Skandia Insurance Co. Ltd.

Vs

Kokilaben Chandravadan and Others

Civil Appeal No. 1386 (N) of 1973

(M. P. Thakkar, B. C. Ray JJ)

01.04.1987

JUDGMENT

THAKKAR J. -

1. While in some States (Andhra Pradesh, Gujarat) a widow of a victim of a motor vehicle accident can recover the amount of compensation awarded to her from the insurance company, in a precisely similar fact-situation, she would be unable to do so, in other States (Assam, Madhya Pradesh, Orissa), conflicting views having been taken by the respective High Courts. The unaesthetic wrinkles from the face of law require to be removed by settling the law so that the same law does not operate on citizens differently depending on the sites of the accident. The question is whether the insurer is entitled to claim immunity from a decree obtained by the dependents of the victim of a fatal accident on the ground that the insurance policy provided "a condition excluding driving by named person or persons or by any person who is not duly licensed or by any person who has been disqualified from holding or obtaining a driving licence during the period of disqualification, "and that such exclusion was permissible in the context of section 96(2)(b) (ii) (96. Duty of insures to satisfy judgment against persons insured in respect of third party risks. - (1) 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 covered by the terms of the policy) is obtained agained 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. (2) No sum shall be payable by an insurer under sub-section (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 executive is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceeding is so 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 :

#(i) .....(a) to (d) .....##

> (ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or .....) for claiming immunity against the obligation to satisfy the judgments against the insured in respect of third party risks.

2. The facts are not in dispute. The Claims Tribunal as also the High Court have concurred with the findings which are recorded in the following passage :

> "The accident in question took place on November 14, 1964. The truck had come from Barejadi and had been unloaded at Baroda. The driver had gone for bringing snacks from the opposite shop leaving the engine running. The ignition key was in the ignition lock and not in the cabin in the truck as alleged by the driver. The driver had handed over control of the truck to the cleaner. On these facts, the driver having been grossly negligent in leaving such a truck with its engine running in the control of the cleaner, this being the immediate cause of the accident, the owner of the truck, viz., the insured, was held vicariously liable along with the driver and the cleaner."

3. The view taken by the High Court has been summed up as under :

> In the present case, there is not an allegation even that the insurer had at any time committed a breach of this condition. The insured has never permitted the cleaner to drive on the fatal occasion. The insured has permitted only the driver who is admittedly the licensed driver. It is the driver's negligence in leaving the vehicle with its engine running with the ignition key in the ignition lock that resulted in this accident. But for this gross negligence of the driver, the cleaner would not have been able to interfere with this vehicle. Once a finding is that the driver in the course of the employment or the master's agent in the course of that agency, negligently left the vehicle with the cleaner, the vicarious liability would immediately be fastened to the owner of the truck .... even if vicarious liability arises because of this principle of social justice and not because the owner committed any breach of the policy condition. The owner in the present case never gave permission to this cleaner to drive and, therefore, the owner even though he had become liable by reason of his vicarious liability, he could not be held guilty of the breach of the contractual condition embodied in the policy of insurance. Therefore, the insurer cannot plead any exemption on the ground that the owner had committed breach, of the specified condition ....

4. It has been contended on behalf of the insurance company that since admittedly there was an exclusion clause, the insurance company would not be liable in case at the point of time when the accident occurred the person who had been driving the vehicle was not a duly licensed person to drive the vehicle. It was immaterial that the insured had engaged a licensed driver and had entrusted the vehicle for being driven to the licensed driver. Once it was established that the accident occurred when an unlicensed person was at the wheels, the insurance company would be exonerated from the liability. The validity of this argument advanced in order to assail the view taken by the High Court has to be tested in the light of the provisions contained in section 96(1) and 96(2) (b) (ii) of the Motor Vehicles Act.

