

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYAISHTA, 1937

MACA.No. 1641 of 2010 ()

AGAINST THE AWARD IN OPMV 1137/2007 of MACT PALA DATED 12.4.2010

APPELLANT/3RD RESPONDENT IN OP(MV) NO.1137/07:

NATIONAL INSURANCE COMPANY LTD,
BRANCH MANAGER, CHERUPUSHPAM BUILDINGS, PALAI
REPRESENTED BY ITS MANAGER, REGIONAL OFFICE
OMANA BUILDINGS, PADMA JN., M.G.ROAD
ERNAKULAM.

BY ADV. SRI.LAL GEORGE

RESPONDENTS/PETITIONERS 1 TO 5 AND RESPONDENTS 1 & 2:

1. SAWDHA BEEVI,W/O.LATE MAMMUKUTTY,
AGED 46 YEARS, ASSARIPARAMBIL HOUSE, ERATTUPETTA
VILLAGE, THALAPPALAM KARA, PLASSANAL.P.O
KOTTAYAM DISTRICT-686 579.

2. MUJEEB,S/O.LATE MAMMUKUTTY,AGED 28 YRS,
ASSARIPARAMBIL HOUSE, ERATTUPETTA VILLAGE
THALAPPALAM KARA, PLASSANAL.P.O
KOTTAYAM DISTRICT-686 579.

3. SHAMILA,D/O.LATE MAMMUKUTTY,
AGED 26 YEARS, ASSARIPARAMBIL HOUSE, ERATTUPETTA
VILLAGE, THALAPPALAM KARA, PLASSANAL.P.O
KOTTAYAM DISTRICT-686 579.

4. NAFILA,D/O.LATE MAMMUKUTTY,
AGED 23 YEARS, ASSARIPARAMBIL HOUSE
ERATTUPETTA VILLAGE, THALAPPALAM KARA, PLASSANAL.P.O
KOTTAYAM DISTRICT-686 579.

5. ISHA UMMA,W/O.HASSANKUTTY,
KOCHUPARAMBIL (ASSARIMPARAMBIL (H)
ERATTUPETTA-686121.

6. RADHAMANIYAMMA,W/O.CHANDRASEKHARAN NAIR,
KUZHIMATTATHIL HOUSE, ADOOPARAMBU
MUVATTUPUZHA-686 667.

7. SAJU,S/O.CHACKO,NEEROLICKAL HOUSE,
MARADI VILLAGE, PERINKUZHA KARA
MUVATTUPUZHA-686 667.[DELETED]

[RESPONDENT NO.7 IS DELETED FROM THE PARTY ARRAY AT THE RISK OF
THE APPELLANT AS PER ORDER DATED 13.03.2015 IN IA 3868/14.]

R1 TO 5 BY ADV. SRI.SHAJI THOMAS PORKKATTIL
R1 TO 5 BY ADV. SRI.T.V.VINU
R6 BY ADV. SRI.P.M.SANEER
R6 BY ADV. SRI.SHAJIN S.HAMEED

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD
ON 10-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**T.R.RAMACHANDRAN NAIR &
K.P.JYOTHINDRANATH, JJ.**

M.A.C.A.No.1641 OF 2010

Dated this the 10th day of June, 2015

JUDGMENT

Ramachandran Nair, J.

This appeal is filed by the Insurance Company aggrieved by the finding by the Tribunal that the Company is liable to pay compensation to the claimants herein.

2. Some of the necessary facts for the disposal of the appeal are the following :

The claimants are the legal heirs of deceased Mammukkutty. The accident occurred on 29.07.2007 at about 8.30 p.m. at Alumthara bhagom on Alumthara-Kunnonni road. The vehicle involved in the accident was a mini lorry bearing Reg.No.KL-07/L 2689 which was moving to a place called Erattupetta. Then the driver lost the control of the vehicle and the vehicle got capsized. The deceased succumbed to the injuries caused to him, on 4.8.2007.

3. The owner of the goods was examined as PW1 and Exts.A1

to A6 were marked on the side of the claimants. Exts.B1 to B3 were marked on the side of the respondents.

