

(1997) 10 KL CK 0047

In the High Court Of Kerala

Case No : M.F.A. No's. 566, 567 and 568/90 and cross objection

National Insurance Co. Ltd.

APPELLANT

Vs

Sujatha and Others

RESPONDENT

Date of Decision : 09-10-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 27(1)
Motor Vehicles Act, 1939 — Section 95(2)

Citation : (1997) 10 KL CK 0047

Hon'ble Judges : P.A. Mohammed, J;P. Shanmugam, J

Bench : Division Bench

Advocate : S.K. Brahmanandan, G.S. Prabhu and S.B. Premachandra Prabhu, for the Appellant; Asok M. Cherian, K. Sasikumar and K.G. Pavithran, for the Respondent

Final Decision : Allowed

Judgement

P.A. Mohammed, J.—These appeals have been filed against the common award passed by the Additional Motor Accidents Claims Tribunal, Mavelikara dated 30th December 1989. The National Insurance Company Limited, the insurer of the vehicle involved in the accident is the common Appellant. The accident occurred at 12.30 p.m. on 1st July 1985. The claimants were passengers carried by the bus and they suffered injuries out of the accident. Therefore they filed claim petitions seeking compensation in respect of the injuries sustained by them. After the inquiry the tribunal has fixed the quantum of compensation and the liabilities have been fastened on the Appellant in all these cases.

2. Appeal number, claim petition number, compensation claimed and compensation awarded are tabulated hereunder:

3. Along with the appeals, Appellant filed petitions under Order XLI, Rule 27 of the CPC for accepting in evidence copy of the policy in respect of the vehicle involved in the accident. Copies of the petitions were served on the Counsel appearing on the other side and they made their submissions. The question

primarily concerned is whether the document sought to be produced through the C.M. Ps. can be accepted. Of course, Counsel appearing for the Respondents submitted that since the Appellant has failed to produce the document before the tribunal they shall not be allowed to produce the same before this Court invoking the provisions contained in Order XLI, Rule 27. Rule 27 authorises the appellate court to receive additional evidence. But Sub-rule (1) of Rule 27 is in the form of a mandatory prohibition. In other words, the general rule is that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. Of course, this general rule has got certain exceptions. In this context, it must be recalled what is provided in Sub-rule (2). It provides that whenever additional evidence is admitted to be produced by an appellate court, the court shall record the reasons for such admission. When there are sufficient reasons for accepting the additional evidence then the exception contained in Sub-rule (1) shall be invoked. Clause (aa) of Sub-rule (1) provides that 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. From this provision it is manifest that when an Appellant, after the exercise of due diligence could not produce the document before the tribunal at the time when the award was passed, he can apply to the appellate court under Clause (aa) of Sub-rule (1) of Rule 27. Such application shall be supported by an affidavit by the Appellant. When the appellate court is satisfied from the averments contained in the affidavit and other attendant circumstance that the Appellant was prevented by sufficient cause from producing such evidence before the tribunal in spite of his due diligence, it shall admit the same as additional evidence.

4. In this case what is pleaded is, in spite of the exercise of due diligence, Appellant could not produce the document before the tribunal and the said document was sought to be produced as additional evidence before this appellate court. The case set out in the affidavit is that a copy of the insurance policy was handed over to the Advocate appearing before the tribunal along with the written statement and hence Appellant was under a bona fide impression that it would have been produced before the tribunal by the Counsel. It is further averred in the affidavit that when the copy of the award was received then only it came to know that the copy of the policy was not produced by the Counsel before the tribunal. It is also pointed out that there was no negligence on the part of the Appellant in making the document available at the time the written statement was prepared. When the document was thus made available and handed over it to the Counsel, it cannot be said, the Appellant had not exercised due diligence in this case. The failure of the Counsel to produce the document before the tribunal even though it was handed over to him, is a countenancing circumstance which will weigh with the appellate court to exercise the discretion in favour of the Appellant.

5. What is sought to be produced is a copy of the policy of insurance about the

existence of which there was no dispute between the parties. In the written statement filed by the owners of the vehicle it is stated thus:

At the time of the accident, the vehicle was validly insured with the Branch Manager, National Insurance Co. Ltd., Alleppey vide policy No. 994/6302097/84 which had a coverage for the period 12th November 1984 is produced herewith.

