

K.N.P. Patel and Others Vs K.L. Kasar and Others and The Jayabharat Insurance Co. Ltd.

Court: Bombay High Court

Date of Decision: Feb. 15, 1965

Acts Referred: Motor Vehicles Act, 1939 " Section 94, 95, 95(1), 95(2), 95(4)

Hon'ble Judges: Kantawala, J

Bench: Single Bench

Advocate: Ajit Mehta, instructed by S.F.B. Tyabji and Co. Attorneys, for the Appellant; D.P. Madan, instructed by Payne and Co., for the Respondent

Final Decision: Dismissed

Judgement

Kantawala, J.

This is a Chamber Summons taken out by the Applicant, which is an Insurance Company, viz., The Jayabharat Insurance

Company Ltd., for setting aside the order passed by the Assistant Prothonotary on the 5th of December, 1964 directing the process to be issued

on the application for execution filed by the Plaintiffs on the 27th of October 1964.

2. The matter arises this way:

One Ishardas Motumal was the owner of a motor car bearing No. BML. 6605. This car was insured with the applicant under Policy No. 1100

dated 10th September, 1960. On 22nd March, 1961 Ishardas instructed his driver George Jacob to take the said car from Lonavla to Bombay.

According to Ishardas, he gave specified instructions to his driver that he should not give a lift to any body in the said car. With these instructions,

the driver George Jacob started from Lonavla to Bombay in the said car. On the way, contrary to specific instructions given to him, the driver

allowed one Nagindas P. Patel and his wife Kamla Nagindas Patel a lift in the said car because the car of Mr. & Mrs. Patel had met with an

accident. While the car BML. No. 6605 was being driven from Mumbai towards Thana along with the Bombay Poona Road, it collided with a

truck which came from the opposite direction as a result of which Nagindas P. Patel and the driver George Jacob died and Mrs. Kamla P. Patel

received certain injuries. On 19th March, 1962, Mrs. Kamla P. Patel and three other persons as the heirs and legal representatives of the

deceased Nagindas, filed a suit in the Court of the Civil Judge, Senior Division, Thana, being Special Civil Suit No. 11 of 1962, for damages, etc.

Ishardas, the owner of the car was Defendant No. 3 in the said suit and Mrs. George Jacob and Master George Jacob were made Defendants

Nos. 4 and 5 in the said suit as heirs and legal representatives of the driver George Jacob, who died in the said accident. It was contended on

behalf of the owner. Ishardas in the said suit that he had given specific instructions to his driver George Jacob not to carry anybody while driving

the car from Lonavla to Bombay and he was, therefore not liable to any damages for the negligence of his driver. if any. The contention urged by

Ishardas was accepted by the learned Civil Judge, Senior Division. Thana, and the suit against Ishardas was dismissed. The learned Judge,

however, found that the driver Jacob was negligent and he passed a decree in favour of the Plaintiffs for the sum of Rs. 50,000/- against

Defendants Nos. 4 and 5, being the heirs and legal representatives of the driver, George Jacob, limited to the extent of the estate of the deceased

coming to their hands. The learned Judge also passed a decree for Rs. 20,000/- in favour of Mrs. Kamla Patel against Defendants Nos. 4 and 5,

limited to the extent of the estate of the deceased George coming to their hands, in respect of the injuries received by her during the collision. The

Plaintiffs in that suit, Mrs. Kamla Patel and three others have on the 27th October, 1964, filed an application for execution of the said decree in this

Court and they have prayed that the amount of the decree be realised by attachment and sale of the moveable properties of the applicant-The

Jayabharat Insurance Company Ltd. In this application for execution, the Assistant Prothonotary has directed process to issue and it is against this

order, directing the process to issue that the applicant, the Jayabharat Insurance Company Ltd. has filed this Chamber Summons.

3. Mr. Madan, who appears on behalf of the applicant, the Jayabharat Insurance Co. Ltd., has contended that having regard to the provisions of

Section 96(1) of the Motor Vehicles Act. the decree-holders are not entitled 1. New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani

and Others, . to ask for satisfactions of the judgment against the Insurance Company. He says that the conditions mentioned in Section 96(1) of the

Act are not fulfilled in the present case and the Insurance Company cannot be called upon to pay the amount in respect of which a decree has been

passed against Defendants Nos. 4 and 5.

