

**(1996) 04 KL CK 0016**  
**In the High Court Of Kerala**  
**Case No : M.F.A. No. 37 of 1992-A**

|                                        |            |
|----------------------------------------|------------|
| Oriental Insurance Co. Ltd., Ernakulam | APPELLANT  |
| Vs                                     |            |
| Mrs. Mary Pushpam and Others           | RESPONDENT |

**Date of Decision :** 08-04-1996

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33  
Motor Vehicles Act, 1939 — Section 110, 110B, 95

**Citation :** (1997) ACJ 100 : AIR 1996 Ker 318 : (1996) 3 ILR (Ker) 148

**Hon'ble Judges :** T.V. Ramakrishnan, J;K.A. Mohamed Shafi, J

**Bench :** Division Bench

**Advocate :** V.V. Surendran and P.M. Padmanabhan, for the Appellant; N.P. Samuel, A.R. Prakasam, A.K. Srinivasan and N.S. Mohamed Usman, for the Respondent

**Final Decision :** Allowed

## **Judgement**

Ramakrishnan, J.—This appeal is by the third respondent in O.P. (MV) No. 203 of 1986 on the file of the Motor Accidents Claims Tribunal, Ernakulam. Appellant is the insurer of a Bus bearing Registration No. KRE 9761 involved in a motor accident occurred on 9-10-1985 in which one Stansilavos died. Respondents 1 to 5 in the appeal are the 5 claimants who have filed the petition originally. Thereafter, the 4th respondent in the petition was transposed as additional claimant No. 6 in the petition. In the appeal he is impleaded as the 6th respondent. Respondents 7 and 8 in the appeal are the driver and owner of the bus in question. They were respectively respondents 1 and 2 in the petition.

2. Respondents 2 to 4 and 6 have filed a cross objection in the appeal. The cross objection was filed in time on 20-3-1992.

3. The case of claimants 1 to 5 was that they are the legal heirs of deceased Stansilavos and on the fateful day the deceased was travelling as a pillion rider on a motor bike driven by P.W. 2. While so, the bus in question hit the motor bike and he was thrown out on the road. He suffered fatal injuries to which he

succumbed on 20-10-1985 at the Medical Trust Hospital, Ernakulam. Claimants have alleged that it was solely on account of the rash and negligent driving of the bus by the 7th respondent that the accident has occurred. Accordingly a total amount of Rs. 4,30,000/- was claimed as compensation against the owner, driver and the insurer of the bus. Claimants stated that the deceased at the time of death was a Class "A" Contractor aged 47 years working in the Minor Irrigation Department and was earning an amount of Rs. 2,000/- per mensem.

4. Respondents 7 and 8 have filed a joint written statement denying negligence and contending that the quantum of compensation claimed is highly excessive and illegal. The appellant has also filed a written statement denying its liability raising the contention that the bus driver was not at fault. It was specifically contended that the accident occurred mainly due to the negligence shown by the rider of the motor bike. It was also contended that the compensation amount claimed is excessive. There was a further contention that even if the appellant is found to be liable to pay compensation, it can be made liable only to the extent of Rs. 50,000/- since its liability is limited to the extent of Rs. 50,000/- as per the policy.

5. On taking evidence and considering the rival contentions put forward by the parties, the Tribunal found contributory negligence on the part of the pillion rider of the motor bike as well as the driver of the bus and apportioned the contributory negligence in the ratio of 1 : 3. As regards the amount of compensation, Rs. 97,200/- was found to be the just compensation payable for the loss suffered by the claimants. 1/4th of the said amount was deducted on account of the contributory negligence found by the Tribunal. Third respondent was found to be liable to indemnify the second respondent to the full extent and as such was directed to deposit the entire award amount, interest and proportionate costs within a period of two months from the date of the award.

