
(1994) 10 KL CK 0001
In the High Court Of Kerala
Case No : M.F.A. No. 781 of 1989-A

K.K. Kurian

APPELLANT

Vs

K.N. Santha and Others

RESPONDENT

Date of Decision : 10-10-1994

Acts Referred:

Citation : (1995) ACJ 690

Hon'ble Judges : V.V. Kamath, J; M.M. Pareed Pillay, J

Bench : Division Bench

Advocate : S. Sankara and Subban, for the Appellant; P.M. Mohammad Ali, K.P. Suresh Kumar, P.N.K. Achan and Ouseph Karuveli, for the Respondent

Final Decision : Allowed

Judgement

V.V. Kamath, J.—In this appeal by the driver, the only question for consideration and consequent decision is as regards the liability of the insurance company, respondent No. 2.

2. The appellant apprehending execution, even though being a driver, feels aggrieved by the impugned award dated 22.7.1989 of the Motor Accidents Claims Tribunal, Wynad, Kalpetta, in O.P. No. 2 of 1987 awarding a total amount of compensation of Rs. 74,600/- distributed as per the details in the award.

3. As per the application, on 3.2.1983 at 13.30 hrs. the deceased was travelling in a jeep KLZ 9298 from Sultans Battery to Pulpally. The deceased was a salesman in Kalpaka Agencies, Sultans Battery, on a monthly salary of Rs. 750/-. When the jeep reached Areappalli on the way to Pulpally, it capsized, as a result the deceased along with the other occupants sustained serious injuries. The present claimants, who are the heirs and legal representatives of deceased Damodaran, presented an application for compensation for Rs. 1,00,000/-.

4. Since in this appeal by the driver, as stated above, the only question is as regards the liability, the necessary pleadings of the respondents would require narration. The appellant (1st respondent) denied rashness or negligence.

According to him, when the jeep reached Areappalli, the leaf set of the jeep was broken and the joint got disconnected, striking the jeep on the ground. Deceased Damodaran jumped out of the jeep as he was not sitting in the jeep holding firmly and sustained injuries on account of the jumping out of the jeep. The appellant disclosed the name of the owner of the jeep and contended that the petition was bad for non-joinder of parties. It was also revealed that the jeep was insured and the insurance company would be liable.

5. Likewise the insurance company (respondent No. 2) initially contended that the vehicle was not insured on the relevant date. It was also contended that the accident was not as a result of rashness and negligence of the driver.

6. However, an additional written statement came to be filed by the insurance company (respondent No. 2) that the vehicle (KLZ 9298) was insured from 22.4.1982 up to 21.4.1983. The accident occurred on 3.2.1983, within the period of valid insurance. It was further contended that the vehicle was insured as a private vehicle and was under "Act policy". On that basis it was further contended that the liabilities are not covered, that the vehicle was used as a goods vehicle without permit at the time of the accident, violating the terms of the policy and contravening the provisions of the Act.

7. As stated above, there is no dispute with regard to the quantum, but at the same time it is necessary to mention the situation of concern that the claimants are the widow and minor children of the victim and they have not received a single paisa with regard to the accident dated 3.2.1983, up to this date except the inevitable amount on the basis of no fault liability, in regard to which also the insurance company is before us in the nature of a cross-appeal.

8. This court, times without number, had occasions to proceed in the light of the observations of the Supreme Court in *National Insurance Co. Ltd. v. Jugal Kishore* 1988 ACJ 270, criticising the attitude of the insurance company as worth mentioning, to observe that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. In regard thereto even earlier it was consistently emphasised that it was the duty of the party which is in possession of a document which would be helpful in doing justice in cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of the instrumentalities of the State such as the insurance company who are under an obligation to act fairly should produce the copy of the policy of insurance. The normal tendency of the owners, for reasons known to them, not choosing to produce the policy or a copy thereof has also been taken into consideration by the Supreme Court. It is declared that it has to be emphasised that in all such cases where the insurance company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability, it should file a copy of the insurance policy along with its defence. The observations show that with passage of time thereafter and this court also had occasions to consider the documents produced by the insurance company.