4. Since the liability of the Company is disputed, we will refer to the salient aspects of the deposition of PW1, the owner of the goods. According to him, he is a timber merchant. He had taken the lorry on rent on the date of the accident. After loading timber in the lorry, for unloading it in the saw mill of one Baiju, they were proceeding to the said place and he was also travelling in the cabin at the time of the accident. The deceased as well as other labourers were occupying the platform of the lorry. According to him, they were travelling while accompanying the goods in the vehicle.

5. In the cross examination, he deposed before the Tribunal that apart from the driver one more person can occupy the cabin and he was occupying the said seat. There were total number of 4 employees in the lorry. They are his own permanent employees for doing the work whenever he gets a contract. They were travelling in the platform on that day. They had to load timber from three different places. The employees were travelling on permission granted by him also. He was

travelling in the vehicle as the owner of the timber.

6. The Tribunal considered the contentions of the parties. It was contended by the Insurance Company that the offending vehicle is a goods vehicle and the liability can only be as per the contract. The policy is only an “Act Only Policy”, which was produced and marked as Ext.B1. The payment under the policy shows that ₹6403/- has been paid as the premium and compulsory PA to owner cum driver is ₹100/- and WC to employee is ₹25/-. Exts.B2 and B3 are the terms and conditions of commercial vehicles package policy and private car package policy. The Tribunal in paragraph 7 observed that there is a clause in Ext.B2 that the company will indemnify the insured in the event of the accident caused by or arising out of the use of the vehicle and Ext.B3 indicates that the company will indemnify the insured in the event of accident caused by or arising out of the use in respect of death or bodily injury to any person including occupants carried in the vehicle. Therefore, the view taken is that as the available evidence suggests that the owner has employed the deceased for loading and unloading the timber and the accident caused by using the vehicle, the

company is liable to pay compensation.

7. We heard the learned counsel for the Insurance Company Sri.Lal George and the learned counsel for the claimants Sri.Shaji Thomas on this question.

8. The learned counsel on both sides invited our attention to the various judgments of this Court and of the Apex Court. Before coming to the contentions of the parties, we will refer to the contents of Ext.B1 policy. A copy of the same perused by us shows that in the schedule the details of premium paid are given as follows :

SCHEDULE OF PREMIUM (₹)

B: TP -BASIC	5580
<i>Compulsory PA to Owner Cum Driver Amount 200000</i>	100
<i>WC to employee</i>	25
GROSS (B)	5705
<i>Gross (OD & TP)</i>	5705
<i>Net premium</i>	5705
<i>Service tax 12.24%</i>	698
<i>Net Amount Payable</i>	6403

9. It will show that ₹ 5580/- is paid for third party , ₹100/- is

paid as compulsory PA to owner cum driver and ₹ 25/- is WC to employee. The gross amount is ₹5705/- and along with service tax, the net amount is shown as ₹6,403/-. Evidently, in the first page of the policy it is stated as an 'Act Only Policy'.

10. The learned counsel for the claimants invited our attention to IMT 39, which reads as follows :

*“IMT 39 - LEGAL LIABILITY TO PERSONS
EMPLOYED IN CONNECTION WITH THE
OPERATION AND/OR MAINTAINING AND/OR
LOADING AND/OR UNLOADING OF MOTOR
VEHICLES (FOR GOODS VEHICLE)*

In consideration of the payment of an additional premium of ---- it is hereby understood and agreed that notwithstanding anything contained herein to the contrary the insurer shall indemnify the insured against his legal liability under the “Workmen's Compensation Act 1923 and subsequent amendments of that Act prior to the date of this Endorsement, the Fatal Accidents Act, 1855 or at Common Law in respect of personal injury to any paid driver (or cleaner or conductor or person

employed in loading/or unloading but in any case not exceeding seven in number including driver and cleaner) whilst engaged in the service of the insured in such occupation in connection with the --- and not exceeding seven in number and will in addition be responsible for all costs and expenses incurred with its written consent.

Provided always that :

(1) The Endorsement does not indemnify the insured in respect of any liability in cases where the insured holds or subsequently effects with any insurer or Group of Underwriters a Policy of Insurance in respect of liability as herein defined for his general employees.

(2) The insured shall take reasonable precautions to prevent accidents and shall comply with all statutory obligations.

(3) The insured shall keep a record of the name of each driver, cleaner, conductor or person employed in loading and /or unloading and the amount of wages salary and other earnings paid to such employees and shall at times allow the insurer to inspect such record.

(4) In the event of the policy being cancelled at the request of the insured no refund of the premium paid in respect of this Endorsement will be allowed.

