(1998) 02 KL CK 0012

In the High Court Of Kerala

Case No : M.F.A. No. 1199 of 1991

National Insurance Co. Ltd. — APPELLANT

Vs

Leela and Others — RESPONDENT

Date of Decision : 24-02-1998

Acts Referred:
Motor Vehicles Act, 1939 — Section 110C(2A)

Citation : (1999) ACJ 542 : (1998) 2 ILR (Ker) 865

Hon'ble Judges : K.V. Sankaranarayanan, J;AR. Lakshmanan, J

Bench : Division Bench

Advocate : Mathews Jacob and Saji Issac K.J, for the Appellant; C.P. Sudhakara Prasad and P.B. Suresh Kumar, for the Respondent

Judgement

A.R. Lakshmanan, J.—Heard both sides. The insurance company is the appellant in this appeal. Respondent Nos. 1 to 6 filed a claim petition claiming compensation of Rs. 5,00,000 for the death of one Sivanandan Pillai who died in a road accident on 7.7.1986 at Quilon. He was hit by a scooter KRQ 4574 driven by the respondent No. 8. The respondent No. 7 is the owner and the appellant is the insurer of the said scooter. Negligence was alleged against the respondent No. 8. Respondent Nos. 7 and 8 filed separate written statements before the Tribunal contending that the respondent No. 8 was not negligent in causing the accident and that the accident occurred due to the contributory negligence of the deceased when he attempted to cross the road and that the quantum of compensation claimed is highly excessive. The insurance company also while admitting the policy, has challenged the quantum. The Tribunal, after finding negligence on the part of the respondent No. 8, passed an award for Rs. 3,50,000 with 12 per cent interest from 27.9.1986 and directed the same to be paid by the appellant.

2. According to the appellant, the award passed by the Tribunal is highly excessive and without any basis. As the respondent No. 7 was not cooperative to file a joint appeal in spite of its best efforts, the appellant has filed the above

appeal. According to the insurance company, there is every reason to believe that insured is colluding with the claimants at this stage though he had contested the case before the Tribunal. Therefore, it is submitted that the insurance company is now invoking the right u/s 110-C (2-A) of the Motor Vehicles Act, 1939, to contest the claim on all grounds that are available to the insured. Moreover, in the policy issued in respect of the offending vehicle there is a condition reserving the right of the appellant to defend the claim on all or any of the grounds available to the insured. The insurance company in fact filed the insurance policy along with C.M.P. 1197 of 1991 at the time of filing the appeal in this Court. It is stated in the affidavit in support of the said petition that the policy was not produced before the Tribunal as there was no necessity to invoke the above said condition by the insurance company since the insured had contested the case there. But now he is not cooperating for filing a joint appeal. The insurance company is forced to take up the defence on his behalf also. Therefore, it is prayed that the copy of the policy produced along with the C.M.P. may be accepted as additional evidence in this case. We see merit in the submission. Learned counsel for the claimant contended that the insurance company ought to have filed this petition and the policy before the lower court or before the Tribunal and having failed to produce a policy before the Tribunal the insurance company should not be allowed to produce the policy at this stage in this appeal. We are unable to accept the contention of the counsel for the claimant. The insurance company has clearly explained in the affidavit as to the necessity to invoke the condition in the policy by producing the same at the appellate stage since the insured is not co-operating in filing a joint appeal. We find merit in the submission of the insurance company. Therefore, we allow C.M.P. 1197 of 1991 and admit copy of the policy as an additional evidence in this case.

3. C.M.P. 1198 of 1991 was filed by the insurance company along with the appeal to allow the insurance company to challenge the award on all grounds that are available to the insured. In view of the order passed in C.M.P. 1197 of 1991 we allow this petition and also permit the insurance company to invoke its right u/s 110-C (2-A) of the Motor Vehicles Act, 1939, to contest the claim on all grounds that are available to the insured by filing an appeal. Learned counsel for the insurance company in support of this contention cited a decision of this Court reported in New India Assurance Co. Ltd. v. Celine 1993 ACJ 371 (Kerala). Learned counsel for the claimant in support of his contention cited New India Assurance Co. Ltd. Vs. Celine and Others, . We have gone through the said decision. The Supreme Court in that case held that the defence referred to in Section 96 (2) which the insurance company can take, were exhaustive and no more defence could be added thereto unless such a right was reserved. In the instant case, the insurance company had specifically reserved its right in the insurance policy. Condition No. 2 of the insurance policy reads as follows:

2. No admission offer/promise of payment shall be made by the insured without the written consent of the company which shall be entitled if it so desires to take

over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured shall give all such information and assistance as the company may require. If the company shall make any payment in settlement of any claim and such payment includes any amount not covered by this policy the insured shall repay to the company the amount not so covered.

