1964

April 24

NEW ASIATIC INSURANCE CO. LTD.

v.

PESSUMAL DHANAMAL ASWANI AND ORS.

[K. SUBBA RAO, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.]

Motor Vehicles Act—(4 *of* 1939), *ss.* 93 *to* 96—*Scope of.*

A had insured his car with the appellant under a comprehensive policy. A permitted B, (who had insured his own car with another company) to drive his car and while B was driving the car it met with an accident. As a result of the accident C died and D sustained serious injuries. Both C and D were in the car. The heirs of C and D filed suits for damages. Notices under s. 96(2) of the Motor Vehicles Act, 1939 were issued to the appellant who thereupon took out a Chamber Summons contending that the notice was bad in law. Alternatively it was contended that the appellant be permitted to defend the suit in the name of the defendant. The Court held that the notices were bad. The plaintiffs filed Letters Patent appeals with success and the Chamber Summons were dismissed and the trial Judge was directed to hear the alternative prayer. Against this Order the present appeal was filed with special leave.

The contention of the appellant was that in view of paragraph 4 of B's own policy issued by the other company which indemnified B against any liability incurred by him whilst personally driving a private car not belonging to him or hired by him under a Hire-Purchase agreement, B was not included among persons indemnified in para. 3 of A's policy which the appellant had issued on account of proviso (a) to the said para. The respondent contended that this proviso is not a limitation on the class of persons indemnified under para. 3 that class being the drivers driving A's car insured under the policy but merely amounted to a condition affecting the liability of the company *vis a vis* the driver who was entitled to be indemnified under any other policy.

Held: (i) From a consideration of ss. 93, 94, 95 and 96 of the Motor Vehicles Act it follows that if under the terms of the policy B can be said to be the person insured under Para. 3 of the policy, the company would be liable to satisfy the decree if any passed against B.

(ii) The appellant by agreeing with the person who effects the policy, to insure him against liability to third parties, takes upon itself the entire liability of the person effecting the insurance. It is open to the insurer not to extend the indemnity to the insured to other persons but if it extends it to other persons, it cannot restrict it *vis a vis* the right of the third party entitled to damages to recover them from the insured, a right which is not disputed. A proviso meant to exempt certain persons from the general classification will have to be related to considerations affecting it and is not to be related to such classified person's right to indemnity from any other insurer.

(iii) The cl. (4) of s. II of B's policy with the other company does not make that policy to be a policy within the meaning of

1964

New Asiatic Insurance Co. Ltd. v. Pessumal Dhanamal Aswami and Others

s. 94 of the Act in relation to A's car by whose user B incurred liabilities sought to be established in the two suits. Such a policy and any indemnity under it cannot be used for sub-classifying drivers specified in the policy issued to A by the appellant.

(iv) The High Court was correct in holding that the appellant had insured B in view of para. 3 of s. II of that policy and that it comes within the expression insurer in s. 96 of the Act.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 1043-1044 of 1963. Appeals by special leave from the judgment and decree dated April 8, 1963 of the Bombay High Court in Appeals Nos. 10 and 11 of 1962.

S. T. Desai, V. N. Thakar, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the appellant (in both the appeals).

G. S. Pathak, O. P. Malhotra and *I. N. Shroff*, for respondent No. 1 (in both the appeals).

V. J. Merchant, for respondents Nos. 2 and 4 to 7 (in C.A. No. 1043/1963).

April 24, 1964. The Judgment of the Court was delivered by

Raghubar Dayal, J.

RAGHUBAR DAYAL, J.—These appeals, by special leave, arise in the following circumstances:

S. N. Asnani owned Chevrolet Car bearing registered No. AA 4431. He insured it with the New Asiatic Insurance Co. Ltd., hereinafter referred to as the company, under a policy dated November 26, 1957. Asnani permitted Pessumal Dhanamal Aswani, hereinafter called Pessumal, to drive that car. When Pessumal was driving the car with Daooji Radhamohan Meherotra and Murli Dholandas in the car, the car met with an accident as a result of which Meherotra died and Murli received injuries.

Pessumal himself owned a Pontiac car which had been insured with the Indian Trade & General Insurance Co. Ltd., under policy No. Bombay P.C. 42733-2, dated November 18, 1957.

The heirs of Meherotra instituted suit no.70 of 1959 against Pessumal for the recovery of Rs. 2,50,000/- by way of damages with interest. Murli instituted suit no. 71 of 1959 against Pessumal to recover Rs. 1,50,000/- by way of damages.

