(1997) 01 MAD CK 0015

In the Madras High Court

Case No : A.A.O. No. 102 of 1985

Oriental Fire and Genl. Ins. Co. Ltd. — APPELLANT

Vs

J.P. Sahayanathan (insane) represented by next friend Karibavathy and Another — RESPONDENT

Date of Decision : 27-01-1997

Acts Referred:
Motor Vehicles Act, 1988 — Section 95

Citation : (1998) 2 ACC 59 : (1999) ACJ 94 : (1997) 1 LW 607 : (1998) 1 MLJ 177

Hon'ble Judges : C.V. Govardhan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

C.V. Govardhan, J.—Second respondent is the appellant.

2. Petitioner in his petition contends as follows: The petitioner was crossing the village road from east to west on 17.7.81. The van bearing

registration No. TNZ 1733 belonging to the respondent No. 1 and insured with the respondent No. 2 proceeding from north to south came at a

high speed and hit the petitioner causing grievous injuries to him. The accident was due to the rash and negligent driving of the van by its driver. The

petitioner therefore makes a claim for a sum of Rs. 40,000. The petition was subsequently amended and the compensation claimed was Rs.

1,00,000 in the amended petition.

3. The respondent No. 2 in his counter contends as follows: On 17.7.1981 at about 6.30 p.m. when the vehicle TNZ 1733 was nearing the

Queens Hotel on village road, a man who was fully drunk suddenly started running from east to west. The driver on seeing the man, applied the brake and stopped the van. But, the man hit the van and fell down. He was responsible for the accident and there was no negligence on the part of

the driver. The injury caused is also simple.

4. In the additional counter, the respondent has contended as follows: The claim made by the petitioner is exaggerated. The petitioner has not

disclosed the nature of disability pleaded by him. The application for enhancement of compensation is belated.

5. On the above pleadings, the Motor Accidents Claims Tribunal held an enquiry and gave a finding that the accident was due to the rash and

negligent driving of the van by its driver and awarded a total compensation of Rs. 94,850 in favour of the petitioner payable by the respondent No.

2.

6. Aggrieved by the same, the respondent No. 2 has come forward with this appeal.

7. In this Court, the respondent No. 2 has filed C.M.P. No. 164 of 1997 for reception of additional document contending as follows: Being an

''Act policy'' taken by the insured, the respondent No. 2 covers the third party risk up to the extent of Rs. 50,000 only. Originally, the petition was

filed for Rs. 40,000. Later, the claim was revised to Rs. 1,00,000. The company was not in a position to produce the policy at the time of the trial.

The question that arises for consideration being the liability of the insurance company, it is necessary to look into the policy and the petitioner is

filing the policy. It may be received.

8. The respondent in his counter contends as follows: The injured sustained injuries in the road accident on 17.7.1981 and has become insane. The

next friend has filed the claim application for Rs. 1,00,000. The Tribunal has awarded Rs. 94,850. The insurance company has filed a counter as

well as additional counter before the Tribunal. It has not taken a plea stating that the liability of the appellant was limited to Rs. 50,000. They have

not produced the insurance policy. The application is belated and it has to be dismissed.

9. The point that arises for consideration in the appeal is whether the liability of the appellant, viz., insurance company is limited to Rs. 50,000. The

point that arises for consideration in C.M.P. No. 164 of 1997 is whether the appellant is entitled to an order for reception of the policy in respect of the vehicle involved in the accident as additional evidence. Since both the points relate to the liability of the insurance company they are taken

together.

10. The learned Counsel appearing for the appellant-petitioner would argue that before the Tribunal, the insurance company has not filed the policy

of insurance since it was under the impression that the insured will produce the policy and the Tribunal, without considering the liability of the

insurance company, as per Section 95 of the Act, has fastened the entire liability on the insurance company and in this appeal, the appellant is only

questioning their liability and to establish that their liability is only Rs. 50,000, the reception of the policy of insurance is necessary and therefore, the

C.M.P. No. 164 of 1997 has to be ordered and in pursuance of the same, the appeal has to be allowed. The learned Counsel appearing for the

appellant also relies upon certain decisions in support of his case.

11. According to the learned Counsel appearing for the appellant, the decision in New India Assurance Co. Ltd. Vs. Thankamma and Others, lays

down that in a case where the insurance company pleaded that it bona fidely believed that the owner would produce the policy but he deliberately

refrained from producing it to the prejudice of the insurance company, the policy can be admitted in appeal in spite of the objection by the owner

to the production of the copy of the policy contending that none of the conditions laid down in Order 41, Rule 27, CPC is satisfied. The learned

Counsel would contend that where the liability of the insurance company is limited as per the statute and the Tribunal mulcted the entire liability on

the insurance company, copies of the policy of the insurance can be admitted in the appeal as it is required for a fair, just and proper disposal of

the appeal. The learned Counsel appearing for the appellant also relies upon the decision in New India Assurance Co. Ltd. Vs. Pathu and Others,

and would contend that though the insurance company was at fault in not producing the copy of the policy at the time of the filing of the written

statement before the Tribunal, the Division Bench of the Kerala High Court has observed that they are inclined to allow the petition, particularly

because, the owner of the lorry who had the original policy and has a bounden duty to produce it, did not produce the policy. The learned Counsel

also referred to the decision in New India Assurance Co. Ltd. Vs. Annakutty and

Others, , wherein it has been laid down as follows:

The mere fact that the appellant insurer was imprudent or was less circumspect in not producing the true copy of the policy before the Claims

Tribunal or that the defect was realised only later and pointed out by a party, will not deter this Court from invoking the provisions of Order 41,

Rule 27 (1) (b) of the Code of Civil Procedure, if, in the interest of justice, this Court is satisfied that the powers vested in this Court under the said

provision should be invoked.

