(1999) 09 MP CK 0051

Madhya Pradesh High Court (Gwalior Bench)

Case No: Miscellaneous Appeal No. 169 of 1996

Smt. Sushila and Another		APPELLANT
	Vs	
Rajveer Singh and Others		RESPONDENT

Date of Decision: Sept. 21, 1999

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4, Order 41 Rule 14, Order 41 Rule 14(1)
- Motor Vehicles Act, 1988 - Section 147, 149, 173

Citation: (2000) ACJ 719 : AIR 2000 MP 121 : (2000) 1 MPHT 331

Hon'ble Judges: S.P. Shrivastava, J; R.B. Dixit, J

Bench: Division Bench

Advocate: N.D. Singhal, for the Appellant; S.S. Bansal, for the Respondent

Judgement

S.P. Srivastava, J.

Feeling aggrieved by the award whereunder as against the claim of Rs. 10,60,000/-, the Motor Accidents Claims Tribunal, Gwalior had determined the quantum of compensation of only an amount of Rs. 1,44,600/-, the claimants have now come up in appeal seeking redress praying for the reversal of the impugned award and enhancement of the amount of compensation.

2. The Insurer impleaded as respondent No. 3 in the appeal has filed a cross-objection under Order XLI, Rule 22, C.P.C., seeking the modification of the award and the reduction in the quantum of compensation.

3. During the pendency of the appeal, an application, I.A. No. 7105/97. was filed by the appellant praying that the service of the notice of the appeal so far as the respondent No. 1, the driver of the offending vehicle was concerned, be dispensed with as the case against him before the Motor Accidents Claims Tribunal had proceeded ex parte and the notice of the appeal sent to him could not be served. It was further prayed that since the owner of the offending motor vehicle impleaded

as respondent No. 2 in the appeal had died, his name be deleted from the memorandum of the appeal as it was not required under the law to bring on record his heirs and legal representatives.

4. A Division Bench of this Court had disposed of the aforesaid application vide the order dated 30-9-1997 to the following effect :

"Appellants have stated that respondent No. 2 has died. As such, they seek to delete the name of respondent No. 2 from the array of respondents. It is also prayed that respondent No. 1 was proceeded ex parte before the Tribunal and, therefore, his service be dispensed with.

Considering the prayer made by the appellants, the service of respondent No. 1 is dispensed with and the name of respondent No. 2 shall be deleted from the array of respondents by the appellants at their risk."

5. We have heard the learned Counsel for the appellants as well as the learned Counsel representing the Insurer-respondent No. 3, and have also carefully perused the record.

6. The learned Counsel for the respondent-Insurer has raised a preliminary objection in regard to the maintainability of this appeal asserting that the appellants having themselves chosen at their own risk to delete the name of the owner of the offending motor vehicle and having omitted to take steps to get the driver of the offending motor vehicle, served with the notice of the appeal, this appeal has been rendered incompetent as in the aforesaid circumstances it is not either possible or permissible to enhance the amount awarded as compensation by the Motor Accidents Claims Tribunal, Gwalior (hereinafter referred to as the Tribunal).

7. In the aforesaid connection, the contention of the learned Counsel for the Insurer is that taking into consideration the nature of the liability which stands cast upon the Insurer under the provisions contained in the Motor Vehicles Act, 1988, and its role having been confined to that of a indemnifier, in the absence of the owner or the driver, the liability which stands cast upon the Insurer under the impugned award cannot be enhanced as it is no longer possible to enhance the liability of the owner of the offending motor vehicle or its driver in their absence behind their back.

8. The learned Counsel for the claimants/appellants has on the other hand urged that taking into consideration the implications arising under the provisions contained in Section 155 of the Motor Vehicles Act, 1988, it was not obligatory upon the claimants to bring on record the heirs and legal representatives of the deceased owner of the offending motor vehicle. It has further been urged that considering the provision contained in the Order XLI, Rule 14(4) of the Code of Civil Procedure, 1908, the service of notice of the appeal on the driver of the offending motor vehicle was not necessary and that is why the claimants were not obliged to get the notice of the appeal served on the respondent No. 1. The assertion is that the appeal

continues to remain competent in spite of the death of the owner of the offending motor vehicle and even in the absence of his heirs and legal representatives having been brought on record and further the non-service of the notice of the appeal on the respondent No. 1, the driver of the offending motor vehicle is of no consequence. In the circumstances, it is urged that there is no legal impediment for the enhancement of the amount of compensation as prayed for in this appeal as it stands now.

