(1954) 24 CompCas 98

Bombay High Court

Case No: Suit No. 282 of 1951 and O.C.J. Appeal No. 41 of 1954

Royal Insurance Company Limited		APPELLANT
	Vs	
Abdul Mahomed Meheralli		RESPONDENT

Date of Decision: March 21, 1954

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, 151
- Motor Vehicles Act, 1988 - Section 96, 96(2)

Citation: (1954) 24 CompCas 98

Hon'ble Judges: P.V. Dixit, J; Coyajee, J; Chala, J

Bench: Full Bench

Judgement

Coyajee, J.

This is a notice of motion taken out by the applicants who are an insurance company asking that they may be allowed to defend the suit in the name of the defendant and make and file their written statement of defence in the name of the defendant. It is apparent that the suit is filed for damages against the owner of the motor cycle, the defendant, for injuries caused by the defendant by a rash and negligent act. It is alleged on behalf of the applicants that the defendant has gone away to Africa and his exact whereabouts today are unknown and that the service on the defendant has been effected only by substituted service. Now, normally the company would be entitled to intervene only u/s 96 if the cause of action falls under any of heads set out in Section 96 of the Indian Motor Vehicles Act and not in any other case. The applicants invoke the help of this court on the ground that it would be most inequitable to allow a decree to be passed against the defendant which will be straightway executed against the insurance company without giving the insurance company an opportunity to be heard and therefore they ask not that they may be allowed to be made parties to the suit but that they should be allowed to carry on the suit in the name of the defendant by filing a written statement of

defence in his name. The difficulty in granting this relief would be that if that were done that would be adding a further ground to the grounds set out in Section 96 of the Indian Motor Vehicles Act. Mr. Banaji who has argued this matter very fully drew my attention to a recent judgment by my brother Mr. Justice TENDOLKAR in Vimlabai v. General Assurance Society Ltd. In that matter there was a similar application and it is argued that the learned Judge after considering the position and certain Indian and English authorities came to the conclusion that just as in England in certain cases cited before him the courts had intervened, the position is the same in India where the court could also intervene in its inherent jurisdiction to do elementary justice to the insurer where the judgment is to be enforced against him and he should have a right to defend. Now, it must be remembered that relying upon the English judgment in Jacques v. Harrison, Lord Justice GREER pointed out in Windsor v. Chalcraft that the defendant had already bound himself to allow the underwriters to use his name and thereupon the applicant was entitled to proceed under the defendant''s name and to have the judgment set aside which had already been given against the original defendant. I have not the benefit of the contract which was placed before the learned Judge, Mr. Justice TENDOLKAR, but this particular ground on which Lord Justice GREER based his judgment clearly shows that the order would be implementing a specific agreement between the insurer and the insured. I have tried to look for a similar provision in the contract before me. As far as I can see there is none and the only clause that is relied upon is clause (3) of the policy. Clause (3) of the policy states :

"the company may at its own option arrange for representation at any inquest or fatal inquiry in respect of any death which may be the subject of indemnity under this section and secondly may 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 this section."

2. This to my mind is entirely different from the clause referred to in the English case of Jacques v. Harrison. The question, therefore, is whether in the absence of such a clause the court is entitled to use its powers under its inherent jurisdiction. That power is used again and again to do justice between parties. The question is, whether the applicants can be considered a party to these proceedings at all. I fully realise that once a decree is passed against the defendant under the law it can be immediately executed against the applicants. That is the statutory right flowing after the decree is passed in favour of the plaintiff.

3. Apart from this question of law I am unable to accede to the application made as there is a very substantial objection to allowing this notice of motion. In paragraph 2 of the affidavit in support the applicants say that they immediately instituted enquiries as a result of which they have come to know that on March 2, 1950, that is the day on which the incident took place, the motor cycle had been transferred by the defendant to one Abdul Sultan Noormahomedbhoy. In other words they wish to take up a defence in the name of the defendant which could not possibly at any time be open to the defendant to take. To

my mind to allow the applicants to take the place of the defendant and to allow them to take a defence which could not be open to the original defendant would be really doing violence to all questions of procedure and addition of parties.

4. Apart from this I may state incidentally that the applicants had taken out a summons which was dismissed by Mr. Justice TENDOLKAR. In that summons of course the application was one different from the application made before me. That was an application that the applicants may be added as party defendants No. 2 to the suit and that application was dismissed. In those circumstances the applicants were forced to come here and ask for the other relief so that they could defend the action.

5. In these circumstances to my mind allowing this notice of motion would in the first instance amount to adding a ground to Section 96 although it may be that in any other circumstance where there is an express agreement as pointed out by Lord Justice GREER it may be that the court would be entitled to intervene. I do not see any ground either in law or on the merits for allowing this application. The notice of motion will, therefore, stand dismissed with costs.

6. The applicants appealed.

Chagla C.J.

