

(1993) 11 KL CK 0029

In the High Court Of Kerala

Case No : M.F.A. No's. 702 of 1984 and 411 of 1985 with cross objections

New India Assurance Co. Ltd.

APPELLANT

Vs

Peelari Edathil Kunhiraman Nambiar and Others

RESPONDENT

Date of Decision : 17-11-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33
Motor Vehicles Act, 1939 — Section 103A

Citation : (1994) 2 ACC 485 : (1994) ACJ 1019 : (1995) 83 CompCas 599

Hon'ble Judges : T.L. Viswanatha Iyer, J;P. Krishnamoorthy, J

Bench : Division Bench

Advocate : S. Parameswaran, for the Appellant; K. Prabhakaran, for Respondents Nos. 1, 2, 4 and 5, E.V. Nayanar and Tony Sebastian for Additional Cross Objectors Nos. 3 to 7, for the Respondent

Final Decision : Allowed

Judgement

T. L. Viswanatha Iyer, J.—Three persons were knocked down by a jeep KLC 4448 at about 9.30 p.m. on October 14, 1979. Of these three, two persons, Raghavan and Devanarayan, died and their legal representatives filed claims for award of compensation for the loss caused by their death, u/s 110A of the Motor Vehicles Act, 1939. The first respondent was stated to be the owner of the vehicle at the time of the accident and the fourth respondent, the previous owner. The second respondent was the driver, and the third respondent the insurer, speaking with reference to the array of parties before the Motor Accidents Claims Tribunal. Though the first respondent was impleaded as the owner of the vehicle, there was no insurance for the vehicle in his name ; it stood in the name of the fourth respondent. The Tribunal held that the vehicle was driven rashly and negligently by the second respondent driver and an award was accordingly passed for amounts of Rs. 5,600 and Rs. 7,600, respectively, as compensation, after deducting an amount of Rs. 1,000 each paid earlier to the legal representatives of the deceased persons. The insurer was made liable for payment of the amounts. Being aggrieved, the insurer has filed these appeals contending that

there was no valid policy of insurance covering the vehicle in question and, therefore, they could not be made liable for payment of the amounts awarded.

2. A memorandum of cross-objections has been filed by the claimants in each of these appeals claiming enhanced compensation.

3. Though the plea raised by the insurer in the written statement was that there was no policy of insurance at all issued by them, covering the vehicle, it turned out subsequently that there was a policy of insurance in relation to this vehicle issued in the name of one Kunhahmed, who, was the owner of the vehicle, before it was transferred to the fourth respondent at the request of Kunhahmed, and the fourth respondent. The policy thus stood in the name of the fourth respondent. There is no dispute on this point. But, after the vehicle was transferred by the fourth respondent to the first respondent, there was no proceeding transferring the insurance cover to the name of the latter ; and there lies the dispute between the parties, on which they were at issue before the Tribunal as well. It was the case of the first respondent, the present owner, that he and the fourth respondent had made an application to the third respondent insurer, for transfer of the insurance policy to his name, as prescribed in Section 103A of the Motor Vehicles Act, 1939, to which they did not receive any reply within a period of fifteen days, or even by the time the first respondent was examined in the case as RW-1. Therefore, and according to the first respondent, a valid policy should be deemed to exist in relation to the vehicle in his name, which made the insurer liable for payment of the amounts of compensation.

4. The first respondent examined himself as RW-1 in support of this plea. In defence, the insurer examined one of its officers as RW-4. The Tribunal proceeded as if there was no cross-examination of RW-1 on his deposition that an application for transfer had been made by him and the fourth respondent. It was based primarily on this circumstance that the Tribunal held that there was a deemed transfer of the policy to the first respondent u/s 103A of the Motor Vehicles Act, 1939. The order of the Tribunal proceeds as if there was no other evidence in the case relating to the transfer of the policy except the alleged uncontradicted statement of R.W.-1. But a perusal of the evidence of R.Ws. 1 and 4 belies this line of reasoning of the Tribunal. As a matter of fact, the Tribunal has omitted to note material portions in the evidence of R.W.-1 besides totally ignoring the evidence of R.W.-4. R.W.-1 was actually cross-examined at length regarding the application for transfer when he deposed as follows:

" Document transfer endorsement No. Give it to my counsel."

5. This endorsement is not produced. This really cuts at the very root of the first respondent's case that nothing was heard of in the matter after the application for transfer was made by him and the fourth respondent. Apart from this, the very case of such an application for transfer cannot be entertained, in the absence of any valid evidence to support it. No copy of the application stated to have been made is produced. The first respondent has not chosen, to disclose as

to when the application was made by him and the fourth respondent. There was thus a total dearth of any evidence regarding the alleged application for transfer. All this, coupled with his admission on the cross-examination to which the Tribunal failed to advert, that he had handed over the transfer endorsement No. to his counsel is proof positive that the case set up by the first respondent of a deemed transfer of the policy could not be true. As a matter of fact, the officer of the insurance company who was examined as R.W.-4 has stated in the cross-examination that he had examined the records in his office, but could not find any such application filed by the first respondent for transfer of the policy. The insurer is maintaining registers about the policyholders as well as the transferees and those registers were examined by him without any trace of such an application being filed. In this state of the evidence, we have no hesitation in holding that there was no application for transfer of the policy from the fourth respondent to the first respondent.

6. The Tribunal has drawn an adverse inference against the insurer by reason of the non-production of the registers maintained by them. But then it must be noted that neither the first respondent nor the fourth respondent took any steps to summon the insurer to produce any of the documents in their possession. An adverse inference could not be drawn in the circumstances, particularly when respondents Nos. 1 and 4 did not take the minimum steps that they were expected to take in the matter of summoning the insurer to produce the documents in their possession.