The premium to be calculated at the rate of ₹25/- per driver and /or cleaner or conductor and/or person employed in loading and /or unloading but not exceeding the number permitted by the Motor Vehicles Act, 1988 including driver and cleaner.

Subject otherwise to the terms exceptions conditions and limitations of this Policy except so far as necessary to meet the requirements of the Motor Vehicles Act, 1988.

11. But it is clear that there is no endorsement showing payment under the said clause in the schedule or any endorsement is there below the schedule also. Of course, the said endorsement will show that the owner of the vehicle could have paid additional premium to get the benefit under the said endorsement. In this context, the learned counsel Sri.Shaji Thomas relied upon the judgment of the Apex Court in **Hanumanagouda v. United India Insurance Co. Ltd.**

[(2014) 9 SCC 341], where a clause similar to IMT 39 was considered.

Therein, paragraph 5 reads as follows :

“ 5. For deciding the above issue, one is simply required to go through the relevant clause IMT 17 of the policy, whose copy has been made available to us. The clause reads thus :

“ Add : for LL to persons employed in connection with the operation and/ or loading unloading of motor vehicle IMT 17.”

12. Interpreting the said clause, the Apex Court held that “ *as Gumasthe, the deceased was accompanying the goods in transit for the purpose of delivery of goods. Obviously, as Gumasthe the deceased would be covered by the expression “ persons employed in connection with operation of motor vehicle”.* It was held that the Insurance Company will be bound to pay the amount of compensation under the award.

13. Sri.Lal George, the learned counsel for the Insurance Company, explained that the said decision will not apply to the facts of this case as the owner has not made any payment under IMT 39.

14. One of the other decisions relied upon by the learned counsel for the claimants is in **Mary & Others v. United India Insurance Co. Ltd. And Another (2014 (1) KLJ 805)**. Therein a Division Bench of this Court held in paragraph 12 of the judgment after interpreting Section 147 of the Motor Vehicles Act and by relying upon the various judgments of the Apex Court that “ *Only those persons mentioned in Section 147(1) of the Act namely owner of the goods or authorized representative of the owner of the goods accompanying the goods carried in the vehicle alone will be covered by the policy.*” The learned Judge continued to hold as follows :

“ Further, in the decision reported in National Insurance Co.Ltd. v. Cholleti Bharatamma and Others (2008(1) SCC 423, the Supreme Court has held that the owner must travel only in the cabin of the vehicle and not in the platform of the vehicle along with the goods. So, from this, it is clear that only the owner of the goods or his authorized representative of the owner of the goods travelling in the vehicle, that too, if he is travelling in the cabin, alone are liable to be covered by the policy issued only for satisfying the provisions

of Section 147 of the Act alone.”

15. In that case, the policy contained another clause whereby going by the schedule of premium, ₹75/- was paid for covering the liability of non-fare paying passenger. It was also noticed that nothing is mentioned in the policy produced regarding the terms and conditions of the policy or the nature of person, who was intended to be covered by the collection of such additional premium.

16. In the light of the above clause, the Division Bench held in paragraph 17 that the Tribunal was not justified in coming to the conclusion that the liability of persons like the deceased carried in the vehicle is not covered by the policy and erred in exonerating the insurance company from the liability. Ultimately, this Court also found that there were violation of the conditions of the policy and after directing the the Insurance Company to pay the amount, the Company was given the right to recover it from the owner of the vehicle also going by the operative portion of the judgment under Section 149 (4) of the Act.

17. Heavy reliance was placed by the learned counsel for the

claimants on this judgment. It is also the argument of Sri.Shaji Thomas that it is not the law that the owner along with authorized representative together cannot travel in the vehicle. It is also his contention that there is no insistence that the authorized representative should be in the cabin. According to us, going by the view taken by the Division Bench in the above said decision itself in paragraph 12, the owner of the goods or his authorized representative only if they are travelling in the cabin alone will get the benefit of the policy covering the statutory liability.

18. The learned counsel Sri.Lal George relied upon the decision of a Full Bench of this Court in **Oriental Insurance Co. Ltd. v. Joseph (2012 (2) KLT 132 (F.B.)**, wherein it was held that when the case of the deceased is not covered under the policy, the question of pay and recover would not arise (paragraph 12).