9. We have given our anxious consideration to the rival contentions of the learned Counsel for the parties.

10. The Tribunal in the present case has found that Kashmirsingh, the husband of the appellant No. 1 and the father of the appellant No. 2. who was an employee in the Gwalior Rayon while travelling in the matador registration No. M.K.W. 7904, the offending motor vehicle driven by the respondent No. 1 and owned by the respondent No. 2 had met with an accident and died on account its having been driven rashly and negligently. The claimants had prayed for compensation to the tune of Rupees 10,60,000/-.

11. The offending motor vehicle had been insured with the respondent No. 3. The Insurer had filed the written statement. It was admitted that the offending motor vehicle had been insured for the period 29-3-1990 to 28-5-1991. The accident in question had taken place on 26-3-1991. The Motor Insurance Pass Book supplied by the Insurer to the owner of the offending motor vehicle shows that the insurance was for the purposes of the Motor Vehicles Act only indicating that the statutory liability contemplated under the said Act only stood fastened on the Insurer.

12. The Tribunal under the impugned award has found that the driver, owner as well as the Insurer were jointly and severally liable to pay the compensation awarded to the claimants.

13. The relevant provision contained in Order XLI, Rule 14 of C.P.C. is to the following effect :

"R. 14. Publication and service of notice of day for hearing appeal.- (1) Notice of the day fixed under Rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

(2) to (3) ... ...

(4) Notwithstanding anything to the contrary contained in Sub-rule (1), it shall not be necessary to serve notice of any proceeding incidental to an appeal on any

respondent other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal.

(5) ... ...

14. A perusal of the Sub-rule (4) of the Order XLI. Rule 14 of C.P.C., referred to hereinabove clearly indicates that dispensing with the service of the notice of the appeal on a respondent therein as contemplated under Order XLI, Rule 14(1) of C.P.C., shall not be necessary in a proceeding incidental to an appeal. The exception to the mandatory requirement envisaged under Sub-clause (1) of the Order XLI, Rule 14 of C.P.C., is only in respect of the notice of any proceeding incidental to an appeal and not the main appeal that is the appeal itself.

15. In the present case, the appellants of their own choice and at their own risk had avoided to take the requisite steps to serve the respondent No. 1. In such circumstances, in his absence and behind his back, no interference in the award could be made so as to enhance the liability which stood cast upon him under the impugned award. The contention of the learned Counsel for the appellants to the contrary is clearly devoid of merit and is not at all acceptable.

16. The provisions contained in Chapter XI of the Motor Vehicles Act, 1988. clearly indicates that a liability stand cast upon the Insurer to indemnify against the third party risk on the establishment of the fact that the Insured was liable to pay the damages to a third party. The provisions of the Act do not require that the Insurer must indemnify the third party independently of the liability of the insured. Where the insured is liable directly or vicariously to pay the damages is a question governed by the law of Torts.

17. It is no longer open to doubt that the contract of insurance is a personal contract of indemnity. However, the provisions contained in Section 149 of the Motor Vehicles Act, 1988, indicate as has already been observed hereinabove that the liability of the Insurer arises only when the Insured has incurred the liability but not independent to it. A claimant, is therefore, entitled to recover from the Insurer the amount of compensation which he is in law entitled to obtain from the insured subject to the statutory limits of liability of the Insurer.

18. The liability of the Insurer being statutory as is apparent from the policy underlying the provisions of the Motor Vehicles Act, a right of the third party flows from the statute and is not contractual. In the circumstances, if there was a breach of any restriction, condition and limitation, the Insurer may be entitled to proceed against the insured either to avoid or cancel the policy but the Insurer is bound by the provisions of Section 149 of the Motor Vehicles Act, 1988, to pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder in case the policy had not been already cancelled before the claim is made. The liability of the Insurer has to be co-extensive with the liability

incurred by the owner of the vehicle. But in case the insurer and the insured have shown to have entered into a mutual agreement the remedy of the insurer may lie against the insured on the basis of the mutual agreement but so far as the third party is concerned, its rights will be regulated not by the conditions of the insurance policy but by the conditions laid down by the statute.