12. The learned Counsel appearing for the respondent would contend that there cannot be two opinions about the reception of the policy of

insurance as additional document in the appellate court if the insurer failed to produce the same before the Tribunal and the insurer is entitled to

exhibit the same as additional evidence, if the insurer had taken a stand before the Tribunal that their liability is limited, as per the statute and that in

the decisions relied by the learned Counsel for the appellant, the insurance company has taken a defence that their liability is limited as per the

statute and that in the case on hand, both the counter and in the additional counter, the insurance company has not taken a stand that their liability is

limited to the extent of Rs. 50,000 and therefore, the appellant is not entitled to exhibit the policy of insurance issued to the vehicle in question as

additional exhibit in this Court. In support of his contention, the learned Counsel appearing for the respondent relies upon the decision in Sudha

Bahri v. Sarvjit Singh 1986 ACJ 1103 (P&H), wherein it has been held that in a case where the insurance company contended that the claimants

failed to plead that the liability of the insurance company exceeded the statutory limits and the insurance company failed to raise a plea regarding

the limit of liability and the policy also was not placed on record, the liability of the insurance, company is not limited as per the statute and it is

liable for the entire amount awarded. In the above decision, it has also been held that where the insurance company seeks to raise a plea of limit of

its liability by amending the written statement and delay in seeking the amendment is not explained, it would be unjust to deprive claimants of a

valuable right of recovery from insurance company by allowing amendment so belatedly and that courts have wide discretion in the matter of

amendment of pleadings, but that discretion is to be exercised judiciously to do substantial justice and avoid injustice. In the above decision it has

also been held that whether the insurance company has sought permission to adduce additional evidence to place on record the policy of insurance

in order to prove limit of its liability, the insurance company cannot be allowed to do so because if permitted, it would enable one of the parties to

remove a lacuna in presenting its case at the proper stage or to fill up gap in its evidence. In the case on hand also, the insurer has not taken a plea

in the counter and in the additional counter that its liability is only Rs. 50,000 as per the statute. Even in this appeal, the appellant has not made any

attempt to amend the pleadings, viz., the counter filed by it in such a way that it is questioning the liability of the insurance company. As it is, as per

the counter the liability of the insurance company has not been challenged, but the appellant wants to file an insurance policy as additional

document, by filing a civil miscellaneous petition. I am of opinion that if permitted, it would only enable the appellant to remove the lacuna in

presenting its case and fill up gap in its evidence as observed in the decision reported in Sudha Bahri v. Sarvjit Singh (supra).

13. I only wish to refer to the decision in National Insurance Co. Ltd. v. Jugal Kishore 1988 ACJ 270 (SC), wherein the Supreme Court has

observed in para 9 as follows:

9. Before parting with the case, we consider it necessary to refer to the attitude often adopted by the insurance companies, as was adopted even in

this case, of not filing a copy of the policy before the Tribunal and even before the High Court in appeal. In this connection what is of significance is

that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. This court has consistently

emphasised that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the

said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the

case of instrumentalities of the State such as the appellant who are under an obligation to act fairly. In many cases even the owner of the vehicle for

reasons known to him does not choose to produce the policy or a copy thereof. We accordingly wish to emphasise that in all such cases where the

insurance company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a

copy of the insurance policy along with its defence. Even in the instant case had it been done so at the appropriate stage necessity of approaching

this Court in civil appeal would in all probability have been avoided. Filing a copy of the policy, therefore, not only cuts short avoidable litigation

but also helps the court in doing justice between the parties. The obligation on the part of the State or its instrumentalities to act fairly can never be

over emphasised.

I wish to point out that their Lordships of the Supreme Court have observed that they wish to emphasise that in all such cases where the insurance

company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the

insurance policy along with its defence. In the present case, as per the pleadings of the insurance company before the Tribunal as it stands today,

the insurance company had not expressed any desire to take a defence in this claim petition that its liability is not in excess of the statutory liability.

In other words, the defence of the appellant to the claim petition as per the pleadings filed by it is not one questioning the liability. Therefore,

enabling the appellant insurance company to file the policy of insurance to prove a case which is not pleaded by them by allowing the civil

miscellaneous petition cannot be ordered by this Court judiciously to do substantial justice and avoid injustice. Allowing the civil miscellaneous

petition would only enable the appellant to remove the lacuna in presenting its case at the proper stage and allowing it to fill up the gap in its

evidence. Therefore, I am of opinion that C.M.P. No. 164 of 1997 cannot be ordered as prayed for by the petitioner, for reception of the

insurance policy and enabling the appellant to exhibit the insurance policy as an additional document.

14. Since the appeal itself is only with regard to the liability of the appellant, in view of the dismissal of the C.M.P. No. 164 of 1997 there is no

merit in the appeal and the appeal is liable to be dismissed.

15. In the result, the appeal and C.M.P. No. 164 of 1997 are dismissed. No costs.

