(1984) 01 KL CK 0001

In the High Court Of Kerala

Case No : A.S. No. 431 of 1979

New India Assurance Co. Ltd. — APPELLANT

Vs

V.S. Thankamani and Others — RESPONDENT

Date of Decision : 25-01-1984

Acts Referred:

Citation : (1984) ACJ 791

Hon'ble Judges : V. Bhaskaran Nambiar, J;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : K. Kurien, Joseph, Alex Thomas, N. Raghava Kurup and M.S. Narayana Pillai, for the Appellant; T.K. Pankajakshan Pillai, M. Stanley Fernandes, Vimala Jacob and Sadhana Mohta, for the Respondent

Final Decision : Dismissed

Judgement

G. Balagangadharan, J.—These appeals arise out of O.S. No. 65 of 1976 and O.S. No. 134 of 1976 respectively of the Subordinate Judge''s Court, Cochin. The common Appellant was the 4th Defendant in each suit. The suits were brought by the respective 1st Respondents in each of the appeals for compensation for injuries sustained by them in a bus accident that took place on 23 10.1976 at 2.30 p.m. The bus K.L.F. 3857 was owned by the common 2nd Respondent. The common Defendants 2 and 3 were its driver and conductor respectively. The Plaintiffs were passengers in the bus. The bus was proceeding from Vypeen to Munambam and when it reached the bus stop at Kudungasseri on the route it dashed against a cocoanut tree. As a result of the forcible impact, the tree broke and fell over the bus. The Plaintiffs were jolted out of their seats and they struck against the side of the bus. The Plaintiff in O.S. No. 65 of 1976 suffered injuries on her face and eyes, while the Plaintiff in the other suit suffered a fracture and other injuries in her arm. Both of them were initially treated in the nearest Government Hospital at Narakkal and subsequently in the District Hospital, Ernakulam. After their discharge from the hospital, they brought the suits, the former claiming Rs. 30,000/- and the latter claiming Rs. 20,000/- as compensation. It was alleged that the accident was caused by the negligence of Defendants 2 and 3. The claim was laid not only against the owner and his two employees, but also against the 4th Defendant, the New India Assurance Company Limited, with which the bus was admittedly insured.

2. The suits were tried by different Judges. They found on the evidence that the Plaintiffs suffered injuries in the accident, that the accident was brought about by the negligence of Defendants 2 and 3 and that they and their employer, the 1st Defendant, were liable. On the quantum of compensation the learned Judges held, considering the nature of the injuries and the damages suffered by the Plaintiffs, that Rs. 10,000/- would be adequate compensation in each case. The Plaintiffs were therefore given separate decress for this amount with interest at 6% in the former suit from the date of suit and in the latter from the date of decree, till date of realisation with proportionate costs.

3. Defendants 1 to 3 have not appealed and these appeals, as mentioned above, have been brought by the 4th Defendant, the insurance company.

4. We shall dispose of the appeals by a common judgment as counsel raised only one common question in support of the appeals.

5. Counsel for the Appellant (different counsel appeared in the appeals) argued that the court below has gone beyond the terms of Section 95(2) of the Motor Vehicles Act in awarding compensation of Rs. 10,000/- forgetting the limit of Rs. 5,000/- imposed by the section. They argued that as there is an infringement of the statute we should modify the decisions of the courts below and reduce the Appellant''s liability to Rs. 5,000/-. Counsel for the Plaintiff''s Respondents met this contention on a two fold objection. It was urged by counsel firstly that this contention is not open to the Appellant at all and secondly that even on the merits it has no validity.

6. In support of the former objection counsel for the Respondents placed reliance upon British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, and various decisions of the High Courts including United India Fire and General Insurance Co. Ltd. Vs. Smt. Kalyani and Others, and The New India Assurance Company Ltd. Vs. O.V. Radhakrishnan and Others which limit the defences available to insurance companies. In our view this contention is well-founded and has to be sustained. Section 96(2) of the Motor Vehicles Act lays down the defences which insurance companies who are joined as Defendants in action for damages, could take. In British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, the Plaintiffs had contended that the written statements put in by the insurance company should be taken off the records on the ground that they could defend the actions only on the pleas specified in Section 96(2) and no others. The High Court upheld the Plaintiffs objection. In the appeal filed by the insurance company before the Supreme Court, the question was whether the defence available to the insurer joined as a party, were only those mentioned in Section 96(2). The Supreme Court discussed the provisions at length and

rejected the arguments on behalf of the insurance company, holding that the insurer who is made a Defendant to an action is not entitled to take any defence which is not specified in Sub-section (2). The head note in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, correctly summarises the substance of the decision. It reads:

Apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute. Sub-section (2) clearly provides that an insurer made a Defendant to the action is not entitled to take any defence which is not specified in it. When the grounds of defence have been specified, they cannot be added to. The only manner of avoiding liability provided for in Sub-section (2) is through the defence therein mentioned. Therefore when Sub-section (6) talks of avoiding liability in the manner provided in Sub-section (2), it necessarily refers to these defences. It cannot be said that in enacting Sub-section (2) the legislature was contemplating only those defences which were based on the conditions of the policy.

The decision has been followed in innumerable cases in the High Courts. Some of them have been mentioned in United India Fire and General Insurance Co. Ltd. Vs. Smt. Kalyani and Others, which itself followed the Supreme Court decision. In view of this pronouncement the 4th Defendant, the insurer, could take only the defences enumerated in Section 96(2).

The point sought to be urged by counsel for the Appellants is not one of the defences so enumerated. Counsel for the Appellants in A.S. No. 341 of 1979 contended that this view would prejudice the insurance companies and as the contention raised by him concerns the violation of a statutory provision, we should entertain it and as it is sound on merits, we should uphold it. This argument ignores the point raised on behalf of the Respondents that the defence is not open to an insurer at all. If it is not open to the insurer, as we hold that it is not, the subsidiary question whether it violates the statute or not is of little relevance. We accept the Respondents contention in this regard.

7. The bar u/s 96(2) applies not only to the original court proceedings, but to the appellate proceedings as well.

The point has been decided in The New India Assurance Company Ltd. Vs. O.V. Radhakrishnan and Others The fact that the contention was raised in appeal and not before the trial court, is therefore of no consequence.

8. In view of our conclusion that this argument is not open to the Appellant, it is unnecessary to go into the merits of the contentions, even though we are inclined prima facie to sustain the Respondents objection on this aspect as well. But we prefer to express no decided opinion on the question.

9. We confirm the decisions of the courts below and dismiss the appeals with costs to the 1st Respondents.