19. At first, we will have to find out whether the policy covers the deceased and if there is no coverage under the policy, the question of pay and recover would not arise, which is the dictum laid down by the Apex Court, which we are bound to follow.

20. Sri.Lal George relied upon another decision in **Sanjeev Kumar Samrat v. National Insurance Co. Ltd. [2013(1) KLT 41 (SC)]**. Therein the view taken is that under Section 147 (1)(b)(i), the insurer is not obliged under law to indemnify owner of a goods vehicle when employees engaged by hirer of vehicle travel with the owner of goods. We extract paragraph 24 of the judgment hereunder :

“ It is worthy to note that sub-clause (i)(c) refers to an employee who is being carried in the vehicle covered by the policy. Such vehicle being a goods carriage, an employee has to be covered by the statutory policy. On an apposite reading of Sections 147 and 167 the intendment of the Legislature, as it appears to us, is to cover the injury to any person including the owner of the goods or his authorised representative carried in a vehicle and an employee who is carried in the said vehicle. It is apt to state here that the proviso commences in a different way. A policy is not required to cover the liability of the employee except an employee covered under the 1923 Act and that too in respect of an employee carried in a vehicle. To put it differently, it does not cover all kinds of employees. Thus, on a contextual reading of the provision, schematic analysis of

the Act and the 1923 Act, it is quite limpid that the statutory policy only covers the employees of the insured, either employed or engaged by him in a goods carriage. It does not cover any other kind of employee and therefore, someone who travels not being an authorised agent in place of the owner of goods, and claims to be an employee of the owner of goods, cannot be covered by the statutory policy and to hold otherwise would tantamount to causing violence to the language employed in the Statute. Therefore, we conclude that the insurer would not be liable to indemnify the insured.”

21. We also notice that going by the said decision also that someone who travels not being an authorised agent in place of the owner of goods, and claims to be an employee of the owner of goods, cannot be covered by the statutory policy.

22. Then the question is whether the argument of the learned counsel for the claimants that as the owner has not raised any claim and going by the statutory policy, there is a coverage for the owner or the authorised representative, in the absence of a claim by the owner, is there any legal impediment to direct the Insurance Company to satisfy the award. We have no doubt in our mind, in the light of the principles

laid down by the Apex Court in the decision quoted above that the coverage is to the owner or the representative. In fact as held by the Division Bench in **Mary & Others v. United India Insurance Co. Ltd. And Another (2014 (1) KLJ 805)** and as held by the Apex Court in **National Insurance Co.Ltd. v. Cholleti Bharatamma and Others (2008(1) SCC 423)**, the owner who is accompanying the goods will have to travel in the cabin and that will be the position in respect of authorized representative also. Therefore for getting coverage for the deceased and other three employees, it is evident that there should be coverage under any endorsement in the policy by paying additional premium, which is not the case here. As it is only an Act only Policy, we fail to see how under the provisions namely of Section 147(1)(b) and 147(1)(c), the persons travelling in the platform could get the benefit. The answer to the above can only be against the contentions of the learned counsel for the respondents.

22. The award of the Tribunal shows that reliance was placed on Exts.B2 and B3 to find that the Insurance Company is liable. We

have also gone through Exts.B1, B2 and B3. Ext.B1 shows that it is a liability only policy. Exts.B2 and B3 are only photocopies of the conditions of commercial vehicles package policy as well as private car policy. Learned counsel for the Insurance Company submitted that Exts.B2 and B3 were produced only for comparing the clauses in the respective policies. The insurer's name is not therein in Exts.B2 and B3 also. Therefore no reliance can be placed on Exts.B2 and B3.

23. In this appeal the Insurance Company has directed to deposit 50% of the award amount within four weeks and for filing the appeal they have deposited Rs.25,000/- before the Tribunal as evidenced from the receipt dated 29.6.2010. We permit the Insurance Company to withdraw the said amount.

24. In that view of the matter, we allow the appeal and hold that the Insurance Company is not liable to satisfy the award and the owner of the vehicle, the first respondent before the Tribunal, who is the 6th respondent before this Court, is liable to satisfy the award along with the interest.

The award is modified accordingly and the appeal is allowed to

that extent. The parties will suffer their costs in the appeal.

T.R.RAMACHANDRAN NAIR, JUDGE

SV.

K.P.JYOTHINDRANATH,JUDGE