

(1989) 03 AP CK 0030
In the Andhra Pradesh High Court

New India Assurance Co. Ltd.

APPELLANT

Vs

Pamula Bala Prabhavathamma and Another

RESPONDENT

Date of Decision : 09-03-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Motor Vehicles Act, 1988 — Section 95

Citation : (1991) 1 ACC 144 : (1990) ACJ 547

Hon'ble Judges : K. Ramaswamy, J

Bench : Single Bench

Judgement

K. Ramaswamy, J.—The appellant herein, the New India Assurance Co. Ltd. is resisting the claim of a sum of Rs. 1, 40, 000/- awarded by the Tribunal below as against the claim of Rs. 3, 20, 000/- to the respondent-claimants, who are widow, minor daughters and a major son of the deceased, P. Bala Muni Reddy, aged about 48 years. The deceased was an employee of the Gram Panchayat drawing a monthly income of Rs. 1, 440/-. At about 7.50 a.m. on February 5, 1984 he was knocked down by the bus APD 3711 at a bridge near Cuddapah town and the deceased died on the spot. As a result, the respondent-claimants laid the claim. The Court below recorded the finding that the death of the deceased was due to rash and negligent driving of the vehicle APO 3711. This finding is based on the direct evidence. Accordingly, I confirm that the death had occurred as a result of rash and negligent driving of the vehicle by the driver.

2. The only point that arises for consideration in this appeal is: what is the liability of the insurance company (appellant)?

3. The contention of Mr. K. Subbarao, the learned Counsel appearing for the appellant, is that in paragraph 7 of the counter it was pleaded by the company that the appellant is liable only as per the policy. No attempt was made by the respondent-claimants to have the policy filed in the Court below. Therefore, by operation of the provisions of section 95 of the Motor Vehicles Act, 4 of 1939 (for short "the Act"), the liability of the appellant should be limited to Rs. 50, 000/-.

The Court below has committed grievous error in awarding a sum of Rs. 1, 40, 000/- as against the insurance company. It is stated that the appellant filed before this court the policy along with the memorandum of grounds of appeal and the clauses therein disclose that the maximum liability is Rs. 50, 000/-. This claim was resisted by Mr. S. Hanumaiah, the learned Counsel appearing for the claimants, contending that the policy now filed into the Court cannot be received as evidence. Unless the appellant satisfies the requirement of Order 41, Rule 27 of the CPC showing the grounds on which the appellant could not file the policy in the court below and unless this Court finds that it is absolutely necessary for the purpose of deciding the point, it cannot be received as additional evidence. It is further contended that in column 17 of the claims statement, the claimants have specifically mentioned the name and address of the insurer. Beyond that, it is not expected of the claimants that they should mention the details of the policy because it is not within their knowledge. Therefore, their claim cannot be rejected on the ground of want of material particulars. As regards the policy, it is the duty of the insurance company (appellant) to mention all the particulars in their counter and the extent of its liability to be established not only by pleading but also by producing the policy and other evidence. In this case no such attempt has been made. Therefore, there is no illegality in the award passed by the Tribunal below awarding the amount in question. It is also stated that they filed cross-objections for the balance amount.

4. The first question, therefore, is whether the amount awarded by the court below is just, fair and reasonable for the loss of dependency. Admittedly, the deceased was drawing a salary of Rs. 1, 440/- per mensem at the time of the accident and he was aged about 48 years and he would have been in service for ten years more. Therefore, what will be the loss of his earnings for ten years and thereafter his pensionary benefits? In this case, the Court below has taken all the facts and circumstances into consideration and awarded a sum of Rs. 1, 40, 000/- in total. Having regard to the facts and circumstances of this case. I find that the amount awarded by the Court below for the loss of dependency is just and fair and there is no illegality in awarding the said amount.

