CIVIL REVISION

Before Khosla and Harnam Singh, JJ.

CAPT. ITBAR SINGH,—*Petitioner,*

versus

WING COMMANDER P. S. GILL OF ARMAMENT TRAINING WING, I.F.A., JAMNAGAR AND TWO OTHERS,—*Respondents.*

Civil Revision No. 81-D of 1953

1954

April, 27th

Indian Motor Vehicles Act (IV of 1939) Section 96(2)—Run down action—Insurer whether entitled to be made a party—Whether entitled to defend the action on grounds other than those mentioned in subsection (2).

Held, that from the words used in Section 96(2) of the Indian Motor Vehicles Act it is plain that though the insurers are entitled to be made a party to a run-down action, the insurers cannot defend the action on grounds other than those specified in Section 96(2) of the Act.

Sarupsingh Mangatsingh v. *Nilkant Bhaskar* (1), and *Royal Insurance Co., Ltd.* v. *Abdul Mahomed Meheralli* (2), relied upon.

(Case referred to the Division Bench,—*vide* orders of Hon'ble Mr. Justice Kapur, dated the 26th February, 1954.)

Petition under section 115 of Act V of 1908 and Section 44, Punjab Courts Act and alternatively under Article 227 of the Constitution of India for revision of the Order of Shri Basant Lal Aggarwal, Sub-Judge 1st Class, Delhi, dated the 29th January, 1953, rejecting the application of the plaintiff and ordering that the Insurers should be shown as defendants Nos. 3 and 4 in the suit.

T. P. S. CHAWLA, for Petitioner.

M. L. MADHOK, BHAGWAT DAYAL and RAM BEHARI LAL, for Respondents.

REFERRING ORDER

Kapur, J.

KAPUR, J.—This is a rule obtained by Captain Itbar Singh against an order passed by Mr. Basant

(1) A.I.R. 1953 Bom. 109
(2) A.I.R. 1955 Bom. 39

Lal, Subordinate Judge Ist Class, Delhi, dated the 29th January 1953 allowing certain pleas to be taken by the defendant company in this case.

The plaintiff brought this suit for recovery of Rs. 10,500 against Wing Commander P. S. Gill and Mrs. Tara Devi as legal representatives of Squadron Leader B. S. Dogra in regard to an accident which took place on the junction of the Kitchner Road and Station Road, Delhi Cantonment.

The insurers in this case were impleaded and they have raised certain pleas which raise the question of the factum of the accident, the question of contributory negligence and the question of quantum of damages. The petitioner has brought this case in revision and prays that the insurers are only entitled to raise such pleas as are referred in section 96(2) of the Motor Vehicles Act, Act IV of 1939.

Under section 96 (1) it is the duty of the insurers to satisfy judgments against third persons in respect of third party risks notwithstanding the fact that the insurers are entitled to avoid or cancel or may have avoided or cancelled the policy. Subsection (6) of this section provides that no insurer to whom notice has been given under subsection (2) is entitled to avoid his liability to the person entitled to the benefit of any such judgment referred to in subsection (1) or subsection (2A) otherwise than in the manner provided for in subsection (2). Subsection (2) provides—

> "96 (2). No sum shall be payable by an insurer under subsection (1) in respect of any judgment unless before or after the commencement of the proceedings * * * the insurer had notice

Capt, Itbar Singh
v.
Wing Commander P. S. Gill and others

Kapur, J.

through the Court of the bringing of the proceedings, * * * * * * and an insurer to whom notice of the bringing of any such proceedings is given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :—

(a) * * * * *

(b) that there has been a breach of a specified condition of the policy being one of the following conditions, namely :—"

The question raised before me is that an insurer who has been made a party to the proceedings is entitled to defend the suit only on the grounds mentioned in subsection (2) of section 96. Mr. Bhagwat Dayal on the other hand contends that where a man is made a party to the proceedings and is liable for payment to a third party, his right to defend the suit on grounds other than those mentioned in subsection (2) is not barred.

This is a matter which in my opinion is of some importance and I would refer it to a Division Bench and I direct that the papers be placed before the Hon'ble the Chief Justice for the constitution of a Bench so that this case can be heard as early as possible during this term of the Circuit.

There is another case Civil Revision No. 365-D of 1953. Counsel for the parties in that case are present before me and they want that their case should also be heard along with this case. Let both the cases be heard together and an early date fixed.

JUDGMENT

HARNAM SINGH, J.—By this order I dispose of Civil Revision No. 81-D of 1953, Civil Revision No. 365-D of 1953 and Civil Revision No. 96-D of 1954 which have been referred to this Bench for decision of the question of law arising under section 96(2) of the Indian Motor Vehicles Act, 1939, hereinafter called the Act. Harnam Singh, J.

In Civil Suit No. 605 of 1951 Captain Itbar Singh claimed decree for rupees 10,500 against Wing Commander P. S. Gill and *Shrimati* Tara Devi Dogra for injuries sustained by him in an accident in which car No. DLA 3347 was involved.

In paragraph 8 of the plaint it was stated that the insurers with whom car No. DLA 3347 and Wing Commander P. S. Gill were insured and the insurer with whom Squadron Leader Dogra was insured at the time of the accident were liable to satisfy the decree that may be passed in Civil Suit No. 605 of 1951.

Notices were sent to the insurers for the 2nd of April 1952, but the insurers did not appear in Court on the date of hearing with the result that *ex parte* proceedings were ordered against them.

On the 22nd of June 1952, *ex parte* proceedings against the insurers were set aside on payment of costs.