4. The policy that was issued in favour of the insured Ishardas contained inter alia the following clauses:

1. The Company will indemnify the insured in the event of accident caused by or arising out of the use of the Motor Car against all sums including

claimant's costs and expenses which the Insured shall be legally liable to pay in respect of:

(a) death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of Motor vehicles Act, 1939

the company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured;

(b) damage to property other than property belonging to the insured or held in trust by or in the custody or control of the insured.

2. In terms of and subject to the limitation of the indemnity which is granted by this section to the insured the Company will indemnify any Driver

who is driving the Motor Car on the Insured's order or with his permission provided that such Driver:

(a) Is not entitled to indemnity under any other policy;

(b) shall as though he were the insured observe fulfill and be subject to the terms, exceptions and conditions of this policy in so far as they can

apply.

5. Chapter VIII of the Motor Vehicles Act deals with insurance of motor vehicles against third party risk. Section 94 thereof makes it obligatory to

insure against third party risk. It provides that no person shall use except as a passenger, or cause or allow any other person to use a motor vehicle

in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of

insurance complying with the requirements of this Chapter. Section 95 deals with the requirements of policies and limits of liability. It is necessary

to refer to Sub-sections (1), (2) and (5) thereof and they are as under:

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer (or by a cooperative society allowed u/s of to transact the business of an insurer), and

(b) insures the person or classes of persons specified in the policy to the extent specified in Sub-section (2) against any liability which may be

incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required:

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or

in respect of bodily injury sustained by such an employee arising out of and in the course of his employment [other than a liability arising under the

Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service, vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods vehicle, being carried in the vehicle, or (ii) except where the vehicle is a vehicle in which passengers are carried for hire or

reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being

carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or (iii)

to cover any contractual liability.

(2) Subject to the proviso to Sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident upto the

following limits, namely:-

(a) where the vehicle is a goods vehicle, a limit of twenty thousand rupees in all, including the liabilities, if any, arising under the Workmen's

Compensation Act, 1923, (8 of 1923) in respect of the death of, or bodily injury to. employees (other than the driver), not exceeding six in

number, being carried in the vehicle ;

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,

in respect of persons other than passengers carried for hire or reward, a limit of twenty thousand rupees ; and in respect of passengers a limit of

twenty thousand rupees in all, and four thousand rupees in respect of an individual passenger, if the vehicle is registered to carry not more than six

passengers excluding the driver or two thousand rupees in respect of an individual passenger, if the vehicle is registered to carry more than six

passengers excluding the driver ;

(c) where the vehicle is a vehicle of any other class the amount of the liability incurred.

(5) Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify

the person or classes of person, specified in the policy in respect of any liability which the policy purports to cover in the case of that person or

those classes of person.

Section 96 makes it obligatory upon the insurers to satisfy judgments against persons insured in respect of third party risks. Sub-section (1) thereof

is as under:

(i) If, after a certificate of insurance has been issued under sub-section (4) of Section 95 in favour of the person by whom a policy has been

effected, judgment in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 95 (being

a liability covered by the terms of the policy) 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 this 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."" Section 96(1) shows that the obligation of an insurer to pay the amount for which the judgment has been passed

is subject to certain conditions and qualifications. The first condition of the obligation of the insurer is that there is a judgment. The second condition

is that the judgment must be in respect of any liability which is required to be covered by a policy under Clause (b) of Sub-section (1) of Section

95. The third condition is that the liability is in fact covered by the terms of the policy. It is contended by Mr. Madan that the provisions of this

section can only be invoked if the three conditions are fulfilled. On the other hand, it is contended by Mr. Mehta on behalf of the decree-holders

that the second and the third conditions abovementioned are not conjunctive but they are disjunctive. He says that it would be enough if any one of

them is fulfilled, if it is established that a particular liability is covered by the terms of the policy, then it is not necessary that this particular liability

must be required to be covered by a policy under Clause (b) of Sub-section (1) of Section 95. In my opinion, the language of this Sub-section is

very clear and it is not susceptible of this interpretation. It provides that the judgment must be in respect of a liability which is required to be

covered by a policy under Clause (b) of Sub-section (1) of Section 95. It further provides that the liability must be covered by the terms of the

policy. In my opinion, unless both these conditions are fulfilled, it will not be open to a decree-holder to enforce the judgment against the Insurance

Company.