19. It may be noticed at this stage that the provision contained in Section 147(5) of the Motor Vehicles Act. 1988 clearly stipulates that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of Insurance under that section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purported to cover in the case of that person or those classes of persons.

20. However, the provision contained in Section 149 of the aforesaid Act. stipulate that if, after a certificate of insurance has been issued under Sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, the judgment or award In respect of any such liability as is required to be covered by a policy under clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of that section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

21. A perusal of the provisions contained in Section 147 of the Motor Vehicles Act, 1988, clearly stipulate that the policy of Insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in Subsection (2) thereof against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to the property of a third party caused by or arising out of the use of the vehicle in a public place and against the death of or bodily injury to any passenger of a public vehicle caused by or arising out of the use of the vehicle in a public place. What is intended to be covered by the policy of insurance is obviously a risk of the person who has incurred the liability for the death or bodily Injury or damage to the property of a third party. The policy covering a third party risk will come into play when it is proved that the insured had incurred the liability. This liability is a vicarious liability which means that the owner is responsible for the negligent act of the driver who is his servant. The Insurer cannot be held liable where the insured himself stands exonerated of any such liability.

22. The insurance policy in the present case which had been issued by the Insurer was a contract of indemnity satisfying the conditions laid down u/s 147 of the

aforesaid Act.

23. The liability of the Insurer, it must be emphasised depends upon the liability of the insured. If the Insured is not liable or could not be held liable then the Insurer could not be saddled with any liability on the strength of the policy of insurance issued by it in favour of the insured.

24. The question which arises for consid-eration in this case is as to whether the liability of the insured, the discharge whereof could be enforced as against the Insurer could be enhanced in the appeal in the absence of his heirs or legal representatives.

25. Section 173 of the Motor Vehicles Act, 1988, provides that a person aggrieved by an award of a Claims Tribunal may prefer an appeal to the High Court subject to certain conditions. An appeal so filed in the High Court is regulated by the provisions contained in the Code of Civil Procedure, 1908.

26. Order XXII of Rule 4(l) of the Code of Civil Procedure. 1908, provides that where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Sub-clause (3) further provides that where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant.

27. By virtue of Rule 11 of Order XXII of C.P.C., the aforesaid provision applies Mutatis mutandis to an appeal. The word "plaintiff" is to be held to Include an appellant and the word "defendant" a respondent, and the word "suit" an appeal.

28. The learned Counsel for the appellants had laid much stress on the provision contained In Section 155 of the Motor Vehicles Act, 1988, in support of his submission. The provision contained in Section 155 of the said Act is to the following effect :

"155. Effect of death on certain causes of action.- Notwithstanding anything contained in Sec. 306 of the Indian Succession Act, 1925 (39 of 1925), the death of a person in whose favour a certificate of insurance had been issued, if it occurs after the happening of an event which has given rise to claim under the provisions of this chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer."

29. It may be noticed that an ''estate'' cannot face any litigation or satisfy any decree unless it is held by some owner or his representative in his absence. There cannot be a decree against an ''estate''. It is, therefore, obvious that survival of cause of action contemplated by the provision contained in Section 155 of the aforesaid Act can only be against the legal representative of the deceased owner and not against

his ''estate'' as such. In the circumstances, on the death of the owner during the pendency of a lis/ action, it can be continued by bringing the legal representatives of the deceased on the record.

30. It may further be noticed that as has already been observed hereinabove, the role of the Insurer is that of an in demnifier and it has to discharge the liability cast upon the insured. It is in this view of the matter, taking into consideration the statutory liability which is required to be discharged by the Insurer that a provision has been made under the Motor Vehicles Act, 1988 to ensure that the Insurer does not escape the liability cast upon it on the ground that it is not the heir or legal representative of the deceased owner.