5. The next question is whether the insurance company (appellant) is liable to the entire extent of the amount. It may be true that the liability of the appellant has been limited to the policy under which the insurer has undertaken of indemnify under the contract of insurance to the extent of damage suffered and likely to be paid to the third parties for the death or bodily injuries to the victims or damage to the vehicle. But in column No. 17 of the claims statement, on obligation is cast on the claimants to specify the name and address of the insurer. This obligation has been discharged by the claimants. As regards the nature of the policy, the liability and the contract undertaken thereunder is within the knowledge of the insurer as well as the owner of the vehicle. The claimants are not expected to make detailed investigation in this regard and specify the same in the claims statement when the insurer has been impleaded as a party respondent. It is the duty of the insurer to plead and prove the extent of its

liability undertaken under the policy. Except pleading that the insurer is not liable, no further particulars have been given in this regard. Therefore, the Tribunal below is well justified in fastening the liability on the insurer as well. It is no doubt true, as relied upon by Mr. K. Subbarao, that in *Desraj and Others Vs. Ram Narain and Others*, the Division Bench of the Allahabad High Court speaking through H.N. Seth, J., has held:

...the Tribunal, while determining the amount payable u/s 110-B can, in view of the provision contained in Section 95(2) of the Act, presume that the insurance company must have in any case covered the risk up to the statutory limit mentioned therein and in the absence of insurance policy it can safely direct payment of such an amount by the insurance company. If, however, any person claims that under the contract of insurance the insurance company had undertaken to indemnify the insured for a larger sum, he has to get the policy made available for perusal of the Tribunal. In absence of insurance policy and without perusing the same, the Tribunal could not fix any liability higher than that mentioned in section 95 of the Act.

6. That was a case where the insurance company had specifically pleaded that its liability is only to the extent mentioned u/s 95 (2) and therefore the Division Bench had held that, if any liability in excess thereof is to be proved, the burden is on the claimants to establish the same. The learned Counsel also relied upon a decision in *Fatik Chandra Bora v. Milan Baroi* 1980 ACJ 391 (Assam), wherein the learned Judges appear to have received at the appellate stage the policy, not marked during the trial, relied upon by the learned Counsel. But I find it difficult to accept the ratio therein in view of the rigor imposed by Order 41, rule 27 of the Code of Civil Procedure. But in *General Assurance Society Limited v. Avtar Singh* 1986 (2) ACJ 652 : (1) 1987 ACC 50, the Division Bench of the Punjab and Haryana High Court speaking through Prem Chand Jain, CJ, has held that the insurance company did not take any plea nor did it lead any evidence before the Tribunal to show that its liability was only to the extent of Rs. 50, 000/-. The insurance company cannot take any benefit of the averment made by the insured in the grounds of appeal or in the application, especially when it has failed to take any plea or lead any evidence on this aspect of the matter. This ratio is in consonance with the view I have expressed hereinbefore and I respectfully agree with the ratio. A Division Bench of this court, of which I was a member, held that it is for the insurance company to fill up the relevant columns pleading extent of its liability and in its absence, the limitation prescribed u/s 95(2) cannot be applied and the entire liability has to be borne out by the insurance company. In view of this ratio, I have no hesitation to hold that the appellant is liable to the entire extent.

7. The question then is whether the insurance policy can be received as evidence in the appeal. Order 41, Rule 27 of the CPC provides that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if the court from whose decree the

appeal is preferred has refused to admit evidence which ought to have been admitted, or the party seeking to produce additional evidence establishes that notwithstanding the exercise of the 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 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. Whatever additional evidence is allowed to be produced by an appellate court, the Court shall record the reason for its admission. Thereby, it is mandatory that the appellate court shall not receive additional evidence, either oral or documentary, as a matter of course. It is for the parties to an appeal to satisfy that either the trial Court has refused to admit the evidence which ought to have been admitted or whether the party establishes that, notwithstanding the exercise of due diligence, the evidence which is sought to be produced was not either within its knowledge or could not, after exercise of due diligence, be produced before the trial Court or whether the document so produced is required by the court with a view to render justice or for any substantial cause the appellate court may receive evidence. But, when receiving such evidence, the appellate court shall give reasons for it. Thereby, it is mandatory on the part of the appellant to satisfy any of these requirements. Except stating that there was correspondence between the appellant's branches, no other reason has been assigned. For well over two years, the proceedings were pending before the court below and no attempt is made to produce the policy in the Tribunal below. The insurance policy was produced only for the first time after the liability was mulcted by the Tribunal below to the entire extent. In these circumstances, I am satisfied that the appellant has not established the requirements mentioned in Order 41, Rule 27 of the Code of Civil Procedure. Therefore, I cannot receive this document as additional evidence. Having regard to the facts and circumstances of the case, the total liability imposed by the Tribunal below is not vitiated by any error of law warranting interference by this court.

8. The appeal is accordingly dismissed. No costs.

9. The claimants are, however, entitled at the rate of 12 per cent interest from the date of the petition till the date of realisation. This order does not preclude the appellant to proceed against the owner, if the liability is against the owner, as per law.