Illustratively, this court in an appeal by the insurance company in New India Assurance Co. Ltd., Cochin Vs. V.N. Thankappan and Others, considered the question of allowing production of the policy of insurance, in the context of the required inability of this court to pronounce the judgment and while declining exercise of such power had observed that in the event of the insurance company wishing to substantiate its claims has the burden to produce the copy and cannot afford to sit tight-lipped taking the stand that it is for the owner of the vehicle to produce the policy before the Tribunal.

9. This court also had a subsequent occasion in KM. Mathew v. Baby M.F.A. No. 786 of 1989-A, to consider the matter with reference to the requirements of producing the document which could be called as the policy of insurance together with an attitude of reluctance of the order of remand after a considerable passage of time in a situation where in a battle between the owner and the driver on the one hand and the insurance company on the other, the court has to look after the need of the claimant if it finds that the claimant is deprived of the legitimate claims. It is in the above guiding background that we proceed to consider the approach of the insurance company which is tight-lipped as described by us hereinbefore. We have already stated that initially the insurance company had completely stayed away from the situation saying that there is no insurance covering the incident and thereafter a second written statement was filed. In the second written statement the contention is taken which we have set out hereinbefore.

10. In support of the contention, the Assistant Administrative Officer is examined and he tendered Exh. R-1 as a policy of insurance (a copy with the insurance company). In the evidence the officer has stated that "Act policy" is issued, the vehicle insured as a private vehicle, and risk of passenger is not covered in an Act policy. It is also deposed thereafter (in examination-in-chief) that if the vehicle is used for hire or reward, it will be violation of the terms of the policy. It is also stated that at the time of the accident the vehicle was used as a taxi. It is deposed as a conclusion that respondent No. 2 is not liable to pay any compensation.

11. Now this evidence of the witness in the examination-in-chief, if tested in the light of the cross-examination and the contents of the document, the case pleaded and deposed gets far from being established on any of the counts necessary.

12. Initially, the witness has been examined with reference to the document tendered by him (Exh. R-1). To appreciate the cross-examination in the context it is necessary to see the document ourselves and we have carefully seen Exh. R-1 which is sought to be tendered by the witness as the policy of insurance. The document has no origin of respondent No. 2, the United India Insurance Co. Ltd., Kalpetta, anywhere on both sides of the paper sought to be tendered. The document has no marks and columns. As stated by admitting in the cross-examination by the witness, it does not bear the signature of the insured. The

document bears the word "unlimited" on the upper portion whereas thereunder Rs. 6,000/- in figures is typed. In the lower column under the words "Act only" Rs. 150/- in figures is typed. On carefully examining the document it cannot be said that it is from the United India Insurance Co. Ltd., Kalpetta and that it clinchingly shows that it is an "Act only" policy. It also shows that the liability is unlimited.

13. These aspects are further available, as we proceed with the cross-examination of the witness. The officer has admitted that he had no direct knowledge regarding the user of the vehicle. It is also admitted that Exh. R-1 does not show that the vehicle insured is a private vehicle.

14. Then there is a cross-examination on behalf of respondent No. 1 (owner). The witness accepts that the expression "unlimited" is not shown as confined to a "third party". It is further available that not only the document, but also the proposal form would not include the terms and conditions of the policy.

15. Observing the documents that are tendered by the insurance companies before the Tribunals in various matters, in the light of the consistent lament of the Supreme Court that the insurance companies are not producing the policies of insurance before the Tribunals which is expected and required by the court in fairness, it is not expression of anxiety that it is time that in this connection the insurance companies should look after this problem as if a necessity to set their house in order in the context of the observations. The material on record does not show the nature of the liability and the nature of the consequence with regard to the incident. The policy appears to be unlimited. The evidence on record shows that the terms and conditions are away from the record of this court and what is attempted to be awarded with regard to the liability by the insurance company is placed before the court in the nature of the evidence that we discussed hereinbefore.

