
(1999) 11 KL CK 0007

In the High Court Of Kerala

Case No : M.F.A. No. 972 of 1990 and cross objection

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

K. Sasidharan and Others

RESPONDENT

Date of Decision : 02-11-1999

Acts Referred:

Motor Vehicles Act, 1939 — Section 96(2)

Citation : (2000) 1 ACC 215 : (2001) ACJ 1368

Hon'ble Judges : R. Rajendra Babu, J;K.K. Usha, J

Bench : Division Bench

Advocate : George Cherian, for the Appellant; C. Pius Kuriakose, for Respondent 4 and P.B. Sahasranaman, for Respondents 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

K.K. Usha, J.—These appeals arise out of an award of the M.A.C.T, Mavelikkara in O.P. (M.V.) Nos. 620/86 and 760/86. Both the petitions were in respect of a common accident which happened on 30th May 1986, as a result of a collision between a scooter bearing Reg. No. KLK 9508 and a bus bearing Reg. No. KLY 6951. O.P. (M.V.) 620/86 was filed by the legal heirs of one Sureshkumar who was riding the scooter and who died in the accident. O.P. (M.V.) 760/86 was filed by the pillion rider who was also injured in the accident. Driver, owner, and insurer of the bus were impleaded as Respondents 1 to 3 respectively. Later, the owner took up a contention that the bus was being driven by one Ramachandran Pillai and not by the first Respondent and on that basis, addl. 4th Respondent was impleaded in O.P. (M.V.) 620/86. But, he was not impleaded in O.P. (M.V.) 760/86. The Tribunal disposed of both the petitions under a common award.

2. Tribunal found that the driver of the bus, at the time of the accident, was the 1st Respondent and that the 2nd Respondent owner had failed to prove his case that it was the 4th Respondent who was the driver of the vehicle. Tribunal further came to the conclusion that the accident happened due to the negligence on the part of the driver of the bus. In O.P. (M.V.) 620/86, the claim put forward by the

Petitioners was for a compensation of Rs. 3,13,600. Deceased was a 23 year old boy and a student of B.A. degree. Tribunal granted a total amount of Rs. 93,000. In O.P. (M.V.) 760/86, total claim was Rs. 24,580. Tribunal granted a compensation of Rs. 8,400. 3rd Respondent-Insurance Company was directed to satisfy the award.

3. Insurance Company had contended before the Tribunal that the driver of the bus was not having proper driving licence at the time of the accident and therefore Insurance Company is absolved of the liability. It was also contended that as per the policy, its liability to third party is limited to Rs. 50,000. Tribunal entered a finding that the 1st Respondent was not having the required driving licence to drive the bus at the time of the accident. But, it did not accept the contention of the Insurance Company that it is absolved of the liability and that its liability towards third party is limited to Rs. 50,000. A copy of the insurance policy was produced as Ext. R-1, and Branch Manager of the Insurance Company was examined as R.W. 1. Tribunal took the view that since the original or carbon copy of the insurance policy was not produced before the court, the contention of the Insurance Company that there is violation of the terms of the policy and/or that its liability is limited to Rs. 50,000 under the terms of the policy towards third party cannot be examined at all. It was on the above basis those contentions were rejected. Aggrieved by the above, Insurance Company has filed these appeals.

4. It is contended by the learned Counsel for the Insurance Company that the Tribunal has erred in taking the view that lack of proper licence for the driver is a matter between the insurer and the insured and it cannot in any manner affect the claim of a third party. If the driver is not having the required licence, Insurance Company is entitled to take up a contention of violation of the terms of the policy as a defence, in the light of the provisions contained u/s 96(2)(b) (ii) of the Motor Vehicles Act, 1939, the provisions of which are applicable in the present case, since the accident had happened on 30th May 1986. Reliance was placed by the learned Counsel on a Full Bench decision of this Court in *Mew India Assurance Co. Ltd. v. Celione* 1993 (1) KLT 159 in support of the above contention. Reliance was also placed on a decision of the Supreme Court in *United India Insurance Co. Ltd. Vs. Gian Chand and others*, . In the above mentioned decision, it was held that when the vehicle is driven by an unlicensed driver, Insurance Company gets exonerated of its liability to the third party. In cases where the owner has entrusted the vehicle with licensed drivers and who on their own and without permission express or implied of the insured, hand over the vehicles or act in such a way that the vehicles get available to unlicensed drivers for being driven by the latter and which get involved in vehicular accidents by the driving of such unlicensed drivers, Insurance Company cannot get the benefit of exclusionary clause. But, the burden is on the insured to prove that he had handed over the vehicle to a driver with valid licence and it came to the hands of unlicensed driver without his knowledge. If he fails to discharge his burden, then the Insurance Company would get exonerated from its liability.