7. Counsel for the first respondent, Sri E. V. Nayanar, was, however, very vehement in his contention that the first respondent had been misled in his defence by the total denial of the existence of the policy by the insurer. According to him, the stand that there was no transfer of the policy to the first respondent was taken only at the stage of evidence when the existence of the policy in the name of Kunhahmed was disclosed, and, therefore, he is prejudiced. We do not find any substance in this plea. The parties went to trial fully aware that the first respondent had to prove the existence of a valid policy in his name or in his favour, if he were to get indemnity from the insurer. It was, therefore, the duty of the first respondent to prove all those facts which were necessary to cast liability on the insurer to indemnify him for the compensation. The initial burden of proof was on the first respondent, and he has failed to discharge that burden. The complaint of prejudice does not, therefore, appeal to us and we overrule the same.

8. We have therefore no hesitation in holding that there was no transfer of the policy from the fourth respondent to the first respondent, and, therefore, the third respondent insurer could not be made liable for the amount of compensation payable to the respective claimants in these cases. The appeals filed by the insurer have, therefore, to be allowed.

9. A memorandum of cross objection has been filed by the claimants in each of these cases, claiming enhanced compensation. Prima facie the cross-objections

are not maintainable having regard to the decision of this court in *United India Insurance Co. Ltd. Vs. Smt. O. Jameela Beevi and Others*, where Bhat and Guttal JJ. held that the position of the insurer being only that of an indemnifier, a memorandum of cross-objections for enhancement of compensation will not lie in an appeal filed by the insurer.

10. But, counsel for the claimants, Sri Therattil contends, relying on the decisions of the High Court of Rajasthan in *Murari Lal v. Gomati Devi* [1986] ACJ 316 and *National Insurance Co. Ltd. v. Tulsi Devi* [1988] ACJ 962 that cross-objections could be entertained and the compensation enhanced in exercise of the powers vested in this court under Rule 33 of Order 41 of the Civil Procedure Code, 1908, even though the appeal is by the insurer only. We find ourselves unable to agree with this submission. The liability of the appellant insurer is only to indemnify the insured, by paying to the claimant the amount of the decree obtained by him (but not exceeding the sum assured), as if he were the judgment-debtor, (vide Section 96(1) of the Motor Vehicles Act, 1939). The liability is only to pay such sum as is adjudged payable by the insured, the owner of the vehicle. Admittedly the owner of the vehicle has not joined the appeal. An objection under Order 41, Rule 22, should, as a general rule, primarily be against the appellant. It is only in exceptional cases, such as where the relief sought against the appellant in the objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and others, that it can be directed also against the other respondents (*Vadlamudi Venkateswarlu and Another Vs. Ravipati Ramamma and Another*, , where the matter is discussed in elaborate detail and which was approved in *Pannalal Vs. State Bombay and Others*, The relief of enhancement of the compensation is directed against the co-respondent-owner of the vehicle. The appellant insurer does not become liable for any further amount unless an enhanced award is passed against the owner of the vehicle, who is only a co-respondent. The memorandum of cross objection is, therefore, not maintainable under Rule 22 of Order 41 of the Civil Procedure Code, 1908.

11. Nor is it possible to grant enhancement under Rule 33 of Order 41. The object of Rule 33 is to avoid contrary and inconsistent decisions on the same questions in the same suit. The rule does not ordinarily confer a right to reopen decrees which have become final. The object of the rule is to adjust the rights of parties according to justice where it becomes necessary as a result of interference with the decree, in favour of the appellant (*State of Kerala v. Padmavathi* [1983] KLT 17). The rule is not intended to provide a kind of separate appeal on disputes essentially between co-respondents and not arising as a result of any decision in favour of the appellant in the appeal.

12. In the first of the cases decided by the Rajasthan High Court, the question of enhancement of compensation was not involved. The accident involved two buses, one a private bus of M and the other of the Rajasthan State Road

Transport Corporation ("the RSRTC"). The Claims Tribunal found both the drivers guilty of negligence, but passed an award only against M. M appealed with the plea that he was not the real owner of the vehicle but one G. The claimants had not filed an appeal or cross objections, nevertheless they claimed an award against the RSRTC in view of the finding of composite negligence of both the drivers. This they claimed under Order 41, Rule 33, and that was granted.

13. In the other appeal, the appeal was by the insurer of a car, who had been made liable on the death of the passengers and driver of the car in a collision with a truck. Both the drivers were found negligent and an award was passed against the owners and drivers of both the vehicles. On an appeal by the insurer of the car seeking enhancement of the compensation, cross-objections were filed. The court invoked Rule 33 of Order 41 to make the insurer of the truck liable for the enhanced amount, though he was only a co-respondent.

14. In the view that we have taken on the scope of Rule 33, in paragraph 10 above, we are unable to agree with these decisions of the Rajasthan High Court. The question of enhancement of the compensation claimed in the cross-objections is one arising only between the co-respondents and is not a matter for consideration in the appeal at all. It does not even arise incidentally therefrom. No adjustment of rights between co-respondents is necessitated by any decision in the appeal. Rule 33 cannot, therefore, be pressed into service to grant the relief of enhancement of compensation to the claimants-respondents.

15. We do not, therefore, find any reason to reconsider the decision in United India Insurance Co. Ltd. Vs. Smt. O. Jameela Beevi and Others, as requested by the claimants-respondents.

16. The appeals are, therefore, allowed and the award in so far as it makes the appellant liable for payment of the amount awarded is vacated. The amounts awarded shall be payable by the other persons made liable by the Claims Tribunal. The memorandum of cross-objections in each case is rejected as not maintainable.