BOMBAY HIGH COURT

Royal Insurance Co Ltd

Vs.

Abdul Mahomed Meheralli

O.C.J. Appeal No. 41 of 1954, in suit No.282 of 1951

(Chagla, C.J. and Dixit, J.)

21.07.1954

JUDGMENT

Chagla, C.J.

1. Respondent 1 was knocked down by a motor cycle belonging to respondent 2 on 14-3-1950, 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 2 was insured against third party risk with the appellant company and on 26-8-1953, a notice was issued to the insurance company under Section 96(2), 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.

2. Now, the position under Section 96, 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 26-8-1953. 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 under Section 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.

3. 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 under Section 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 given 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 under Section 151 in order to do something which is contrary to what a statute lays down. Section 151 does not exist in the Code of Civil Procedure 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 cases 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, the 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 under Section 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[1]',* 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 was whether the insurance company bad a 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 under Section 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

[1] AIR 1953 Bom 109

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 the 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 under Section 96 (2). We have also pointed out at pp. 110, 111 that the object of giving the notice to the insurance company was obviously to enable it to defend 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 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 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.

4. There is an English case which was referred to at the bar and that is - *'Windsor v. Chalcraft[2]',* 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 off the defendant. But even in the case before us we have a provision in the policy which, though not in terms identical with the one in the English case, is very similar to it, and that is this:

> "The Company may undertake the defense of proceedings in any Court of Law in respect of any act or alleged offence causing or relating to any event which may be
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[2]1939-1 KB 279
>
> the subject of indemnity under this section."

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.

5. 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), 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.

6. 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.

7. 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.

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

Order accordingly.