5. But before doing so, a brief survey of the decisions of the High Courts may be usefully made. Reliance is placed on behalf of the appellant on Sardar Nand Singh v. Abhyabala Debt (AIR 1955 Ass 157). The view has been taken therein that while the master is undoubtedly liable for the

wrongful conduct or negligence of his servant where the act or conduct or negligence occurs in the course in the course of the master's employment or in furtherance of his interest notwithstanding the fact that the servant may have been prohibited from doing such an act. The High Court has, however, proceeded to absolve the insurance company from the liability in the light of section 96(2) of the Act. The High Court in doing so has not examined or analysed the provisions of section 96(2) and has taken for granted that once it is established that the vehicle was being driven by an unlicensed person, the insurance company stood exonerated. The decision is, therefore, of little significance for testing the validity or otherwise of the view taken in the judgment under appeal.

6. The appellant has also relied on Shanker Rao v. M/s. Babulal Fouzdar (AIR 1980 MP 154 : 1980 MPLJ 562 : 1980 Jab LJ 650), wherein the High Court has exonerated the insurance company on the following reasoning :

> According to one of the terms of the policy of insurance, the insurer's liability is subject to the condition that the person driving the vehicle holds a licence to drive the vehicle or has held and is not disqualified from holding or obtaining such a licence and provided he is in the employment of the insured and is driving on his order or with his permission. Unless the person driving the vehicle falls in that category, the insurer is not liable under the policy and is, therefore, exempted from indemnifying the insured. In the present case, apart from the question whether Hari Prasad held a driving licence or not, he was neither in the employment of the insured nor was he driving the bus at the time of the accident on the order or with the permission of the insured. The insurer, therefore, is exempt from any liability under the terms of the policy and there is no infirmity even in this conclusion reached by the Tribunal.

7. It has to be noticed that the conclusion of the High Court is backed only by an assertion and not by reasoning. It is, therefore, of little assistance in resolving the issue.

8. So also the appellant has placed reliance on Orissa State Commercial Transport Corporation v. Dhumali Bewa (AIR 1982 Ori 70, 53 Cut LT 167 : 1982 ACJ 325) wherein the High Court came to the conclusion that the insurer was not liable. The entire reasoning is contained in the following passage which does not throw any light in regard to the basis of the reasoning or the interpretation of section 96(2)(b)(ii)

The insurer, who is opposite party No. 2, in the common written statement denied the averments made in the petitions. It contended that it is not liable to compensate the appellant as the vehicle was driven by S. Appa Rao who had no driving licence. Further, the accident took place near Jetty No. 1 which is not a public place. For the aforesaid reasons, it is contended that opposite party No. 2 is not liable to indemnify opposite party No. 1.

9. On behalf of the respondents, support is sought from Kilari Mammi v. Barium Chemicals Ltd. (AIR 1979 AP 75 : (1978) 2 APLJ (HC) 378 : (1978) 2 Andh LT 536 : 1979 ACJ 58 : 1979 TAC 170) decided by the Andhra Pradesh High Court which has taken the same view as has been taken by the Gujarat High Court in the judgment under appeal. Says the High Court :

> If the first respondent had authorised only a licensed driver to drive the vehicle, then the defence under section 96(2) could be rightly invoked by the fourth respondent. But this is a case where due to the negligence of the authorised driver, the third respondent, a third person, drove the vehicle and, therefore, I do not think the

> decision relied upon by the learned counsel is of any relevance to the facts of this case.

This decision is also exposed to the same criticism. It is buttressed by 'ipse dixit' rather than rationation.

10. The respondents have also placed reliance on Dwarka Prasad Jhunjhunwala v. Sushila Devi (AIR 1983 Pat 246 : 1983 BLJ 175 1983 TAC 367 : 1983 Pat LJR 338). It is no doubt true that the High Court has upheld the claim of the insured to be reimbursed by the insurance company but as is evident from paragraph 9 of the judgment, which is reproduced below things have been taken for granted :

> From the above discussions, it is clear and was not disputed that the liability of appellant 1 for the negligent act of his driver is there. If appellant 1 being the owner of the car is liable, then I do not see why if the insurance was taken to cover a third party risk, the insurance company cannot be fastened with the liability. The appellant had taken an insurance policy to cover the risk against third party. Clause (b) of section 95(1) ensures the person against the liability incurred by him in respect of the death of, or bodily injury to, any person caused by or arising our of the use of the vehicle in public place. In view of this cover, appellant 1 appears to me to be certainly entitled to shift the burden of the compensation awarded against him on the insurance company which, in this case, the car being a private one, is unlimited. I would, therefore, accept the argument of Mr. S. C. Ghose that, on the facts and in the circumstances discussed above, the liability of appellant 1 should be shifted from him to the National Insurance Co. Ltd., respondent 7.