16. It must be stated that it became very necessary to consider this evidence laid by the insurance company because the learned Tribunal has considered the question with reference to issue No. 5 ignoring the evidence of the officer in question. The Tribunal has observed that the jeep in question was carrying goods of Kalpaka Agencies, Sultans Battery, at the time of the incident. Even the text of the application which is a copy of the F.I.R. does not support the above factual statement. We have made it clear at the outset that the connection of Kalpaka Agencies, Sultans Battery, is only stated to show the income of the deceased who was its salesman. The Tribunal has also travelled further in the same way that the deceased was travelling in the jeep along with the maker of Exh. A-1 statement to sell those goods. In short, the reasoning in para 26 of the judgment in this connection is speculative. In this context only one sentence from the cross-examination would be a complete answer. Although the original sentence is in Malayalam (omitted) it would mean that the jeep is a taxi. It leads nowhere, but adds to the element of paucity of evidence with reference to the pleadings of the insurance company in the context. The material on record shows that the

document (Exh. R-1) cannot, on probabilities, connect with necessary particulars the vehicle in question. We have discussed this aspect hereinbefore. The record also shows that the deceased jumped out of the vehicle and received injuries thereafter. There is also no material on record that it was being used for hire.

17. (Sic.) award, the Tribunal takes up for consideration the document (Exh. R-1) to reach the conclusion that the insurance company is not liable for the compensation to the petitioners. The various factors discussed hereinbefore, having been ignored by the Tribunal, and so, it is difficult to accept the conclusion reached by the Tribunal. The learned counsel contended, placing reliance on the decision of the Supreme Court in *Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co.* 1977 ACJ 343 , especially para 22 thereof that it is not required that a policy of insurance should cover risk to the passengers who were not carried for hire or reward. As stated above, factually there is no material that the occupants were passengers. There is no evidence that they travelled for hire or reward, nor there is evidence that they travelled gratuitously. No attempt is made to bring these aspects on record by the insurance company.

18. The learned counsel has contended that it is already observed by this court in *Simon Pathrose Vs. United India Insurance Co. Ltd.* and Another, that the driver is vicariously liable with the owner of the vehicle and, therefore, the claimant is entitled to sue either the driver of the vehicle or its owner and for this reason would not be a necessary party to the proceedings. Consequently, the learned counsel urged that this is an appeal by the driver-appellant and if he is not a necessary party, the appeal would not be maintainable in law at all. We have gone through the decision of this court holding that if the driver is not a party to the original petition, the original petition would be maintainable. The question before us is entirely different. The driver was a party not only to the original petition, but there is a decree against him with an impending fear of its execution. The appellant, who is a driver, has approached this court by this appeal. The decree or the award creates joint and several liability both of the driver and the owner. It is not possible to accept the submission that the appeal is not maintainable on the ground that in certain situations the original petition does not fall down as bad for non-joinder of necessary parties.

19. After taking us through the entire record and making of the submissions, the learned counsel prayed for an order of remand to enable the insurance company to produce the copy of insurance policy. In this context reference to an earlier judgment (*supra*) would be necessary, wherein with reluctance to an order of remand, the factor which is also present before us in this appeal is taken into consideration. We have already stated at the outset that in the incident of 1983, the claimants have suffered the period of waiting of 11 years. It must be recorded that the appeal proceeded on the basis of the document, Exh. R-1.

20. The material on record shows that the liability is unlimited; that the incident occurred during the period covered by the policy as admitted; that there is no satisfactory material that the policy is an "Act policy"; that there is no material

that the occupants were passengers carrying goods for hire or reward; and, in fact, the material shows on probabilities that the vehicle was a taxi and further that the deceased jumped out and sustained injuries as a result of his jumping out. Taking into consideration all these aspects, we hold that the Tribunal did not consider the various aspects with regard to the liability of the insurance company. The insurance company is liable wholly with regard to the amount of the award.

21. For the above reasons the appeal stands allowed and the impugned award of the Tribunal is modified as an award against all the three respondents jointly and severally and respondent No. 2, the United India Insurance Co. Ltd., Kalpetta, is directed to make the payment and seek its remedies against the other respondents thereafter, if so advised. The respondent No. 2, United India Insurance Co. Ltd., Kalpetta, is directed to make payments in accordance with the award to the three claimants on or before 31.12.1994 with interest at 12 per cent per annum from the date of the application, i.e., 13.11.1986. It is made clear that in the event of non-payment as per the above order before the stated date, the amount due shall carry interest at the rate of 18 per cent per annum, instead of 12 per cent per annum. It is made additionally clear that this increase in the rate of interest would only be in the event of non-payment on or before 31.12.1994.

In view of the above conclusion, the cross-appeal filed by the insurance company for the return of the amount paid on the basis of no fault liability immediately falls down and gets dismissed. In the circumstances, there shall be no order as to costs.