7. Respondent No. 1 was knocked down by a motor cycle belonging to respondent No. 2 on March 14, 1950, and suffered certain injuries. He filed a suit against the defendant claiming a sum of Rs. 30,000 as damages in respect of these injuries. Respondent No. 2 was insured against third party risks with the appellant company and on August 26, 1953, a notice was issued to the insurance company u/s 96(2) of the Motor Vehicles Act. The insurance company took out a chamber summons to be added as a party to the suit. That chamber summons was dismissed. It then took out a notice of motion to be allowed to defend the action in the name of the defendant. This notice of motion was also dismissed by Mr. Justice COYAJEE, and it is against this decision that this appeal is preferred.

8. Now, the position u/s 96 of the Motor Vehicles Act is that a vicarious liability is cast upon the insurance company in respect of any decree that may be passed against the person in default and who has been insured with the insurance company. But before the plaintiff can become entitled to execute such a decree, it is obligatory that the insurer should have notice through the court of the bringing of the proceedings and it was this notice that was served upon the insurance company on August 26, 1953. After the notice is served, the insurer has been given the right to be made a party to the suit and to defend the action on any of the grounds mentioned in sub-section (2) of Section 96. It is common ground that the insurance company in this case does not want to defend the action on any of those grounds. Therefore, it is clear that it is not entitled u/s 96(2) to be made a party and to defend the action in its own right. The question that we have to consider is whether the court has any power independently of Section 96 to permit an

insurance company to defend the action in the name of the defendant.

9. Now, the facts here are rather significant. The defendant is not in India. He has left India and he had to be served with a summons in the suit by substituted service and the possibilities are that at the hearing of the suit he will not appear to defend the action. Therefore, this very extraordinary situation arises, that although the defendant may not defend the action and although the insurance company cannot be made a party to the action u/s 96(2), if a decree were to be passed in favour of the plaintiff in an undefended action a statutory liability will be cast upon the insurance company to satisfy the decree inasmuch as the statutory notice has been served upon it; and the real question that arises for our determination is whether an insurance company is entitled to defend the action on merits, not in its own name, not in its own right, but in the name of the defendant. Now, apart from authorities, we should have thought that it is a principle of elementary justice that a liability cannot be cast upon a party without that party being give an opportunity to resist the claim which it has ultimately to satisfy. What we are told by Mr. Desai on behalf of the plaintiff is that, however elementary this notion of justice might be, the Motor Vehicles Act does not permit us to give effect to this well-established principle. Now, it is perfectly true that a court should never avail itself of its inherent powers u/s 151 in order to do something which is contrary to what a statute lays down. Section 151 does not exist in the CPC in order to arm the court with doing something contrary to the policy of the Legislature; but the very object of Section 151 is to empower the court to deal with those various situations which arise from time to time which could not possibly have been contemplated by the Legislature and could not have been dealt with by the Legislature. Now, Section 96 deals with the specific case where the insurance company wishes to defend the action on one of the grounds mentioned in sub-section (2). The Legislature has not dealt at all with a case where the defendant does not wish to resist the plaintiff''s claim. He may not wish to resist it because he may not be interested, knowing that the decree will ultimately be satisfied by the insurance company. He may collude with the plaintiff; he may submit to a consent decree which may be prejudicial to the interests of the insurance company. Is it suggested that the Legislature intended that in any one of these case the mouth of the insurance company should be shut and it should not be permitted to defend the action in the name of the defendant ? It is said by Mr. Desai that he only exception that the authorities contemplate is a case where there is a contract between the insurer and the defendant under which the defendant has permitted the insurer to take charge of the proceedings against the defendant; and Mr. Desai says that, as the present insurance policy does not contain any such term, it is not open to the insurance company to step into the shoes of the defendant. Now, we find it rather difficult to understand or appreciate this argument. If a contract between the parties can permit the court to act in a manner not contemplated by the statute and to permit the insurance company to defend in the name of the defendant, why cannot the interests of justice equally permit the court to allow the insurance company to defend in the name of the defendant ? Surely the interests of justice should stand on a higher pedestal than the mere sanctity of a contract. As we shall presently point out, as far as the decision of this

