

(1997) 10 KAR CK 0026
In the Karnataka High Court
Case No : MFA No. 802 of 1988

National Insurance Co. Ltd.

APPELLANT

Vs

Kowsalyamma

RESPONDENT

Date of Decision : 13-10-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (1998) ILR (Kar) 2073

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : M. Sowri Raju, for the Appellant; M.S. Basavaraja, for Respondents 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

Harinath Tilhari, J.

1. Heard the Counsel for the appellant Insurance Company Sri M. Sowri Raju.

2. The only point in this appeal that has been urged is limited to the extent of liability of the Insurance Company, in the matter of compensation awarded. As regard the finding of facts, it has not been challenged nor the quantum of compensation has been challenged. Sri Sowri Raju contended that the question of extent of Companies liability has not been examined. Learned Counsel contended that company does not dispute its liability to the extent which is prescribed under the Act. Learned Counsel contended that the fastening of liability for entire amount of compensation to the extent of Rs. 68,000/- on the Company is illegal. Learned Counsel contended that is liability is only to the extent of 50,000 + interest and the costs. He invited my attention to Sub-section (2), Clause (b)(i) of the Motor Vehicles Act, 1939, as the occurrence in this case had taken place on 23.11.1985, that is prior to the coming into force of Act of 1988. Learned Counsel contended that the liability for more sum than the one prescribed under the Act, the additional premium had to be paid to the tune of

Rs. 150/-, and the Tribunal had to examine this aspect of the matter and if there was no evidence as to above before the Court and it was admitted case that the Insurance Company is liable for the compensation, Learned Counsel contended that the statutory liability could be fastened and no more, unless other heirs of deceased or injured or the owner of the vehicle prove that additional premium was paid for that liability, may be unlimited liability or otherwise.

3. On behalf of the appellant an application has also been filed seeking permission to file the copies of the policies taken by respondent No. 4 for the period 29th October, 1985 to 28th October, 1986 and the other policy from 13th November, 1986 to 12th November, 1987, with respect to the vehicle in question. Learned Counsel contended that the statutory liability is not denied and interest of justice requires that this document for a just decision may be taken for consideration, as for increased third party liability if additional premium has been paid and so this application, learned Counsel contended be allowed and appeal may be decided in terms of studied principles of law. Though name of Sri M.S. Basavaraju appears for respondents 1 to 3, but he has not appeared today. Respondent No. 4 has also been served, but none appears on his behalf.

4. I have applied my mind to the contentions made by Learned Counsel for the appellant. As appears from the record, respondent No. 3 Insurance Company, present appellant admitted that the vehicle in question was covered by Insurance Cover and its liability was subject to terms and conditions and limitations contained in the policy. The liability when it has been admitted to be covered by the Insurance Policy and when in defence it was pleaded that it was subject to terms, conditions and limits contained in the policy, burden was on the Insurance Company as well as to produce the policy before the Tribunal to show that the liability was limited to the extent specified in the section and was not beyond that, as no additional premium had been paid for 3rd party liability. The Insurance Company did not produce the policy, nor did the owner of the vehicle produced the policy. The heirs of the deceased could not be expected to produce that policy. They had to make their claim. They made their claim against the owner as well against the insurer. The contention of the Learned Counsel for the appellant that burden was on the claimant to have produced the policy, have got no substance. The principle behind the emphasis on vehicle being insured against third party also has been made with a specific object that neither the injured nor the heirs of a deceased in the motor vehicle accident be subjected to litigative harassment for realising the compensation awarded. More the delay is there in realisation of the compensation, the effect thereof is to render the compensation nugatory with the passage of time so it emphasises that each motor vehicle which is to be used on the road should be insured.

5. In the case of National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, , dealing with a similar matter, Their Lordships of the Supreme Court observed:

".....In this connection what is of significance is that the claimants for

compensation under the Act are invariably not possessed of either the policy or a copy thereof. This Court has consistently emphasised that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the 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 instrumentalities of the State such as the appellant who are under an obligation to act fairly. In many cases even the owner of the vehicle for reasons known to him does not choose to produce the policy or a copy thereof. We accordingly wish to emphasise that in all such cases where the Insurance Company concerned wishes to take a defence in 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. Even in the instant case had it been done so at the appropriate stage necessity of approaching this Court in Civil Appeal would in all probability have been avoided. Filing a copy of the policy, therefore, not only cuts short avoidable litigation but also helps the Court in doing justice between the parties. The obligation on the part of the State or its instrumentalities to act fairly can never be overemphasised."

6. In the present case the policy had not been filed at the proper stage. Application which has been made under Order 41 Rule 27 has to be examined in the context of the provisions of that Rule. Order 41, Rule 27 reads as under:-

"Order-41, Rule-27, :- production of additional evidence in Appellate Court.

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellant Court. But if --

a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

6A. A reading of this provisions will indicate that the first primary principle of law is that no party is entitled to file as of right any additional evidence at the stage of appeal in the appellate Court. The exceptions provided are three namely; (1) Whether a party had sought to file the evidence oral or documentary in the Trial Court, but the Trial Court has refused to admit that evidence, which it ought to have admitted (2) in cases where a party seeking to produce additional evidence

establishes that notwithstanding the exercise of due diligence and inspite of exercise of due diligence, such an evidence was not within his knowledge or that party could not inspite of exercise of due diligence, produce that evidence before the Court or Tribunal at the time when the decree appealed against was passed it may allow additional evidence being filed. The averments made in the affidavit do not indicate such case to have been made out. The 3rd case is whether the appellate Court itself requires any document to be produced or any evidence to be examined to enable it to produce the judgment, or for any other substantial cause.

7. The law on the subject has been very clearly expounded by the Privy Council as well as by the Supreme Court that a litigant unsuccessful in the lower Court cannot be allowed to patch up the weak part of his case and to fill up the omissions (See AIR 1931 143 (Privy Council) . Relevant observations in this regard may be found at page-148, Column - 2 and Page - 149, Column - 1. In the case of State of U.P. Vs. Manbodhan Lal Srivastava, , the principle of law has been laid down as under:-

"It is well settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage, and to fill in gaps. Of course, the position is different where the appellate court itself requires certain evidence to be adduced in order to enable it to do justice between the parties....."

The very principle has been reiterated and laid down by the Supreme Court in the case of Haji Mohammed Ishaq Wd. S.K. Mohammed and Others Vs. Mohamad Iqbal and Mohamed Ali and Co.,

8. There is no question of burden being on the claimant to produce relevant evidence to show and to prove the fact that no additional premium was paid, for third party enhanced liability, that when appellant insurance company took the plea that it admits its liability to pay compensation subject to the terms and conditions of the policy and it not having shown at the original stage before the Tribunal by producing the policy that it did not cover the liability beyond Rs. 50,000/- particularly when the Insurance Company as well as the owner of the vehicle had got the policy with them, in my opinion the Tribunal was justified in directing the payment of entire compensation by the Insurance Company. The evidence which ought to have been produced, not having been produced and the appellant not having made out any case for production of additional evidence at the appellate stage, within the four corners of the three types of cases, in my opinion, the application at the stage deserves to be rejected. Any way, it is kept open to the Insurance Company, after the payment of the entire compensation to seek for reimbursement from the owner of the vehicle to the extent it exceeds if at all, its statutory liability.

The appeal is thus disposed of and is dismissed. Let the entire amount of compensation with interest and the costs be paid, minus the amount that has

already been deposited under interim order of this Court by appellant.