

**Nafeesa Vs. Koya**

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**SooperKanoon Citation :** [sooperkanoon.com/722625](http://sooperkanoon.com/722625)

**Court :** Kerala

**Decided On :** Feb-13-2003

**Reported in :** II(2003)ACC561; 2004ACJ1137; 2003(2)KLT293

**Judge :** K.A. Abdul Gafoor and; R. Basant, JJ.

**Acts :** [Motor Vehicles Act, 1988](#) - Sections 96

**Appeal No. :** M.F.A. No. 79 of 1993

**Appellant :** Nafeesa

**Respondent :** Koya

**Advocate for Def. :** T.K.M. Unnithan, Adv.

**Advocate for Pet/Ap. :** P.K. Abbobacker and; P. Chandrasekhar, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**R. Basant, J.**

1. The award of the Motor Accidents Claims Tribunal in so far as it limits the liability of the insurer only to Rs. 50,000 is challenged, by the claimants in this appeal. The total compensation awarded is Rs. 1,64,000.

2. The husband of the first claimant, the father of claimants 2 to 4 and son of claimant No. 5 suffered injuries in a motor accident and succumbed to the same. The deceased was knocked down by a taxi car driven, owned and insured by respondents 1 to 3 respectively. The tribunal found that in all an amount of Rs. 1,64,000 is due by way of compensation. Respondent No. 3, the insurer was directed to pay Rs. 50000 with interest and costs. The owner of the vehicle was directed to pay the balance.

3. Before the Tribunal the insurer had taken up a contention that the insurer's liability is limited to an amount of Rs. 50000. No evidence whatsoever is available on this crucial aspect. The Tribunal in paragraph 7 of the award observed as follows:-

'..... The third respondents has admitted the insurance coverage, subject to the terms and conditions of the policy. It is admitted that the liability of the Insurance Company is limited to Rs. 50,000. Therefore the 3rd respondent is bound to pay only Rs. 50,000 and the balance has to be paid by the 2nd respondent.'

4. The learned counsel for the appellants contends that no such admission was at any rate made by the claimants/appellants herein. There was no evidence whatsoever on that aspect also. In these circumstance the Tribunal erred grossly in assuming that there was an admission on this crucial aspect and in proceeding to dispose of the claim on the basis of such alleged admission.

5. The available records have been perused. There is nothing to indicate that any such admission was made by the claimants or any other at any point of time. There is significant and crucial absence of evidence on that crucial aspect of limit of liability of the insurer.

6. It is trite that the burden is heavy on the insurer to plead and substantiate the contention that there are limits for coverage under the policy. That burden must certainly be discharged by the insurer. The claimants will not be in a position to make any satisfactory pleadings or adduce evidence on that aspect as they are third parties to the policy of insurance and have no access to such policy. At worst they can be blamed only for not calling upon the insurer/insured to produce the

policy document. Though the insured can, if he wants, produce the policy document, he has not chosen to produce the same. The non-production of the policy document by the insured cannot also prejudice the rights of the claimants. The Supreme Court in *National Insurance Co. Ltd., New Delhi v. Jugal Kishore*, AIR 1988 SC 719 has given stress to the obligation of the Insurance Company to produce the policy of insurance for doing justice to the parties. A Division Bench of this Court in *Chandran v. United India Insurance Co. Ltd.* (1989 (1) KIT SN 5) also has held that the insurer will be liable to pay the entire award amount, unless such limit of policy coverage is pleaded and established by satisfactory evidence.

7. Coming back to the facts of the case the policy document was, for obscure reasons not made available before the Tribunal. Even assuming that the provisions of the Motor Vehicles Act do not compel the statutory insurer to cover the entire liability of the insured to third parties/pendestrains, it cannot be disputed that a policy of insurance can cover larger liability than what is compulsorily coverable under the statute. In this view of the matter also the burden is certainly heavy on the insurer to produce the policy document before the court to satisfy the court that the liability of the insurer is limited and does not cover the entire liability to the claimants.

8. Before this Court on 3.12.1999 a schedule of the policy has been produced. Even here it is crucial to note that the policy document as such is not produced. No explanation whatsoever is offered why the policy document is not produced at least before this Court. Later when this was pointed out, a printed policy document without any entries has been produced for the perusal of this Court. On going through that policy document, it is very evident that the said document cannot have any connection with the policy of insurance in the instant case. What is produced is copy of a post 1988 amendment policy and it refers to the [Motor Vehicles Act, 1988](#). Obviously therefore, the document produced can be of no help, as the accident was on 16.3.1989, before the enforcement of the 1988 Act. There is absolutely no justification in the conduct of the Insurance Company not producing the policy document at least before this Court.

9. Our attention has been drawn to the decision of the Supreme Court reported in Oriental Insurance Co. Ltd. v. Nafeessu (2001 (1) KIT 498 (SC)). The terms of the policy produced before us is exactly identical to the policy document which the Supreme Court had occasion to consider. The avoidance clause of the policy is extracted below:-

'Avoidance of certain terms and right of recovery:

Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the [Motor Vehicles Act, 1988](#).