31. The liability of the owner which has been determined under the provisions of the aforesaid Act has to be discharged by the Insurer as its liability is co-extensive with that of the owner. The cause of action contemplated u/s 155 of the said Act does not cease to exist so as to enforce the liability of the owner as against the Insurer. But once a situation is created where the liability of the owner cannot be enhanced in his absence, the mere presence of the Insurer could be of no avail as its liability being co-extensive with that of the owner, it cannot be enhanced without affording an opportunity of hearing to the heirs and legal representatives of the deceased owner. The appeal as against the deceased owner has to be taken to have abated in view of the failure of the appellants to take the requisite steps as contemplated under Order XXII, Rule 4 of the Code of Civil Procedure, 1908.

32. We are of the clear opinion that dehors any statutory provision, a Judgment or an award could be executed only against the tort-feasor and not against his Insurer because no direct liability of the Insurer arises qua the claimant. The Insurer''s liability is secondary and conditional to that of the insured. Unless the liability is first fastened on the Insured, none can possibly fall on the Insurer who has only undertaken to indemnify the loss or damage suffered by the insured. The object underlying the provisions of the Act appears to be to compel the insurance against third party risk in cases of motor vehicle and in order to avoid the multiplicity of proceedings (that is the necessity of the claimant first obtaining a judgment against the insurer and later suing his insurer to be indemnified therefor) it was made possible to execute the judgment against the Insurer directly as if he were the judgment-debtor, for the satisfaction of the claim against the Insured. The statute does not intend to plainly do more than this. However, further safeguards have been provided to the insurer by making it mandatory that he should be made a party to the proceedings Instituted by the claimant against the insured and then to defend the action on specified, though limited grounds.

33. It should not be lost sight of that it is no longer open to doubt that the contract of insurance is a personal contract of indemnity and it is in this view of the matter, that the statutory liability is cast upon the insured may be enforced as against the insurer. Though the insurer is not the legal representative of the deceased yet a

statutory provision has been made to that effect saddling the insurer with the burden to discharge the liability of the insured. The said liability being co-extensive irrespective of the death of the Insured. The provisions contained in Section 155 of the Motor Vehicles Act, 1988, thus have to be given a narrow interpretation only to effectuate the object underlying the said provision. The liability of the Insurer being secondary and co-extensive to that of the Insured, It cannot be enhanced in the absence of the heirs and legal representatives of the Insured.

34. We are clearly of the opinion that the provisions contained in the Order XXII, Rule 4 of the Code of Civil Procedure. 1908, stands squarely attracted to an appeal contemplated u/s 173 of the Motor Vehicles Act, 1988, and the claim of the appellants for enhancement of the amount of compensation so as to increase the liability of the insured in the face of the abatement of the appeal as against the owner whose liability is to be discharged by the Insurer is not sustainable.

35. In view of our conclusions indicated hereinabove, we are of the considered opinion that this appeal stands abated as against the owner of the offending motor vehicle, respondent No. 2 and has been rendered incompetent.

36. Further, we are of the clear opinion that in the absence of the driver, the re spondent No. 1 who had filed the written statement and had contested the proceed ings but has not been served with the notice of the appeal, the quantum of compensation determined by the Tribunal as payable by that respondent cannot be enhanced in his absence.

37. In the aforesaid circumstances, the liability which stands cast upon the Insurer, under the Impugned award cannot be enhanced as prayed for, since the appeal has to be held to have been rendered incompetent as indicated hereinabove.

38. So far as the cross-objection filed by the Insurer is concerned, it may be observed that the cross-objection which has been filed under Order XLI, Rule 22, C.P.C., was presented in this Court on 7-11-1996. A notice of the appeal fixing 22-8-1996 had been served on the Insurer on 31-7-1996. Obviously, the cross-objection had been presented in this Court much beyond the prescribed period of limitation. No application furnishing any explanation for the delay has been filed. The condonation of delay in filing the cross-objection has not been sought for as there is no application for the purpose. In the circumstances, the cross-objection deserves to be rejected.

39. In view of our conclusions indicated hereinabove, the preliminary objection raised by the Insurer/respondent No. 3 is upheld.

40. In the circumstances referred to hereinabove, both, the appeal as well as the cross-objection are dismissed.

41. There shall however be no order as to the costs.