Since the right was reserved under condition No. 2 in the policy, we are of the view that the insurance company is at liberty to raise all the contentions and defending the action not only in its name but also in the name of the insured. The above Supreme Court decision was cited before the Full Bench. The Full Bench held that the Supreme Court decision in Captain Ithar Singh''s case 1958 ACJ 1 is clear authority that it is open to the insurer to reserve a right in the policy of insurance to defend the action in the name of the assured and in case, there is such a reservation, all defences open to the assured can be urged by him. The Full Bench also said that the above decision is binding on it and has been, in fact, followed by various High Courts. In view of the above Supreme Court decision and followed by the High Court we have permitted the counsel for the insurance company to argue the matter on merits. Counsel for the insurance company submitted that the award of the Tribunal in granting the compensation at Rs. 3,50,000 without any discussion as to how claimants are entitled for the amount is liable to be set aside. We have gone through the award of the Tribunal. Learned counsel appearing for the claimants at the time of his reply to the argument of the counsel for the insurance company tried to justify the findings rendered by the Tribunal. We are of the view that the Tribunal has awarded a sum of Rs. 3,50,000 without any discussion as to how the claimants are entitled for that amount. As rightly pointed out by the learned Counsel for the insurance company, the Tribunal has adopted a rough and ready method in awarding the compensation of Rs. 3,50,000. There is absolutely no discussion about the likely salary which the deceased may get on promotion as a loco foreman. There is no discussion at all as to how the compensation of Rs. 3,50,000 has been arrived at. Therefore, we as an appellate court, propose to examine the entire materials on record and also findings. In this case, the accident took place on 7.7.86. Sivanandan Pillai died as a result of the rash and negligent driving of the scooter bearing registration No. KRQ 4574 by the respondent No. 8 in the course of his employment under respondent No. 7 who is the registered owner of the scooter. The Tribunal has held that the accident was due to the rash and negligent driving. Insofar as the quantum of compensation is concerned the claimants filed Exh. A-7 which is the salary certificate issued by the Divisional Personnel Officer of the Trivandrum Railway Division of the Southern Railway. According to Exh. A-7 the pay of Sivanandan Pillai was Rs. 378 and including other allowances, etc., the total amount drawn by him as salary was Rs. 1,202.30. The other documents filed by the claimants, namely, Exhs. A-l to A-6 are the copy of the

F.I.R., copy of scene mahazar, copy of charge-sheet, copy of inquest report, copy of post-mortem certificate and copy of admission register. Except Exh. A-7, no other proof has been filed in regard to the probable salary which the deceased may get on his promotion. Exh. A-7 shows that he was getting Rs. 1,202.30 by way of salary. On the date of the accident he was only 41 years old. It is also in evidence that he was likely to be promoted as the loco foreman.

4. Taking into consideration all the future prospects of the deceased, we may safely fix Rs. 2,000 as the monthly income of the deceased. Counsel appearing for the insurance company has fairly conceded that this figure may be safely adopted for calculating the compensation to be awarded. One-third of Rs. 2,000 to be deducted for personal expenses appropriately comes to Rs. 600. Contribution to the family would be Rs. 1,400 per month. If multiplied by 12 months it becomes Rs. 16,800 per annum. Since the deceased had 17 years left for retirement we adopt 17 years as multiplier which comes to Rs. 2,85,600 (16,800 x 17). In this case, the Tribunal has awarded a sum of Rs. 3,50,000 by way of global compensation. We are of the view that in matters like this some amount should also be awarded by way of pain and suffering of the deceased and loss of consortium for the wife. We may safely fix Rs. 14,000 by way of conventional damages. Adding these conventional damages to the amount awarded at Rs. 2,85,600, the claimants would be entitled to a total compensation of Rs. 2,99,600 which may be rounded off to Rs. 3,00,000. The claimants will be entitled to interest at 12 per cent per annum from 27.9.1986, the date of filing the claim petition including costs. It is represented that insurance company has already deposited Rs. 1,00,000 with the Tribunal. The balance amount now awarded shall also be deposited with the Tribunal within two months from today. C.M.P. No. 1198 of 1991 stands allowed and C.M.P. No. 1199 of 1991 stands dismissed.