6. In the appeal, the learned counsel for the appellant has submitted that even though the Tribunal has noted the specific contention raised by the appellant in the written statement that as per the policy issued in respect of the bus in question, the liability of the insurer to third party is limited to Rs. 50,000/- and as such even if the driver of the bus is found to be negligent, the insurer can be made liable only to that extent, the Tribunal has totally failed to consider the said contention while making the appellant liable for the entire amount of compensation awarded. It was submitted that the Tribunal ought to have framed issues as per the relevant rules. In the absence of necessary issues, the Tribunal has totally failed to consider the contention raised on behalf of the appellant. The omission has substantially prejudiced the interest of the appellant. The appellant has produced and marked the relevant policy along with the proposal form on the basis of which the policy was issued as Exts. B-1 and B-2. The terms and conditions contained in the policy would clearly indicate that the liability of the insurer to third party is limited to the extent of Rs. 50,000/-. The award passed making the insurer liable for the amounts in excess of Rs. 50,000/- is thus illegal

and liable to be set aside in appeal.

7. In the cross objection, the corss objectors have challenged the finding regarding contributory negligence and the sufficiency of the compensation awarded. It was submitted that the compensation awarded is too low and arbitrary.

8. During the course of the arguments, learned counsel for the 8th respondent, owner of the bus, has raised an objection regarding the maintainability of the cross objection relying upon the decisions reported in United India Insurance Co. Ltd. Vs. Smt. O. Jameela Beevi and Others, and N. I. A. Co. Ltd. v. Kunhikrishnan Nambiar (1994) 1 KLT 956 Apart from raising the objection regarding the maintainability of the cross objection, the learned counsel for the 8th respondent has also supported the award and contended that the compensation awarded is just and reasonable in the facts and circumstances of the case.

9. As the maintainability of the cross objection has been challenged, we may consider the said question before going into the other contentions raised by the parties in the appeal.

10. The appeal in this case is admittedly by the insurer challenging the award only to the extent the Tribunal has made the appellant liable for the amounts in excess of its liability under the policy, namely Rs. 50,000/-. In fact, the learned counsel for the appellant has not contended for a total exclusion of the appellant from any liability to pay compensation. He has only prayed for limiting the appellant's liability to Rs. 50.000/- with proportionate interest and costs.

11. This Court has in the above two cases specifically considered the question of maintainability of the cross objection filed by the claimants in an appeal by the insurer alone and has held that such cross objection is not maintainable in law. In Kunhikrishnan Nambiar's case (1994) I Ker 956 a Division Bench of this Court in response to a request to reconsider the view taken in United India Insurance Co. Ltd. Vs. Smt. O. Jameela Beevi and Others, without much of a reasoning, has after a detailed consideration of the entire aspects of the question, reiterated the view taken earlier in Jameela Beevi's case as per a well considered judgment. In the later decision, the learned Judges have considered the point in all its aspects referring to the relevant decisions of the Supreme Court. Having heard the counsel for the parties, we arc in full agreement with the view expressed by the Division Bench in Kunhikrishnan Nambiar's case (1994) 1 KLT 956 regarding the maintainability of the cross objection under Order XLI Rule 22 of the Code of Civil Procedure. We find no reason to disagree with the said view. As such, we would hold that the cross objection filed is not maintainable under Order XLI Rule 33 of the Code of Civil Procedure.

12. However, we are of the view that even though the cross objection filed is as such not maintainable, the claimants are entitled to get certain reliefs on some of the grounds raised in the cross-objection in the peculiar facts and circumstances of this case in exercise of the powers vested in this Court under Order XLI, Rule

