice would induce a Court not to adopt such a view if it were possible to secure to him the right of being heard in a case in which the insured after being offered the proper indemnity refuses to defend the suit.

6. In -- "*Windsor v. Chalcraft*", 1939 1 KB 279 in a motor accident case a judgment was signed against the defendant for default of appearance, and on the application of the underwriters the Master made an order that the judgment be set aside, and that the underwriters be at liberty to appear in the action in the name of the defendant and to deliver a defence. On appeal by the plaintiffs, the Judge at Chambers made an order setting aside the order of the Master. On appeal, the Court of Appeal, Greer and Mackinnon L. JJ. (Slesser L. J. dissenting) rescinded the order of the Judge and restored that of the Master. The learned Law Lords held that the underwriters were the persons aggrieved by the judgment as they would have to satisfy the judgment and as such were entitled to an order setting aside the judgment and giving them leave to enter an

appearance in the action in the name of the defendant or in their own name and to deliver a defence. Greer L. J. In his judgment points out that if the case was not covered by authority he might have felt some doubt on the point, but took the view that it was covered by authority and he drew attention to certain observations of Bowen L. J. in -- "Jacques v. Harri-son", (1884) 12 QBD 165 (C) which lay down that a stranger affected by an order may (p. 167) :

"... .in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made;....."

Greer L. J. then pointed out that the defendant had already bound himself to allow the underwriters to use his name, and thereupon the applicant was entitled "in the defendant's name to apply to have the judgment set aside on such terms as the Judge may" think reasonable or just." Of course in making any such order the Court would make an appropriate order indemnifying the real defendant against any consequences of a judgment against him. Slessor L. J., as I have stated before, took a contrary view, but Mackinnon L. J. In his judgment observed (p. 291) :

"....By condition No. 2 of the policy, the nominal defendant, Mr. Chalcraft, did bind himself to allow strangers to this litigation, namely the underwriters, to use his name. Therefore, those) strangers to this litigation have an interest in it and may, in that defendant's name, apply to have the judgment set aside."

These observations are to my mind a clear enunciation of the proposition that at any rate in a case in which the insured has bound himself to allow the underwriters to defend an action in his name, the underwriters, or the insurers as they are called under the Motor Vehicles Act, would be entitled to take proceedings in the name of the insured to defend the action and to protect their rights.

7. is the position any different in India? in my opinion, this Court is clothed with all the equity jurisdiction that is vested in the King's Bench Division under the Judicature Acts in England and for the purposes of securing justice as between the parties to a litigation and third parties affected by the litigation the Court has inherent jurisdiction to make any order that it may consider just and equitable. It seems to me to be a matter of elementary justice to the insurer that if a judgment is to be enforced against him he should have the right to defend the suit before judgment, not by being a party which he cannot be except on any of the grounds set out in Section 96(2), but through the defendant or in the name of the defendant. Ordinarily he would have to defend the suit through the defendant, and therefore he must in the first instance offer to the insured that he shall indemnify him against the consequences of defending the suit and request the insured to defend the suit. But if the insured unreasonably refuses to defend the suit on those terms, it seems to me that this Court has ample jurisdiction to authorise the insurer to enter an appearance and to defend the suit in the name

of the insured so that the judgment does not go by default.

8. in the present case the insured, defendant No. 1, offered to defend the suit; but the insurers contend that under the terms of the policy as between them and the insured they are not bound to pay the amount of any decree that may be passed in this suit and they offer to give an indemnity to defendant No. 1 without prejudice to their rights and contentions in respect of breaches of the policy committed by defendant No. 1. The defendant has refused to accept such an indemnity and to defend the suit. That conduct of defendant No. 1 is, in my opinion, unreasonable, because he cannot avail himself of the position that the action can be defended through him to get rid of his possible liability to the insurer for breaches of terms of the policy. In my opinion, therefore, this is a fit case in which I ought to allow the insurer, the applicants, to enter an appearance and to defend the suit in the name of defendant No. 1 and for that purpose to do all acts that may be necessary in the name of defendant No. 1. The applicants undertake to indemnify defendant No. 1 against the consequences of their defending the suit in his name. The costs of this notice of motion shall be the costs by the cause. The Prothonotary to act on the minutes.

9. Order accordingly.