11. The question, therefore, deserves to be examined afresh on its own merits on principle. Now, the proposition is incontrovertible that so far as the owner of the vehicle is concerned, his vicarious liability for damages arising out the accident cannot be disputed having regard to the general principles of law as also having regard to the violation of the obligation imposed by section 84 of the Act which provides that no person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver. However, in the present case, the appellant contends that the exclusion clause is strictly in accordance with the statutorily permissible exclusion embodied in section 96(2)(b)(ii) and that under the circumstances the appellant-insurance company is not under a legal obligation to satisfy the judgment procured by the respondents.

12. The defence built on the exclusion clause cannot succeed for three reasons, viz :

> (1) On a true interpretation of the relevant clause, which interpretation is at peace with the conscience of section 96, the condition excluding driving by a person not duly licensed is not absolute and the promisor is absolved once it is shown that he has done everything in his power to keep, honour, and fulfill the promise and he himself is not guilty of a deliberate breach.
>
> (2) Even if it is treated as an absolute promise, there is substantial compliance therewith upon an express or implied mandate being given to the licensed driver not

to allow the vehicle to be left unattended so that if happens to be driven by an unlicensed driver.

(3) The exclusion clause has to be 'real down' in order that it is not at war with the 'main purpose' of the provisions enacted for the protection of victims of accidents so that the promisor is exculpated when he does everything in his power to keep the promise.

13. In order to divine the intention of the Legislature in the course of interpretation of the relevant provisions, there can securely be a batter test than that of probing into the motive and philosophy of the relevant provisions, keeping in mind the goals to be achieved by enacting the same. Ordinarily, it is not the concern of the Legislature whether the owner of the vehicle insures his vehicle or not. If the vehicle is not insured, any legal liability arising on account of third party risk will have to be borne by the owner of the vehicle. Why then has the Legislature insisted on a person using a motor vehicle in a public place to insuring against third party risk by enacting section 94 ? Surely, the obligation has not been imposed in order to promote the business of the insurers engaged in the business of automobile insurance. The provision has been inserted in order to protect the members of the community travelling in vehicles or using the roads from the risk attendant upon the user of motor vehicles on the roads. The law may provide for compensation to victims of the accidents who sustain injuries in the course of an automobile accident or compensation to the dependents of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the courts would be recoverable from the persons held liable for the consequences of the accident. A court can only pass an award or a decree. It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have the resources. The exercise undertaken by the law courts would then be an exercise in futility. And the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from scarce resources of the community would made a mockery of the injured victims, or the dependents of the decreased victim of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. To overcome this ugly situation, the Legislature has made it obligatory that no motor vehicles shall be used unless a third party insurance is in force. To use the vehicle without the requisite third party insurance being in force is a penal offence (Section 94 of the Motor Vehicles Act). The legislature was also faced with another problem. The insurance policy might provide for liability walled in by condition which may specified in the contract of policy. In order to make the protection real, the Legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by section 96 and by providing that except and save to the extent permitted by section 96 it will be the obligation of the insurance company to satisfy the judgment obtained against the persons insured against third party risks (vide section 96). In other words, the Legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third party risks which is in conformity with the provisions enacted by the Legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependents of the victims of fatal accidents are really compensated in terms of money and not in terms of promise. Such a benign provision enacted by the Legislature having regard to the fact that in the modern age, the use of motor vehicles, notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose of the legislation. The provision has, therefore, to be interpreted in the twilight of the aforesaid perspective.