But the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.'

This identical clause is extracted in paragraph 5 of the said judgment. In paragraph 6 of the said judgment of the Supreme Court there is reference to Section 11 of the policy which deals with liability of third parties. An exactly identical clause relating to liability to third parties is there in the document produced as the policy document in the instant case by the Insurance Company. The Observations in paragraphs 5, 6 and 10 of the judgment in 2001 (1) KLT 498 are therefore applicable squarely to the document produced as the policy document in the instance case also. We extract paragraphs 5, 6 and 10 of the judgment in 2001 (1) KLT 498 (SC) below:-

'5. Under the insurance policy the limit of company's liability in respect of any one claim or series of claims arising out of one event is Rs. 50,000 only. However, the avoidance clause of the policy provides:

'Nothing in this policy or the endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96.

But the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions'.

6. Section 11 of the policy deals with 'liability of third party' and provides that the company will indemnify the insured against all sums including claimants costs and expenses which insured become legally liable to pay in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or damage to the property caused by such use. A conjoint reading of all the terms of the policy of insurance executed in this case indicate that total extent of liability of the insurance policy is Rs. 50,000 but the company is liable to indemnify the insured against all sums including claimant's costs and expenses which insured becomes liable to pay and nothing in the policy affects the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of Section 96 of the Act. However, the insured is liable to repay to the company all sums paid by the company which the company would not have been liable to pay but for the condition of liability relating to third party.

10. In the facts and circumstances of this case we find that despite holding the liability under the policy limited to the extent of Rs. 50,000, the Claim Tribunal and the High Court were not unjustified in directing the appellant-company to pay the whole of the awarded amount to the claimants on the basis of the contractual obligations contained in clauses relating to the liability of the third parties and avoidance clause. However, the Claim Tribunal and the High Court were not justified in rejecting the right of the appellant-company to recover from the insured the excess amount paid in execution and discharge of the award of the Tribunal.'

10. In view of the interpretation of the identical terms in the policy document by the Supreme Court, we are of the opinion that identical directions can be issued in this case also.

11. In view of which we have taken above, it is not necessary to further consider the interesting argument advanced by the learned counsel for the appellant that Section 95(2)(b) of the Motor Vehicles Act, 1939 is not applicable to non-passengers/ pedestrains. Counsel strenuously contends that Section 95(2)(b) is applicable only to passengers in vehicles which are authorised to carry passengers for hire or reward or by reason or in pursuance of a contract of employment. It is contended that the clause will apply only to passengers who are

carried for hire or reward or by reason of or in pursuance of a contract of employment and cannot have any application to pedestrians and non-passengers. Counsel relies on the policy document that is produced and contends that the schedule of premium under the head B covers liability to public risk without any limitation. Rs. 120 is the premium collected to cover public risks for all vehicles whether they belong to the class of goods vehicles, public service vehicles or private vehicles. So far as the users of the road outside the vehicle are concerned, they are completely covered under Clause B for which identical premium is levied for all classes of vehicles. In this view of the matter it is contended that so far as public service vehicles are concerned, the insurer's liability in respect of the pedestrians on the road is total and without limit and can admit of no limitation. We are of opinion that the question raised, though interesting, need not be considered in detail in this appeal as we have already held that the insurance company must be mulcted with liability for the reason that the actual policy document has not been produced and that under the document that has been produced as the policy document, they cannot avoid liability in the light of the decision in 2001 (1) KLT 498 (SC).

We are in these circumstances of the opinion that the challenge is bound to succeed. The insurer is liable to compensate the claimants without any limit of liability. We do of course agree that in the light of the dictum in 2001 (1) KLT 498 (SC) the insurer will be entitled to recover the amount paid to the claimants in excess of Rs. 50,000 and the proportionate interest and costs, from the insured. A direction to that effect can hence be issued.

12. We find no merit in the contention that the insured having been deleted from the array of parties in this appeal at the risk of the claimants, no such direction can be issued. We are not mulcting the insured with any additional liability than the liability imposed on him under the impugned award. Under the impugned award the claimants are permitted to recover the balance amount from the insured. We are now only directing that the insured will be liable to pay the same amount but that the recovery of that amount can be made by the insurer after making payment to the claimants. The impugned award is thus not in any way being varied to disadvantage of the insured. In these circumstances the contention that without

the insured on the party array in this appeal such a modification cannot be undertaken is found to be without any merit.

13. In the result

(i) This appeal is allowed with costs, (ii) The impugned award is modified.

(iii) It is directed that the insurer shall pay the entire amount of Rs. 1,64,000 together with interest and costs to the claimants.

(iv) It is further directed that the third respondent insurer shall be entitled to recover the excess amount paid (in excess of Rs. 50,000 with proportionate interest and proportionate costs throughout) from the insured under Section 110-E of the Motor Vehicles Act, 1939.

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