33 of the Code of Civil Procedure. We would like to make it clear specifically that while taking the above view, we are not going against the view taken by this Court in the earlier two decisions on the question of maintainability of the cross-objection filed under Order XLI, Rule 22, CPC. We are only entertaining some of the contentions raised in the memorandum of cross-objection for consideration on merits in exercise of the powers conferred under Order XLI, Rule 33, CPC, in the peculiar facts and circumstances of this case. It is true that in the earlier two cases this Court has not thought it fit to exercise its discretionary jurisdiction under Order XLI, Rule 33, CPC in the facts and circumstances of the respective cases. That may not, however, preclude us from giving relief to the claimants if we find that the case is a fit one for granting relief to them in exercise of the powers conferred under Order XLI Rule 33, CPC. In this regard we find sufficient support from a series of decisions of the Supreme Court and this Court explaining the scope and amplitude of the provisions contained in Order XLI, Rule 33, CPC. Pannalal Vs. State Bombay and Others, ; Giasi Ram and Others Vs. Ramjilal and Others, ; Mahant Dhangir and Another Vs. Madan Mohan and Others, ; M/s. Bihar Supply Syndicate Vs. Asiatic Navigation and others, ; Narayananio v. Sudarshan, and Mathewv. Eliswa (1988) 1 KLT 310 )

13. Pannalal Vs. State Bombay and Others, was a case where the respondent in the appeal before the High Court has invoked the power of the Court under Order XLI, Rule 33, CPC without filing an appeal or cross-objection. Though the request was turned down by the High Court, the Supreme Court has found the refusal illegal and ha; allowed the prayer and remanded the matter to the High Court directing the High Court to consider how far relief can be granted to the respondent in exercise of the powers conferred under Order XLI, Rule 33, CPC. In the above decision, the Supreme Court has observed thus (Para 14):

".....We are not, at present advised, prepared to agree that if a party who could have filed a cross-objection under 0.41, Rule 22 of the CPC has not done so, the Appeal Court can under no circumstance give him relief under the provisions of Order 41, Rule 33 of the Code. It is, however, not necessary for us to discuss the question further as, in our opinion, the assumption made by the High Court that the plaintiff could have filed a cross-objection is not justified."

The above observations would indicate that even if a party who was entitled to file a cross-objection omits to file the same, the appeal Court in appropriate cases can grant necessary reliefs to such a party under Order XLI, Rule 33, CPC. The observations would further show that even if a party was not entitled to file a cross objection, still the party can be granted necessary reliefs in appropriate cases by the appeal court in exercise of the provisions contained under Order XLI Rule 33 CPC. The above position was followed by the Supreme Court in Mahant Dhangir and Another Vs. Madan Mohan and Others, , wherein the Supreme Court has observed thus (at p. 58):

"....If the cross-objection filed under Rule 22 of Order 41, C.P.C. was not maintainable against the co-respondent, the Court could consider it under Rule

33 of Order 41, C.P.C. Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If objection cannot be urged under Rule 22 against correspondent, Rule 33 could take over and come to the rescue of the objector. The appellate Court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower Court. The appellate Court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate Court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find any. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraints that we could see may be these: That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities."

The above case is an instance where the Supreme Court has granted relief in exercise of the powers under Order XLI, Rule 33, CPC even after finding specifically that the cross-objection filed is not maintainable. *M/s. Bihar Supply Syndicate Vs. Asiatic Navigation and others*, is yet another case where the Supreme Court has found it justifiable to grant relief under Order XLI, Rule 33, CPC even though the cross-objection filed was found to be not maintainable. As regards the scope and content of Order XLI, Rule 33, CPC, the Supreme Court has made the following observations in the above decision (para 29):

"Really speaking the Rule is in three parts. The first part confers on the appellate Court very wide powers to pass such orders in appeal as the case may require. The second part contemplates that this wide power will be exercised by the appellate Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The third part is where there have been decrees in cross- suits or where two or more decrees are passed in one suit, this power is directed to be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees."

Similar is the view taken in the later Supreme Court decisions and the decision of this Court referred to above.

14. In the light of the exposition of the law on the point by the Supreme Court as indicated above, we would understand the two decisions of this Court only as decisions where this Court has found it unnecessary to exercise its jurisdiction under Order XLI, Rule 33, CPC and cannot understand those decisions as decisions where this Court has taken the view that when once a memorandum of cross-objection is found to be not maintainable, the party who has filed the cross-objection cannot be granted any relief in exercise of the powers conferred under Order XLI, Rule 33, CPC. That much regarding the legal justification for entertaining the contentions raised in the memorandum of cross-objection for consideration on merits as part of the appeal. We may point out the factual justification for exercising the discretionary power under Order XLI, Rule 33, CPC, a little later.