14. Section 96(2)(b)(ii) extents immunity to the insurance company if a breach is committed of the

condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified from holding or obtaining driving licence during the period of disqualification. The expression "breach" is of great significance. The dictionary meaning of "breach" is "infringement or violation of a promise or obligation" (See collins English Dictionary). It is, therefore, abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of the promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect, how can it be conscientously posited that he has committed a breach ? It is only when the insured himself places the vehicle in charge of a person who dies not hold a driving licence, that it can be said that he is "guilty" of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the insurance company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach, the insurer cannot escape from the obligation to indemnify the insured and successfully contented that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive it himself, it cannot be said that the insured is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause. In a way the question is an to whether the promise made by the insured is an absolute promise or whether he is exceptated on the basis of some legal doctrine. The discussion made in paragraph 239 of Breach of Contract by Carter (1984 Edition) under the head "Proof of Breach", gives an inkling of this dimension of the matter (Exculpation of a promisor. Given a presumption of absoluteness of obligation, a promisor who is alleged to have failed to perform must either prove performance or establish some positive excuse for any failure on his part. In other words he must find exculpation from what is presumed to be a breach of contract, either in the contract itself or in some external rule of law. These are five grounds for exculpation : construction of the contract; the doctrine of frustration; the existence of an implied term; the presence of an exclusion clause; and the application of a statutory rule or provision. These will be later). 2 In the present case, even it the promise were to be treated as an absolute promise, the grounds for exculpation can be found from section 84 of the Act which reads thus :

> 84. Stationary vehicles. - No person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver.

In view of this provision, apart from the implied mandate to the licensed driver not to place an unlicensed person in charge of the vehicle, there is also a statutory obligation on the said person not to leave the vehicle unattended and not to place it in charge of an unlicensed driver. What is prohibited by law must be treated as a mandate to the employee and should be considered sufficient in the eye of law for excusing non-considered as a breach on the part of the insured. To construe the provision differently would be to rewrite the provision by engrafting a rider to the effect that in the event of the motor vehicle happening to be driven by an unlicensed person, regardless of the

circumstances in which such a contingency occurs, the insurer will not be liable under the contract of insurance. It needs to be emphasised that it is not the contract of insurance which is being interpreted. It is the statutory provision defining the conditions of exemption which is being interpreted. These must, therefore, be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfill its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be achieved. What the Legislature has given, the Court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent. In fact, it appears that the former view is more plausible apart from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependents on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity there is hardly any choice. The court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of "reading down" the exclusion clause in the light of the "main purpose" of the provision so that the "exclusion clause" does not cross swords with the "main purpose" highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose. This theory which needs no support is supported by Carter's "Breach of Contract", vide paragraph 251. To quote :

> Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule, usually referred to as the 'main purpose rule', which may limit the application of wide exclusion clauses defining a promisor's contractual obligations. For example, in Glynn v. Margetson & Co. ((1893) AC 351, 357), Lord Halsbury L.C. stated :

It seems to me that in construing this document, which is contract of carriage between the parties, one must in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard ... as its main purpose, one must reject words, indeed whole provisions, it they are inconsistent with what one assumes to be the main purpose of the contract.

Although this rule played a role in the development of the doctrine of fundamental breach, the continued validity of the rule was acknowledged when the doctrine was rejected by the House of Lords is Suisee Atlantique Societe d' Armement Maritime S. A. v. N. V. Rotterdamsche Kolen Centrale ((1967) 1 AC 361, 393, 412-41 413, 427-428, 430 : (1966) 2 All ER 61). Accordingly, wide exclusion clauses will be read down to the extent to which they are inconsistent with the main purpose, or object of the contract.

15. In our opinion, therefore, the High Courts of Gujarat and Andhra Pradesh (sic and Patna) are right and the High Courts or Orissa, Patna (sic Assam) and Madhya Pradesh are in error. The exclusion clause does not exonerate the insurer.

16. The appeal accordingly fails and is dismissed with costs.

</html