Notices under s. 96(2) of the Motor Vehicles Act, 1939 (Act IV of 1939), hereinafter called the Act, were issued to the New Asiatic Insurance Co, Ltd. The notice was given to the company as the defendant's liability to third parties had been insured with it under its policy no. MV/4564. The company then took out Chamber Summons and it was contended that notice under s. 96(2) of the Act was bad in law and should be set aside and that the company was not liable to satisfy any

judgment which might be passed in the suit against the defendant. Alternatively, it was prayed that the company be added as a party defendant to the suit and/or be authorised to defend the suit in the name of the defendant. Tarkunde J., held the notice issued to the company in the suits under s. 96(2) of the Act, to be bad in law and, accordingly, set them aside.

The plaintiffs then filed Letters Patent Appeals which were allowed and the Chamber Summonses were dismissed. It was directed that the trial Judge would hear the alternative prayers in the Chamber Summonses and make the necessary orders. It is against this order in each of the appeals that the company has preferred these appeals, after obtaining special leave.

To appreciate the contentions of the parties in these appeals, reference may be made to certain provisions in the two policies. The various provisions in the two policies are identical in matters affecting the question for determination before us. We, therefore, set out the relevant provisions from the policy issued by the company and would refer to differences, if any, at the proper place.

The policy is described as 'Private Car (Comprehensive Policy)'. The policy issued by the other company does not so describe it, but it is also a Comprehensive Policy as the premium charged is on that basis. The policy insures, under Section I against loss or damage, under Section II against liability to third parties and under Section III against liability for medical expenses. Thereafter, follow the general exceptions and conditions.

Para 1 of Section II indemnifies the insured, i.e. Asnani who effected the policy, in the event of accident caused by or arising out of the use of the motor car, against all sums which he may become legally liable to pay in respect of death or of bodily injury to any person. Paras 3 and 4, generally known as 'Other drivers' 'Extension Clause' and 'Other Vehicles Extension Clause' respectively, are material and are set out in full:

"3. In terms of and subject to the limitations 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, fulfil and be subject to the terms, exceptions and conditions of the policy in so far as they can apply.

1964

New Asiatic Insurance Co. Ltd. v. Peesumal Dhanamal Aswani and Others

Raghubar Dayal, J.

4. In terms of and subject to the limitations of the indemnity which is granted by this Section in connection with the Motor Car the Company will indemnity which is granted by this Section in con-Private Motor Car (but not a Motor Cycle) not belonging to him and not hired to him under a Hire Purchase Agreement".

Under the heading 'Avoidance of certain terms and right of recovery', the policy states:—

"Nothing in this Policy or any endorsement hereon shall affect the right of any person indemnified by this Policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, section 96.

But the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions."

Condition 6 reads:

"6. If at the time any claim arises under this Policy there is any other existing insurance covering the same loss damage or liability the Company shall not be liable to pay or contribute more than its rateable proportion of any loss damage compensation costs or expense. Provided always that nothing in this Condition shall impose on the Company any liability from which but for this Condition it would have been relieved under proviso (a) of Section II-3 of this Policy".

The Schedule to the policy mentions the limitations as to use and under heading 'Driver' notes:—

(a) Any person:—

(b) The insured may also drive a motor car not belonging to him and not hired to him under a Hire Purchase Agreement.

Provided that the person driving holds a licence to drive the Motor Car or has held and is not disqualified for holding or obtaining such a licence".

At the end of the Schedule is an important notice which reads:

"The insured is not indemnified if the Vehicle is used or driven otherwise than in accordance with this Schedule. Any payment made by the Company by reason of wider terms appearing in the Certificate in order to comply with Motor Vehicles Act 1939 is recoverable from the Insured. See the clause headed 'Avoidance of certain terms and right of recovery'."

The contention for the appellant is that in view of para 4 of Pessumal's policy issued by the other company, Pessumal was indemnified against any liability incurred by him whilst personally driving a private motor car not belonging to him and not hired to him under a Hire Purchase Agreement, and that, therefore, he was not included among the persons indemnified in para 3 of the policy it had issued to Asnani on account of proviso (a) to para 3 which reads:

> "provided that such driver is not entitled to indemnity under any other policy".

This contention is met by the respondent on the ground that this proviso is not a limitation on the class of persons indemnified under para 3, that class being the drivers driving the Chevrolet car insured under the policy, but merely amounted to a condition affecting the liability of the company *vis a vis* the driver who was entitled to indemnity under any other policy. The question thus reduces itself to the determination of whether Pessumal comes within the persons indemnified in para 3 of the policy issued by the company.

We may now set out the relevant provisions of the Act which have a bearing on the contention between the parties. Chapter VIII of the Act provides for insurance of motor vehicles against third party risks. Section 93 defines the expressions 'authorised insurer', 'certificate of insurance' and reciprocating country'. The relevant portions of the various sections are:

> "94. (1). 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.