15. Before parting with this aspect of the case, we would like to point out that but for the authoritative decisions of the Supreme Court laying down the contours of Rule 33 of Order XLI, we would have doubted the reason given by the Division Bench in paragraph 10 of the judgment in Kunhikrishnan Nambiar's case (1994) 1 KLT 956 to the extent it suggests that the discretionary power conferred under Order XLI, Rule 33, CPC can be invoked only, for the purpose of avoiding contrary and inconsistent decisions on the same question in the same suit and that the only object of the rule is to adjust the right of the parties according to justice where it becomes necessary as a result of interference with the decree in favour of the appellant. As we have already indicated, in the light of the clear exposition of the law by the Supreme Court it is not necessary for us to doubt the correctness of the above view taken by the Division Bench and to refer the matter to a larger Bench. We would, on the other hand, proceed to follow the principles laid down by the Supreme Court in the matter of exercise of power under Rule 33 of Order XLI, CPC treating the above observations of the Division Bench as not fully representing the correct legal position.

16. Turning to the merits of the appeal, we have no hesitation in holding that as per the policy, copy of which has been produced as Ext. B1, the appellant can only be made liable to the extent of Rs. 50,000/- and the award passed against the appellant making it liable to the full extent cannot be sustained in law. We would accordingly modify the award by limiting the liability of the appellant to the extent of Rs. 50,000/- with interest and proportionate costs.

17. As regards the claim for enhancement raised in the cross-objection, we have to reject the same as a result of our finding that the cross-objection as such is not maintainable under Order XLI, Rule 22, CPC though the learned counsel for the appellant has elaborately argued the same with much vehemence. Sufficiency or otherwise of the compensation awarded cannot in our view be a matter for consideration and correction in exercise of the discretionary power under Order XLI, Rule 33, CPC in this case. It was a matter which could have

been challenged properly by filing an appeal. That has not been done. That part of the award has really become final. Moreover, the quantum of compensation awarded cannot also be considered as shockingly low. As such we would decline to interfere with that part of the award.

18. However, as regards the point raised in the cross-objection that there was no justification for holding the deceased liable for (contributory negligence, we find that interest of justice requires interference in exercise of the powers conferred on this Court under Order XLI, Rule 33, CPC. Even assuming that driving of a motor bike by a person without a proper licence can be treated as a ground for finding such a driver negligent to some extent, the pillion rider cannot be found to be liable for contributory negligence by any stretch of imagination in the facts and circumstances of the case. There was not even a plea of contributory negligence on the part of the pillion rider or a plea that the driver of the motor bike was driving the bike without a proper licence and the pillion rider was aware of that. In fact the entire aspect is one brought out during the examination of P.W. 2 by the Court. There is a finding that nothing has been brought out through the cross-examination by the respondents to show that P.W. 2 was negligent. During the examination by Court P.W. 2 was not able to give satisfactory answers to some questions regarding his licence and it is solely on that basis it has been found that the pillion rider should be held liable for contributory negligence. In the absence of a plea that there was contributory negligence on the part of pillion rider, there was no justification to find contributory negligence on the part of the pillion rider for the sole reason that driver of the motor bike was not having a proper driving licence. We find that if such a finding is upheld, it will result in perpetuation of an injustice. We think that we should interfere with that part of the award to set right the said mistake in the interest of justice. We would accordingly hold that the deceased was not liable for contributory negligence. The result of the said finding is that the claimants will be entitled to get the entire amount of compensation awarded by the Tribunal without any deduction. Thus the award will stand modified fixing the compensation due to the claimants as Rs. 97,200/- instead of Rs. 76,650/-.

19. Appeal is thus allowed. Cross-objection is dismissed as not maintainable. The award will stand modified as indicated above in exercise of the powers conferred under Order XLI, Rule 33 of the Code of Civil Procedure, Parties will bear their respective costs.