6 Mr. Mehta invited my attention to Sub-section (5) of Section 95 and said that it is implicit in this Sub-section that if a policy of insurance confers

any indemnity to any person specified in the policy in respect of any liability which the policy purports to cover in the case of that person, then a

judgment in respect of such liability can be enforced against the insurer. This contention does not appear to me to be well founded. Section 96(1)

specifically refers to Clause (b) of Sub-section (1) of Section 95 and provides that the liability must be required to be covered by a policy under

that particular provision In Section 96(1) there is no reference whatsoever to the provisions of Sub-section (5) of Section 95 Simply because Sub-

section (5) of Section 95 specifically refers to the right of an indemnity of a person conferred by a policy, it cannot be said that automatically such

liability can be enforced in the manner provided by Section 96(1).

7. The question then arises, are the conditions mentioned in Section 96(1) of the Act fulfilled in the present case. Mr. Madan has contended that

having regard to the terms of the policy issued by the applicant, the liability in respect of which the decree has been passed in favour of the Plaintiffs

is not covered by the policy. Secondly, he contends that in any event the liability in respect of which the decree is passed is not required to be

covered by a policy under the provisions of Clause (b) of Sub-section (1) of Section 95. As both these contentions have been urged it will be

convenient to deal with each of them separately.

8. Condition No. 3 of the policy provides for indemnity to a driver. Under that condition, the Company is bound to indemnify a driver who is

driving the motor car on the insured's order or with his permission provided that such driver is not entitled to indemnity under any other policy and

such driver shall as though he were the insured, observe, fulfill and be subject to the terms and conditions of this policy in so far as they can apply.

Mr. Madan says that as Ishardas, the owner of the car, had issued specific instructions to the driver George Jacob not to permit a lift to any other

person in the car and as the driver had permitted a lift to Mr. & Mrs. Patel contrary to his specific instructions, it must be held that the driver was

not driving the car on the owner's orders or with his permission. In Special Civil Suit No. 11 of 1962, the learned Judge has held that Ishar das

had given specific instructions to his driver George Jacob not to allow anybody, to sit in the car while driving the car from Lonavla to Bombay and

I am informed that that finding of the learned Judge had not been challenged because the Plaintiffs have not preferred any appeal dismissing the suit

against Ishardas. The fact that the driver George Jacob permitted Mr. & Mrs. Patel to enter the car contrary to his master's instructions in my

opinion cannot assist Mr. Madan. What this condition requires is that the driver must be driving the motor car on the insured's order or with his

permission. It is Ishardas who had instructed the driver to take the car from Lonavla to Bombay with his luggage and it was pursuant to these

instructions, that he was taking the car from Lonavla to Bombay and all along the road, he was driving the car on his master's order and with his

permission. The mere fact that contrary to the master's instructions, he permitted a lift to Mr. & Mrs. Patel in the car on the way cannot alter the

position. Even at the time when the collision took place, the driver was driving the car under the orders of his master and with his permission and

having regard to the terms and conditions of condition No. 3, the insurer is bound to indemnify the driver.

9. The question then arises, whether the liability in respect of which the judgment is passed is required to be covered by the policy under Clause

(b) of Sub-section (1) of Section 95, Clause (b) of Sub-section (1) of Section 95 provides that the policy of insurance must be a policy which

insures the person or class of persons specified in the policy. Such insurance is only to the extent specified in Sub-section (2) and is against any

liability which may be incurred by him or them, in respect of the death or bodily injury to any person caused by or arising out of the use of the

vehicle in a public place. If there was no proviso to this Sub-section, the position would have been very clear. That insurance will cover the risk

incurred in respect of the death of Mr. Patel and bodily injury to Mrs. Patel. There is, however, a proviso to this Sub-section and in the present

case, I am only concerned with Clause (ii) of the proviso. Clause (ii) of the proviso makes a distinction between the vehicles in which passengers

are carried for hire or reward or by reason of or in pursuance of a contract of employment and the other cases. In cases where the passengers are

carried for hire or reward or in pursuance of a contract of employment, it is obligatory that the policy should cover the liability in respect of the

death of or bodily injury to persons carried in the vehicle, but under Sub-section (2) of the said section, the extent of the liability is, however,

limited. However, in cases where the vehicle is not used by passengers for hire or reward or by reason of or in pursuance of a contract of

employment, it is not obligatory that the policy should cover the risk of liability in respect of the death of or the bodily injury to persons being

carried in or upon the vehicle. It is clear that in the present case, both Mr. & Mrs. Patel were in the car at the time when the collision took place

and they were not passengers for hire or reward or by reason of or in pursuance of a contract of employment. In fact the driver had given, the lift

to them contrary to his master's instructions not to give lift to any one, as held by the learned judge. Having regard to the provisions of the proviso

to Sub-section (1) of Section 95, it was not obligatory for the owner to have a policy covering the liability in respect of the death of or bodily injury

to either Mr. & Mrs. Patel while they were in the car. The mere fact that the policy contains a clause indemnifying the driver cannot alter the

position. This condition requires that the judgment must be in respect of a liability which is required to be covered by a policy under Clause (b) of

