(1995) 03 KL CK 0046

In the High Court Of Kerala

Case No : M.F.A. No. 328 of 1995-C

Oriental Insurance Co. Ltd. — APPELLANT

Vs

Joshy and Others — RESPONDENT

Date of Decision : 24-03-1995

Acts Referred:

Motor Vehicles Act, 1939 — Section 103A

Citation : (1995) 2 ACC 251 : (1995) ACJ 1217 : (1995) 83 CompCas 612 : (1995) 3 ILR (Ker) 68

Hon'ble Judges : N. Dhinakar, J;K.T. Thomas, J

Bench : Division Bench

Advocate : George Cherian, for the Appellant;

Final Decision : Dismissed

Judgement

K.T. Thomas, J.—This appeal by one insurance company is in challenge of the direction contained in an award passed by a Motor Accidents Claims Tribunal (for short "the Claims Tribunal") that the awarded compensation should be paid by the appellant-insurance company.

2. The claimant in the case is a minor boy who sustained some injuries in a motor accident which took place on November 23, 1984. The claim was for compensation exceeding a lakh of rupees, but the Claims Tribunal awarded a sum of Rs. 40,000 together with interest at 12 per cent. per annum. The appellant-company was directed to pay the amount as the vehicle involved in the accident was insured with the appellant-company.

3. One of the main contentions advanced by the appellant before the Claims Tribunal was this : At the time when the certificate of insurance and policy were issued in respect of the vehicle (a scooter) its owner was the fourth respondent. But much before the accident the ownership of the vehicle was transferred to the second respondent. So the policy lapsed and the insurer is not liable under the policy any more. The above contention did not find favour with the Claims

Tribunal. After holding that the accident was the consequence of the scooterist the Claims Tribunal held that the insurer is also liable to make the compensation amount good.

4. Learned counsel for the appellant argued before us also that the insurance policy was not alive on the date of accident as it lapsed with the transfer of ownership of the vehicle prior to that date. In support of the contention learned counsel referred to the following decisions of this court, viz., M. Swaminathan Vs. C.K. Jayalakshmi Amma and Others, Alavi v. Velayudhan [1989] 2 KLT 48 and New India Assurance Co. Ltd. Vs. Peelari Edathil Kunhiraman Nambiar and Others, . In those decisions the position held was that when the insurance policy was not transferred in the name of the transferee of the vehicle concerned, the policy would lapse. But the question whether the policy would stand transferred under certain circumstances was not considered in any of those decisions. In fact, that is the question which arises in this appeal. However, learned counsel conceded that the legal position in regard to such transfers which take place after the enforcement of the Motor Vehicles Act of 1988 is different in view of Section 157 of that Act as per which the policy described in a certificate of insurance shall be deemed to have been transferred along with transfer of ownership of the vehicle. But he contended that since the policy in this case was issued under the Motor Vehicles Act, 1939, the process of transfer of insurance policy envisaged in the present Act would not take place.

5. For appreciating the above contention we must bear in mind that this is a case where the claim is made by a third person who was not a party to the contract of insurance. No doubt, the contract of insurance was entered between fourth respondent and appellant on May 17, 1984, and before the date of accident (i.e., November 23, 1984) ownership of the vehicle was transferred to the name of the second respondent.

6. In the aforesaid context we refer to Section 103A(1) of the Motor Vehicles Act, 1939. That section reads thus :

" Transfer of certificate of insurance. -- (1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this chapter proposes to transfer to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, he may apply in the prescribed form to the insurer for the transfer of the certificate of insurance and the policy described in the certificate in favour of the person to whom the motor vehicle is proposed to be transferred, and if within fifteen days of the receipt of such application by the insurer, the insurer has not intimated the insured and such other person, his refusal to transfer the certificate and the policy to the other person, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer."

7. As per the section where a person in whose favour the certificate of insurance has been issued proposed to transfer ownership of that vehicle to another person he was required to apply to the insurer to transfer the certificate of insurance and the policy in favour of the transferee. The provision further provided that if, within 15 days of receipt of such application, the insurer did not intimate the insured and the transferee his refusal to transfer the certificate of insurance and the policy, the "same shall be deemed to have been transferred" in favour of the transferee. Thus a legal fiction is created by the Legislature that a transfer in the policy has taken place in a certain situation though in reality no such transfer is effected on the policy as such. In other words, the purport of the insurance policy is not the yardstick, but the enquiry should be directed to ascertain whether the situation has arisen to presume that the fiction created in Section 103A of the old Act can be drawn.

8. In the light of Section 103A of the old Act no insurance company can justifiably contend that when a policy merely remains in the name of the transferor the insurer is not liable even if the ownership of the vehicle was transferred. By the legal fiction mentioned above the Legislature directed an implied transfer in the policy also in the situation set out therein. The question then is, on whom is the burden to establish that the transferor has not applied for such transfer. According to us, the insurer should plead and prove that no application has been forwarded by the transferor in cases where a third party claimant is involved. Such third party cannot get first hand information about such matters. So he cannot be expected to advance such a plea, nor can he adduce evidence in that line. When the insurer has no such case the owner of the vehicle is normally not expected to advance any such plea. Hence we take the view that it is for the insurer to put forth such plea and then to prove it.

9. In the written statement filed by the appellant-company before the Claims Tribunal no such plea has been adopted at all. Without a factual foundation having been laid how could it be held against a claimant who is not a party to the insurance contract that the deeming provision in Section 103A of the Motor Vehicles Act, 1939, is not applicable in the case. There is not a whisper in the pleadings of the appellant that the transferor or the transferee had not intimated the company about the transfer. That apart, no evidence, whatsoever, has been adduced in that regard. Therefore, we are of the view that merely because no change is seen to have been effected on the policy no ready conclusion can be drawn that the policy was never got transferred in favour of the transferee.

10. The legal position being the above, there is no scope for interference with the impugned direction in the .award. The appeal is, accordingly, dismissed in limine.