On the 11th of July 1952 Captain Itbar Singh applied that the written statement filed by the insurers may not be considered, for the insurers could not be impleaded to be defendants in the suit and file written statement on merits.

Capt. Itbar Singh
v.
Wing Commander P. S. Gill and others

Harnam Singh J.

In deciding the matter *Shri* Basant Lal, Sub-Judge, ordered—

> "No doubt there is no specific order on the file making the insurers as parties to the case, but notices were sent to the insurers at the instance of the plaintiff and under subsection (2) of section 96 of the Motor Vehicles Act of 1939, the insurers are entitled to be made parties to the case and to defend the action.
>
> They will also be entitled to defend the suit on the grounds, i.e., their right to challenge the factum of the accident, the factum of the negligence and the quantum of damages etc."

In *Sarupsing Mangatsing* versus *Nilkant Bhaskar* (1), Chagla, C.J. (Bhagwati, J., concurring) expressed the opinion that independently of section 96 (2) of the Act the insurance company cannot be made a party to the suit under Order I rule 10 of the Code of Civil Proceedure and defend the action. In expressing that opinion Chagla. C.J. (Bhagwati, J., concurring) observed—

> "The jurisdiction of the Court to add parties to the suit is restricted to O. I, R. 10, and a person can only be added a party in two cases ; one is when he ought to have been joined as plaintiff or defendant and is not so joined, and the other is when without his presence the questions in the suit cannot be completely decided. Now, it is clear that there was no obligation upon the plaintiff to join

(1) A.I.R. 1953 Bom. 109

the insurance company as a party defendant, there was no privity between the plaintiff and the Insurance Co. and the plaintiff was seeking no relief against the Insurance Co. Can it be said that the Insurance Co. would fall in the second category, or, in other words, can it be said that although the Insurance Co. was not a necessary party it was a proper party. There again it is difficult to see how it could possibly be urged that the question in the suit could not be completely decided in the absence of the Insurance Co. No issue arose as between the plaintiff and the Insurance Co."

Section 96 (2) of the Act provides—

"No sum shall be payable by an insurer under subsection (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal ; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action *on any of the following* grounds, namely—

* * *

* * *"

Capt. Itbar Singh
v.
Wing Commander P. S. Gill and others

Harnam Singh J.

From the words used in section 96 (2) of the Act it is plain that though the insurers are entitled to be made a party to a run-down action, the insurers cannot defend the action on grounds other than those specified in section 96 (2) of the Act. For authority on this point *Sarupsing Mangatsing* versus *Nilkant Bhaskar* (1) and *Royal Insurance Co. Ltd.* versus *Abdul Mahomed Meheralli* (2), may be seen.

In *Sarupsing Mangatsing* versus *Nilkant Bhaskar* (1) Chagla, C.J. (Bhagwati, J., concurring) observed :—

> "Now, section 96 was recently enacted and it casts a sort of vicarious liability upon an Insurance Co., and although the statute makes it obligatory upon the plaintiff to serve a notice through the Court upon the Insurance Co., if he wants to hold the Insurance Co. liable as it were a judgment-debtor under the decree which he might obtain, the statute does not confer any right upon the Insurance Co. to defend the action on the same points in issue which the defendant would be entitled to defend. The right of the Insurance Co. to defend is restricted to the various matters set out in s. 96 (2), and obviously the right of the Insurance Co. to be made a party to the suit is also restricted to those matters where it could put forward a defence."

(1) A.I.R. 1953 Bom. 109
(2) A.I.R. 1955 Bom. 39

Capt. Itbar Singh
v.
Wing Commander P. S. Gill and others

Harnam Singh J.

In *Royal Insurance Co. Limited* versus *Abdul Mohamed Meheralli*, (1), Chagla, C. J. (Dixit, J., concurring) observed—

> "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 under s. 96 (2) to be made a party and to defend the action *in its own right.*"

Section 96 (2) of the Act deals with third party procedure where a person not a party to the suit would become liable to satisfy the decree passed in a run-down action.

In making rules under section 122 of the Code of Civil Procedure the High Court of Bombay has added rules 13 to 30 in Order VIII of the Code of Civil Procedure. Rules 23 to 30 added by the High Court of Bombay deal with third party procedure. Rule 23 (3) of those rules provides—

> "The third party shall as from the time of the service upon him of the notice, be a party to the suit with the same right in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant."

On the subject of third party procedure the Madras High Court has added Order VIII A to the

(1) A.I.R. 1955 Bom. 39

Capt. Itbar Singh
v.
Wing Commander P. S. Gill and others

Code of Civil Procedure. Rule 2 of Order VIII A of the Code is identical with the rule 23 (3) cited above.

In my judgment the insurers cannot defend the action on grounds other than those specified in section 96 (2) of the Act.

Harnam Singh J.

In considering the principles underlying section 96 (2) of the Act Chagla, C.J. (Dixit, J., concurring) said in *Royal Insurance Co., Ltd.* versus *Abdul Mohamed Meheralli* (1) —

> "* * * 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 the claim on any of the grounds mentioned in s.* 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 or 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.*

(1) A.I.R: 1955 Bom. 39

For the foregoing reasons, I think that the order passed by *Shri* Basant Lal, Sub-Judge, giving the right to the insurers to defend the action on merits cannot be sustained.

In the result, I allow Civil Revision No. 81-D of 1953 by restraining the defence of the insurers to the matters specified in section 96 (2) of the Act. In all other respects the order passed by the Sub-Judge on the 29th of January 1953 would stand.

KHOSLA, J.—I agree.