5. In the present case, as mentioned earlier, after entering a finding that the 1st Respondent-driver was not having proper licence to drive the bus, Tribunal still proceeded to hold the Insurance Company liable for the reason that policy containing an exclusionary clause was not proved in this case. We are afraid, we cannot agree with this finding of the Tribunal. Ext. R-1 is a duplicate copy of the insurance policy which was proved through R.W. 1, Branch Manager of the Company. We have gone through his evidence. It is seen that the insured, namely, the owner of the vehicle, had not challenged the genuineness of Ext. R-1. It has to be noted that the original of Ext. R-1 should, in the natural course, be with the insured. When the insured has not raised an objection either for marking copy of the policy as Ext. R-1 or challenge in relation to its contents by way of cross-examining R.W. 1, there was no reason for the Tribunal to take the view that Ext. R-1 is not a true copy of the insurance policy of the vehicle. We have gone through Ext. R-2 licence of the 1st Respondent. It is seen that he had a licence issued in his name authorising him to drive light motor vehicles from 3rd October 1962 to 2nd October 1965. But, there is no authorisation to drive transport vehicle which is necessary for a driver of a bus as per the relevant rules under the Kerala Motor Vehicle Rules, 1961.

6. In the present case, apart from contending that it was the 4th Respondent who was the driver of the vehicle and not the 1st Respondent, owner of the vehicle did not take any step to substantiate the above contention. He did not enter the box to give evidence nor the 4th Respondent. 1st Respondent also did not contest the matter. Under these circumstances, as was observed by the Supreme Court in AIR 1997 S. C. 3824, when unlicensed driver was entrusted with the bus with the knowledge of the insured, the insurer is absolved of the liability to the third party.

7. Learned Counsel for the owner of the vehicle sought to place reliance on a Bench decision of this Court in Oriental Insurance Co. Ltd. v. Nani Janaki 1998 (2) KLT 836. The facts in the above case were as follows. The vehicle which was insured on 14th July 1986 as a private car, was involved in an accident on 9th May 1987. It was contended by the Insurance Company that the owner of the vehicle had altered the character of the vehicle on 31st July 1996 and was using the same as a contract carriage. According to the Insurance Company, the owner of the vehicle had misrepresented the fact on 14th July 1986 at the time of obtaining the policy, and therefore violation would come u/s 96(2)(c) of the Motor Vehicles Act, 1939. On the basis of the evidence in the case, the Bench took the view that on 14th July 1986, the vehicle was a private car and therefore there was no misrepresentation. If that be so, Section 96(2)(c) will not be applicable. It was also contended that there has been a breach of condition under Clause (a) of Section 96(2)(b)(i). This contention was also not accepted. It is the following observation of the Bench, that is strongly relied on by the learned Counsel for the Respondents, "the liability to pay compensation to a third party by the insurer is a statutory liability which cannot be taken away because of the violation of the policy conditions by the owner of the vehicle". The above

observation of the Division Bench has to be understood in the facts of the case. It cannot be taken that the Bench has taken the view against the dictum laid down by the Supreme Court in A.I.R 1997 S.C. 3824. Reference made to an observation of the decision of the Supreme Court in New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others, is also not relevant to the facts of the present case.

8. There is a cross appeal filed by the Respondents-claimants seeking enhancement of the quantum of compensation. Since the appeal filed by the Insurance Company is not on the quantum of the award, the cross appeal is not maintainable. On the facts of the case also, we do not think that it is necessary for this Court to interfere with the quantum of compensation.

In the light of the above, we find that there has been a violation of the terms of the policy which would come u/s 96(2) (b) (ii) of the Motor Vehicles Act, 1939, which would absolve liability of the Insurance Company. The appeals therefore stand allowed. Cross appeal is dismissed. No costs.