court is concerned, it is clear that the view taken by this court is that it is only the interests of justice that would justify the court in using its inherent power u/s 151 to permit the insurance company to defend in the name of the defendant. The decision just referred to is reported in Sarupsing Mangatsing v. Nilkant. That was rather a striking case where an ex parte decree was passed against the defendant and the insurance company applied to set aside the ex parte decree and the question that arose whether the insurance company had right to have an ex parte decree set aside when the decree was not directed against it. In that case, we pointed out that the insurance company could not become a party to the suit u/s 96. We also pointed out that it could not be made a party under Order 1, rule 10. But we made it clear that, if the insurance company had shown satisfactory cause why it did not have a proper opportunity to defend the action, we would certainly have, under our inherent jurisdiction, set aside the decree, because the view we would then have taken would be that in the interests of justice the insurance company should be given an opportunity to defend the action result of which would cast a liability upon it under the Motor Vehicles Act. Therefore, clearly implicit in this decision is the principle that in the interests of justice the insurance company may be allowed to defend the action in the name of the defendant although the insurance company was not entitled to defend it in its own name and in its own right u/s 96(2). We have also pointed out that the object of giving the notice to the insurance company was obviously to enable it to depend the action through the defendant, but that no right had been given to the insurance company to defend the action in all cases in its own right or in its own name. Therefore, the object of providing for a notice to the insurance company is really two-fold. One is to enable it to defend the action in its own right and in its own name if it is challenging in the claim on any of the grounds mentioned in Section 96(2). But the other purpose and object of the notice, which is equally important, is to give intimation to the insurance company that an action has been started against the defendant so as to enable the insurance company to see that that action is properly defended and that the decree does not go against the defendant by default of that a decree is not passed collusively against the defendant. Therefore, when in this case a notice was served upon the insurance company, and when the insurance company found that the defendant had left India and was not likely to defend the action, it was open to the insurance company to come to court and apply that it should be permitted to defend the suit in the name of the defendant.

10. There is an English case which was referred to at the bar and that is Windsor v. Chalcraft which was a case of the Master setting aside an ex parte decree and the Court of Appeal by a majority held that, inasmuch as the underwriters, although not parties to the action, were liable under the provisions of the Road Traffic Acts, 1930 and 1934, to pay the amount of the judgment to the plaintiff, and under the policy to pay it to the defendant, they were persons aggrieved by the judgment, and as such were entitled to an order setting aside the judgment. It is true that in the judgment of the court a reference is made to a specific term in the policy by which the underwriters were entitled to take absolute control of all proceedings and negotiations and to have full discretion to settle,

prosecute or defend any claim in the name of the insured; and the fact is emphasized in the judgment that by this condition the nominal defendant bound himself to allow strangers to this litigation, namely, the underwriters, to use his name. But we refuse to accede to the contention of Mr. Desai that the real ratio of this decision is the right given to the stranger under the contract to use the name of the defendant in the litigation and to defend the action in his name. It would be taking much too narrow a view of the powers of the court to assume that the English court would have been helpless if such a provision in the contract was not to be found and if the court had taken the view that in the interests of justice the insurance company should be allowed to defend the action in the name of the defendant. But even in the case before us we have a provision in the policy which, though not in terms identical with one in the English case, is very similar to it, and that is this :

"The company may 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 this section."

11. Therefore, under this clause, the insurance company has reserved to itself the power of defending proceedings in respect of any act which is covered by the indemnity given by the policy.

12. The learned Judge below - with respect to him - has taken the view that the difficulty in granting the relief would be that if that were done that would be adding a further ground to Section 96(2) of the Indian Motor Vehicles Act. Now, that would be the case if the insurance company was being made a party to the suit or was allowed to defend the suit in its own name. But that is not the application of the insurance company. Its application is outside the ambit of Section 96 and Section 96 has no application to the relief that the insurance company seeks in this motion. We are also unable to accept the view of the learned Judge that, in the absence of any specific clause in the insurance policy entitling the insurance company to defend the action in the name of the defendant, the court would not be entitled under its inherent powers to allow the insurance company to defend in the name of the defendant.

13. Mr. Desai says that the defendant in this case has not been served and that he may choose to come at the date of the hearing and defend the action and by our order we may be prejudicing his rights as a defendant. Now, the order that we propose to pass will in no way prejudice the defendant. It would be open to the defendant to appear at the hearing. He is the defendant and he has every right to defend the action. The only right which the insurance company will get will be to defend in his name if he does not choose to defend, and, if he chooses to defend, to remain in court at the hearing and to see that the defence is properly put forward. We must also protect the defendant as far as the costs of the suit are concerned. It may be that the plaintiff may succeed and he might get the costs of the suit. He will be entitled to execute the decree against the defendant for costs of the suit and the insurance company must indemnify the defendant against any decree for costs that might be passed against him. The plaintiff in a conceivable case might also be

prejudiced by the action being wrongly resisted by the insurance company when the defendant may not want to defend the action. In such a case, it would be open to the court to secure the plaintiff"s costs by ordering the deposit of a substantial sum in court by the insurance company. But there is not the slightest danger in this case of the plaintiff not being able to recover the costs from the insurance company and, therefore, such a question does not arise.

14. We will, therefore, set aside the order of the learned Judge and pass the following order : Liberty to the appellants to defend the suit in the name of the defendant. The appellants to give an indemnity indemnifying the defendant against any order for costs of the suit being made against him.

15. Costs of the motion and the costs of the appeal costs in the cause.

16. Appeal allowed.