Explanation—A person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is required by this sub-section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force.

> (2) Sub-section (1) shall not apply to any vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise.
>
> (3) The appropriate Government may, by order, exempt from the operation of sub-section (1) any

1964

New Asiatic Insurance Co. Ltd.
v.
Pessumal Dhanamal Aswani and Others

Raghubar Dayal, J.

vehicle owned by any of the following authorities. namely:—

* * * * *

Provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority in accordance with the rules made in that behalf under this Act for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment may incur to third parties.

* * * * *

95. (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 co-operative society allowed under section 108 to transact the business of an insurer, and

(b) insures the person or classes of person 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:

* * * * *

(4) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any conditions subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

* * * * *

(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.

96. (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 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.

(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 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:—

* * * * *

(3) Where a certificate of insurance has been issued under sub-section (4) of section 95 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 95, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the in-insurer from that person.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under

1964

New Asiatic Insurance Co. Ltd.
v.
Pessumal Dhanumal Aswani and Others

Raghubar Dayal, J.

the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

* * * * *

(6) No insurer to whom the notice referred to in sub-section (2) or sub-section (2A) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in sub-section (1) or sub-section (2A) otherwise than in the manner provided for in sub-section (2), or in the corresponding law of the State of Jammu and Kashmir or of the reciprocating country, as the case may be".

Chapter VIII of the Act, it appears from the heading, makes provision for insurance of the vehicle against third-party risks, that is to say, its provisions ensure that third-parties who suffer on account of the user of the motor vehicle would be also to get damages for injuries suffered and that their ability to get the damages will not be dependent on the financial condition of the driver of the vehicle whose user led to the causing of the injuries. The provisions have to be construed in such a manner as to ensure this object of the enactment.

Section 94 prohibits, as a matter of necessity, for insurance against third-party risk, the use of a motor vehicle by any person unless there exists a policy of insurance in relation to the use of the vehicle by that particular person and the policy of insurance complies with the requirements of Chapter VIII. The policy must therefore provide insurance against any liability to third party incurred by that person when using that vehicle. The policy should therefore be with respect to that particular vehicle. It may, however, mention the person specifically or generally by specifying the class to which that person may belong, as it may not be possible to name specifically all the persons who may have to use the vehicle with the permission of the person owning the vehicle and effecting the policy of insurance. The policy of insurance contemplated by s. 94 therefore must be a policy by which a particular car is insured.

Section 95 lays down the requirements which are to be complied with by the policy of insurance issued in relation to the use of a particular vehicle. They are: (1) the policy must specify the person or classes of person who are insured with respect to their liability to third-parties; (2) the policy must specify the extent of liability which must extend to the extent specified in sub-s. (2); and (3) the liability which be incurred by the specified person or classes of person in respect of death or bodily injury to any person caused by or arising out of the use of the vehicle insured in a public place.

Sub-section (4) of s. 95 requires the issue of a certificate of insurance, in the prescribed form, to the person who effects the policy. The form of the certificate prescribed by the Motor Vehicles Third Party Insurance Rules, 1946, requires the specification of persons or classes of persons entitled to drive. The authorised insurer is also to certify in the certificate that the policy to which the certificate relates, as well as the certificate of insurance, are issued in accordance with the provisions of Chapter VIII of the Act.

Sub-section (5) of s. 95 makes the insurer 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. If the policy covers the insured for his liability to third parties, the insurer is bound to indemnify the person or classes of person specified in the policy The same is the effect of sub-s. (1) of s. 96 which provides that the insurer is bound to pay to the person entitled to the benefit of a decree he obtains in respect of any liability covered by the terms of the policy against any person insured by the policy irrespective of the fact whether the insurer was entitled to avoid or cancel or might have avoided or cancelled the policy. This means that once the insurer has issued a certificate of insurance in accordance with sub-s. (4) of s. 95 he has to satisfy any decree which a person receiving injuries from the use of the vehicle insured obtains against any person insured by the policy. He is however liable to satisfy the decree only when he has been served with a notice under sub-s. (2) of s. 96 about the proceedings in which the judgment was delivered. It is for this reason that a notice under sub-s. (2) of s. 96 was issued to the company and it is on account of the consequential liability in case the plaintiffs' claim is decreed against Pessumal that the appellant challenged the correctness of the allegation that Pessumal was a person insured under the policy issued by it in respect of the Chevrolet car. It follows from a consideration of these various provisions of the Act—and this is not really disputed for the appellant—that if under the terms of the policy Pessumal can be said to be the person insured under para 3, the company would be liable to satisfy the decree if any passed against Pessumal.

