(1994) 11 KL CK 0025

In the High Court Of Kerala

Case No : M.F.A. No''s. 33 and 267 of 1987

New India Assurance Co. Ltd. APPELLANT

Vs

K.C. Rajan and Others RESPONDENT

Date of Decision : 29-11-1994

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

Citation : (1995) 1 ACC 311 : (1995) ACJ 994

Hon'ble Judges : M.M. Pareed Pillay, Acting C.J.;T.V. Ramakrishnan, J

Bench : Division Bench

Advocate : S. Parameswaran, for the Appellant; M.N. Sukumaran Nair, Sunny Varghese, B. Raman Pillai, S. Vijaya Kumar, C.K. Pavithran, Varghese Myloth and P.V. George, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Pareed Pillay, Actg. CJ.

1. M.F.A. No. 267 of 1987 arises from the award in O.P. (M.V.) No. 425 of 1985 of the Motor Accidents Claims Tribunal, Quilon and M.F.A. No. 33 of 1987 arises from the award of the same Tribunal in O.P. (M.V.) No. 241 of 1985. In O.P. (M.V.) No. 425 of 1985 Rs. 1,65,000/- was awarded. In O.P. (M.V.) No. 241 of 1985 Rs. 78.500/- was awarded. Insurance company is the appellant in both the appeals.

2. Insurance company can challenge the quantum of award only when the insurance policy reserves a right to defend the action in the name of the assured. When there is such a reservation, all defences open to the assured can be urged. In New India Assurance Co. Ltd. Vs. Celine and Others, the position is made clear. The decision states:

It is open to the insurer to reserve a right in the policy of insurance to defend the action in the name of assured and in case there is such a reservation, all defences open to the assured can be urged by him.

Though insurance policy is admitted, the appellant did not produce the same before the Tribunal. That being the position, there is nothing in evidence to hold that the insurer has reserved a right in the policy of insurance to defend the action in the name of the assured.

3. Admittedly the insurance policies of the vehicles were not produced before the Tribunal. In M.F.A. No. 267 of 1987 the policy was produced along with the appeal. Whether that would be sufficient is the moot point to be considered.

4. It is only along with the appeal memorandum in M.F.A. No. 267 of 1987 that the insurance policy was produced. No petition was filed by the appellant under Order 41, Rule 27 of the Code of Civil Procedure. Production of additional evidence in the appellate court can only be done as provided under Order 41, Rule 27, Civil Procedure Code. A party can produce additional evidence, whether oral or documentary, only if the conditions under rule 27 are satisfied. The conditions to be satisfied are:

(1) that the court has refused to admit evidence which ought to have been admitted;

(2) 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.

That apart, whenever 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 additional evidence can be adduced before the appellate court.

5. Under Order 41, Rule 27 (1) (aa) it is for the appellants seeking to produce additional evidence before this court to establish that notwithstanding the exercise of due diligence, such evidence was not within their knowledge or could not, after the exercise of due diligence, be produced by them at the time when the award appealed against was passed by the Tribunal. Separate petition with notice to the opposite side is indispensable in a case where the party wants to file additional evidence before the appellate court. Mere production of additional evidence along with the appeal memorandum would not be sufficient to meet the requirements under Order 41, Rule 27, Civil Procedure Code. It is only when a separate petition is filed with notice to the opposite party that he would be in a position to ventilate his defence with regard to it. Producing additional evidence without a separate petition stating sufficient cause for the same cannot be countenanced on the ground that additional documents have been produced along with the appeal memorandum. As the insurance policy has not been produced with petition as envisaged under Order 41, Rule 27, Civil Procedure Code, what has been produced along with the appeal memorandum cannot be admitted in evidence.

6. In M.F.A. No. 33 of 1987 the appellants have filed C.M.P. No. 1834 of 1987 for

reception of additional evidence, viz., the insurance policy. Except seeking production of the photocopy of the policy and the statement that for an effective and complete adjudication of the appeal it is just and necessary for this court to receive the same in evidence there is hardly any averment justifying the production of additional evidence as postulated under Order 41, Rule 27, Civil Procedure Code. That being the position, C.M.P. No. 1834 of 1987 is only to be rejected.

7. Compensation determined by the Tribunal in both the cases does not warrant any interference. In the result, both the M.F.As. are dismissed.