Sub-section (1) of Section 95. On the facts of the present case, it was not obligatory for Ishardas to have a policy covering, the liability arising out

of the death of Mr. Patel and injury to Mrs. Patel, while they were in the car and this condition is, therefore, not fulfilled. The judgment, therefore,

that has been obtained by the Plaintiffs against the heirs and legal representatives of the driver George Jacob cannot therefore be enforced against

the applicant u/s 96. I am not concerned in the present case whether such judgment can be enforced in any other manner and I do not propose to

express any opinion on that question.

10. Mr. Mehta, however invited my attention to a decision of the Supreme Court in the New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal

Aswani and Others, . In that case, one Asnani owned a Chevrolet car bearing registered No. AA. 4431. He insured it with the New Asiatic

Insurance Co. Ltd., under a policy dated November 26, 1957. Asnani permitted Pesumal Dhanamal Aswani to drive that car. When Pesumal was

driving the car with Daooji Radhamohan and Murli Dholandas in the car. the car met with an accident as a result of which Daooji died and Murli

received injuries. Pesumal himself owned a Pontiac car which had been insured with the Indian Trade and General Insurance Co. Ltd. The heirs of

Daooji and Murli filed two separate suits to-recover damages against Pesumal and in these suits, notices were issued u/s 96(2) of the Motor

Vehicles Act to the New Asiatic Insurance Co. Ltd., the Insurance Company then took out a Chamber Summons on the ground that the notice

was bad in law and should be set aside. The policies that were issued in respect of Chevrolet car and Pontiac car were identical in terms and they-

contained what are normally called other driver"s extension clause and other cars extension clause. It was contended on behalf of the Insurance

Company that in view of the provisions of the policy issued in favour of Pesumal by the Indian Trade & General Insurance Company, Pesumal was

indemnified against any liability incurred by him while personally driving private motor car not belonging to him and he was. therefore, not included

among the persons indemnified in condition No. 3 of the policy that was-issued to Asnani. While considering "this question, their Lordships

considered the scheme of chapter VIII of the Act and the provisions of Sections 94, 95 and 96. Their Lordships-pointed out that the Act

contemplates the possibility of the policy of insurance undertaking liability to third parties providing such a contract between the insurer and the

insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to

the third party, from the insured. The insurer thus acts as security for the third party with respect to its realizing damages for the injuries suffered,

viz-a-viz the insured, the company does not undertake that liability or undertakes it to a limited extent. In this case their Lordships had no occasion

to interpret the conditions which are laid down by Section 96(l). No doubt in the case before Their Lordships, Daooji who died and Murli who

received injuries, were both in the car that was belonging to Aswani. But, before Their Lordships, no question was raised whether the liability

arising out of the death of Daooji or personal injuries to Murli were required to be covered by the policy of insurance under the provisions of

Clause (b) of Sub-section (1) of Section 95. In fact, the contentions which have been urged by Mr. Madan before me were not urged before Their

Lordships and the observations that have been made in the judgment were only restricted upon the fact that as Pesumal was indemnified against the

liability by reason of a policy procured by him in respect of the Pontiac car, the New India Insurance Co. Ltd. which issued the Policy in respect of

the Chevrolet car could not be held liable. This decision cannot therefore assist Mr. Mehta.

11. In my opinion, as the liability in respect of the death of. Mr. Patel and injury to Mrs. Patel was not required to be covered by policy under

Clause (b) of Sub-section (1) of Section 95 one of the conditions required to be fulfilled u/s 96(1) has not been fulfilled and the decree-holders are

sot entitled to obtain satisfaction of the judgment against the applicants u/s 96(1) thereof.

12. In the result, the ummoni is made absolute in terms of prayer (a). The application for execution of the decree is, therefore dismissed. As the

insurance company has succeeded on one point and lost in the other, the fair order as to costs should be that each party should bear its own costs.