The whole question then is whether Pesumal comes within the terms of para 3 of Section II of the policy.

Under this paragraph, the company indemnifies any person who is driving the motor-car on the insured's order or with his permission. Pessumal was driving the car with the permission of Asnani who had effected the policy and therefore the company undertook to indemnify Pessumal in accordance with this provision of para 3. The appellant, however

1964

New Asiatic Insurance Co. Ltd. v. Pessumal Dhanamal Aswani and Others

Raghubar Dayal, J.

contends that this provision should not be read as defining by itself the class of persons insured under it, in view of the further classification of this class of drivers by proviso (a). It is contended that only such drivers were indemnified as were not entitled to indemnity under any other policy and thus drivers who were entitled to indemnity under any other policy were taken out of the general class of drivers driving the car on the insured's order or with his permission. We do not agree with this contention.

The proviso is not really a classification of drivers but is a restriction on the right of the driver to recover any damages he had to pay, from the company. The driver who can get indemnity from any other company under any other policy is, under this contractual term, not to get indemnity from the company. The proviso thus, affects the question of indemnity between a particular driver and the company and has nothing to do with the liability which the driver has incurred to the third party for the injuries caused to it and against which liability was provided by s. 94 of the Act and was affected by the policy issued by the company. The company, by agreeing with the person who affects the policy, to insure him against liability to third parties, takes upon itself the entire liability of the person effecting the insurance. It is open to the insurer not to extend this idemnity to the insured to other persons but if it extends it to other persons, it cannot restrict it *vis a vis* the right of the third party entitled to damages, to recover them from the insured, a right which is not disputed. A proviso meant to exempt certain persons from the general classification will have to be related to considerations affecting it and is not to be related to such classified persons right to indemnity from any other insurer. In this connection reference may be made to proviso (b) which cannot in any case be a proviso relating to the classification of persons to be indemnified. It provides that the person indemnified under para 3 will observe, fulfil and be subject to the terms, exceptions and conditions of the policy in so far as they can apply to him.

We are further of opinion that clause (4) of Section II of Pessumal's policy with the other company does not make that policy to be a policy within the meaning of s. 94 of the Act in relation to the Chevrolet car by whose user Pessumal incurred liabilities sought to be established in the two suits. The paragraph indemnifies the insured, i.e., Pessumal, whilst personally driving any private motor car. It does not indemnify him against the liability incurred when driving any particular car and therefore, in view of what we have said earlier, Pessumal's policy cannot be a policy of insurance in relation to the Chevrolet car as required by s. 94 of the Act. Such a policy and any indemnity under it cannot be used for sub-classifying drivers specified in the policy of the company.

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 realising damages for the injuries suffered, but *vis a vis* the insured, the company does not undertake that liability or undertakes it to a limited extent. It is in view of such a possibility that various conditions are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the company to third parties. This is mentioned prominently in the policy itself and is mentioned under the heading 'Avoidance of certain terms and rights of recovery', as well as in the form of 'An Important Notice' in the Schedule to the policy. The avoidance clause says that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The 'Important Notice' mentions that any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Act is recoverable from the insured, and refers to the avoidance clause.

Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake *vis a vis* the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the per sons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of Section II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim against the company on account of its claim against a person specified in para 3 as one to whom cover of the policy was extended.

It has been contended for the appellant that it was not incumbent on the owner of a car to take out a policy of insurance indemnifying himself or any person permitted to drive the car and that if he does not insure the car and uses it he runs the risk of prosecution under s. 125 of the Act. This is

1964

New Asiatic Insurance Co. Ltd. v. Pessumal Dhanumal Aswani and Others

Raghubar Dayal, J.

true, but has no relevant effect on the question for decision before us. Asnani did insure his car with respect to liability against third persons. We have to see whether the company, on account of undertaking that liability can be said to have insured Pessumal on account of his driving the car with the permission of Asnani. The same may be said about the other contention for the appellant that there is nothing in the Act which makes it compulsory for an insurer to insist that the owner of the car takes out a policy in the widest terms possible covering any person who drives the car with his permission. The company did agree under the policy to indemnify drivers who drove the car with the insured's permission. The question is whether that undertaking covers Pessumal.

Lastly, we may mention that the question about the proper stage at which the question raised by the company in the Chamber notice is to be decided, came up for consideration at the hearing. We however do not propose to express any opinion on that point in this case.

We are of opinion that the High Court rightly held that the company had insured Pessumal in view of para 3 of Section II of the policy and that it comes within the expression 'insurer' in s. 96 of the Act. We therefore dismiss the appeals with costs of hearing one set.

Appeals dismissed.