The above statement shows that the vehicle was validly insured with the Appellant at the time of the accident and the policy number was found to be 994/6302097/84. The document sought to be produced is the very same document having the same number. The Appellant bona fide believed that the Counsel who appeared for it before the tribunal must have produced the copy of the policy supplied to him for the same purpose and it is because of the said belief the Appellant did not later make any attempt to produce it before the award was passed. The mistake was noted only when the copy of the award was made available to the Appellant. In this context it is apt to be noted that the original of the document sought to be produced would be available with the owner of the vehicle. When the vehicle is admittedly covered by a valid insurance policy, the document can either be produced by the owner or insurer of the vehicle or any other party to the proceeding before the tribunal. When the owner is having the original of the policy, he is also bound to produce the same and he cannot advance an argument that it is the duty of the insurer alone to produce it. In other words, the obligation of the owner to produce the copy of the policy of insurance is co-extensive with that of the insurer of the vehicle and hence he cannot plead for dispensation. Under this premise the owner is disentitled to object the admission of the document in evidence. After considering all the aspects of the case, we are inclined to allow the petitions filed by the Appellant for acceptance of the additional document. Accordingly, the insurance policy involved in these cases is put in evidence for finally solving the dispute between the parties.

6. The next question which falls for decision relates to the limit of liability of the insurance company for the compensation awarded by the tribunal in all these cases. The argument is that in respect of one passenger carried by the vehicle who has suffered the injury the liability of the insurer is limited to Rs. 15,000 and if any compensation has been awarded over and above that amount, the same shall be satisfied by the owner and driver of the vehicle. With reference to the policy, Counsel for the Appellant submitted that this is a case where there was no special contract between the insurer and the insured and no extra premium was collected from the owner for making the liability under the policy unlimited. What is collected as is evident from the policy is only the premium required for the Act policy. It is further clarified that acceptance of Rs. 600 as premium for legal liability to passengers is for total 50 passengers at the rate of Rs. 12 and it is not an additional premium for making the liability unlimited. It is an admitted case that there was no special contract between the insured and insurer so as to make the liability unlimited. So under any circumstance the liability of the insurer in

respect of one passenger cannot be limited to higher than Rs. 15,000. In support of this contention, a decision of the Supreme Court in *New India Assurance Co. Ltd. Vs. Smt. Shanti Bai and others*, is brought to our notice. That was a case where the limits of liability of the insurer in respect of a passenger carried by the offending vehicle u/s 95(2)(b)(ii) of the Act came up for consideration just as in the present case. What is significant is that the insurance policy was accepted in evidence by the Supreme Court when the matter was pending before it. After placing reliance on the terms and conditions contained in the said policy the Supreme Court said:

In the present case, the premium which has been paid is at the rate of Rs. 12 per passenger and is clearly referable to the statutory liability of fifteen thousand rupees per passenger u/s 95(2)(b)(ii) of the Motor Vehicles Act, 1939. In the present case, there is no special contract between the Appellant-company and Respondent No. 4 to cover unlimited liability in respect of an accident to a passenger. In the absence of such an express agreement, the policy covers only the statutory liability. The mere fact that the insurance policy is a comprehensive policy will not help the Respondents in any manner.

The above principle laid down by the Supreme Court will clearly apply to the facts of the present case. It is worth-while to mention that the Supreme Court has referred to its earlier decisions in *National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others*, and *M.K. Kunhimohammed Vs. P.A. Ahmedkutty and Others*, . Thus the question is sufficiently settled by the decision of the Supreme Court in *New India Assurance Co. Ltd. Vs. Smt. Shanti Bai and others*, , that the liability of the insurer in respect of a passenger carried by an offending vehicle is to the extent of Rs. 15,000, in the absence of a special contract and payment of additional premium for making the liability unlimited.

7. In view of what is said above, the liability of the Appellant in all these cases is limited to the extent of Rs. 15,000 with 9 per cent interest as ordered by the tribunal. The balance amount towards compensation shall be recovered from the owner and driver of the vehicle with same rate of interest as ordered by the tribunal. The appeals are allowed to the extent indicated above.

8. No. argument is advanced in cross-objection filed in M.F.A. No. 568 of 1990. In view of the decision of this Court in *New India Assurance Co. Ltd. v. Kunhiraman Nambiar* 1994 (1) KLT 956, the cross-objection seeking enhancement of compensation is not maintainable. Hence it is dismissed.