

(1965) 02 BOM CK 0028

Bombay High Court

Case No: Application in Thana Special Suit No. 11 of 1962

K.N.P. Patel and Others

APPELLANT

Vs

K.L. Kasar and Others and The
Jayabharat Insurance Co. Ltd.

RESPONDENT

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. -6f 05 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. 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/- 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 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 die 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 persona insured in respect of third party risks. Sub-section (I) 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 (l)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 Ishardas 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. Pesumal 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 Daoji Radhamohan and Murli Dholandas in the car. the car met with an accident as a result of which Daoji 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 Daoji 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, Daoji 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 Daoji 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 not 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.