

(1992) 12 KL CK 0024

In the High Court Of Kerala

Case No : M.F. Appeal No's. 313, 391, 529, 629 and 737 of 1986 and 424 of 1987

New India Assurance Co. Ltd.

APPELLANT

Vs

Celine and Others

RESPONDENT

Date of Decision : 14-12-1992

Acts Referred:

Motor Vehicles Act, 1939 — Section 110C(2A), 95(1), 95(2), 96, 96(1)

Citation : (1993) 1 ACC 445 : (1993) ACJ 371 : (1993) 2 ILR (Ker) 653

Hon'ble Judges : M. Jagannadha Rao, C.J.; P. Krishnamoorthy, J.; K.A. Nayar, J

Bench : Full Bench

Advocate : P.V.R. Kaimal, for the Appellant; T.H. Abdul Azeez, in M.F.A. No. 391 of 1986, K.P. Sreekumar, in M.F.A. No. 529 of 1986, Thomas Anthony, for Respondent Nos. 2 and 3 in M.F.A. No. 529 of 1986 and Respondents Nos. 6 and 7 in M.F.A. No. 629 of 1986, P.V. Jyothi Prasad, for Respondents Nos. 1 to 5 in M.F.A. No. 629 of 1986, George Thomas, in M.F.A. No. 737 of 1986, P.M. Mohamed Ali, in M.F.A. No. 737 of 1986, N. James Koshy, in M.F.A. No. 737 of 1986 and T.G. Rajendran, in M.F.A. No. 424 of 1987, for the Respondent

Judgement

Jagannadha Rao, C.J.—This reference to a Full Bench has been made for a decision on the correctness of the Division Bench ruling in *United India Insurance Co. Ltd. v. Surendran Nair* [1990] 1 KLT 10. The point in issue is whether in view of the provisions of Section 96(2) and (6) of the Motor Vehicles Act, 1939, it is open to the insurer to rely on a "reservation clause" in the policy and then to raise all the defences open to the insured against the third party, in an action for compensation filed by the third party. The respondents-claimants contend, on the basis of the ruling in *Surendran Nair's* case [1990] 1 KLT 10 that, notwithstanding the existence of any "reservation clause" in the policy, it is not permissible for the insurer to either contend that there is no negligence on the part of the insured or that the quantum of compensation awarded against the insured is excessive even when the quantum is within the statutory limits in Section 95(2). It is true that the ruling in *Surendran Nair's* case [1990] 1 KLT 10 supports the respondents' case for saying that in spite of a "reservation clause"

the insurer cannot take such defences before the Tribunal or file an appeal against the award raising such pleas. The decision states that Section 96(2) and (6) of the Act permit only certain specific defences to be taken by the insurer and that the said defences are exhaustive. It further says that it is only in the limited class of cases where Section 110C(2A) applies that the insurer can raise defences other than those stated in Section 96(2). Section 110C(2A) permits the insurer to take all defences when it is impleaded suo motu by the Tribunal upon being satisfied that there is collusion between the claimants and the insured or where the insured is ex parte. The question is whether Section 96(2) and Section 110C(2A) are exhaustive and whether the insurer can, when there is a "reservation clause", raise all pleas available to the insured including pleas of want of negligence of the insured or that the award is excessive.

2. The contention on behalf of the insurer by learned counsel, Sri P.V.R. Kaimal, is that Section 96(2) and Section 96(4) deal with cancellation or avoidance of a contract of insurance, He submits that when an insurer accepts the policy but denies liability under the policy, on the basis of a "reservation clause" in the policy, Section 96(2) and (6) cannot come in the way. It is also argued that Section 110C(2A) is only an enabling provision and that, if there is a "reservation clause" in the policy, the insurer can take all defences open to the insured against the claimants-even if there is no collusion between the insured and the claimants and even if the insured is not ex parte as stated in Section 110C(2A). It is argued, therefore, that the insured could, in view of the "reservation clause", contend that there is no negligence on the part of the insured or his servants or that the quantum of compensation is on the high side, even though it is within the upper limit mentioned in Section 95(2).

3. On the other hand, it is contended for the claimants by Sri T.G. Rajendran, Sri Ravindran, Sri Sreekumar and others that Section 96(2) bars the insurer from raising the above contentions. It is also contended that except in the cases specified in Section 110C(2A), the insurer cannot raise defences other than those stated in Section 96(2). Reliance is also placed on Section 96(1), Section 96(3) and Section 96(4) to say that the insurer is bound to pay the entire award amount and is then to recover excess from the insured. It is also pointed out that in some of these cases before us, extra premium is paid by the insured to make the insurer liable for an "unlimited" sum and, therefore, the appeals have to be dismissed without going into any question of negligence or correctness of the quantum of compensation.

4. On the basis of the above contentions, the following points arise for consideration :

(1) Whether, in a case where the insurance policy contains a reservation clause, the insurer can raise defences, other than those mentioned in Section 96(2), in its own name ?

(2) Whether, in a case where the insurance policy contains a reservation clause,

the insurer can raise all defences, even though the case is not one falling u/s 110C(2A) where there is collusion between the insured and the claimants or one where the insured has remained ex parte ?

(3) Whether, in view of Section 96(1) and 96(3), the third party claimants could recover the total compensation amount from the insured leaving it to the insurer to recover any excess from the insured ?

(4) Whether, in a case where, on account of extra premium paid by the insured to the insurer so as to make the insurer's liability "unlimited" and not confined to the limits in Section 95(2), the third party could claim the benefit of the unlimited liability as against the insurer directly u/s 96(1) read with Section 96(4) and Section 110B ?

Point No. 1.--Before going into the point, it would be convenient to refer to the so-called "reservation clause". We may point out that the clause does not use the word "reserved". In insurance parlance, it is actually called an "excess clause" (see Hardy Ivamy, *Fire and Motor Insurance*, 1984. 4th edition, page 289). The clause which is relied upon by the appellant-insurer is condition 2 of the policy of the insurance and reads as follows :

"No admission, offer, promise, payment or indemnity shall be made or given by or on behalf of 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 the name of the insured 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."

5. As the question is whether the above clause can be operated upon by the insurer in the presence of Section 96(2) and 96(4), it is also necessary to refer to these statutory provisions, to the extent relevant. As Section 96(1) is the only provision which creates a direct right to the claimants against the insurer and is referred to in Section 96(2), it is also necessary to refer to the said sub-clause.

"96(1). If, after a certificate of insurance has been issued under Sub-section (4) of Section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree, any sum. not exceeding the sum assured, payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

6. The above provision in Section 96(1) thus directly creates a right in favour of the claimants against the insurer to recover the amount of such liability as is required to be covered by a policy u/s 95(1)(b). We have held in another Full Bench case in M. F. A. No. 298 of 1987 National Insurance Co. Ltd. Vs. Roy George and Others, [FBI that inasmuch as Section 95(1)(b), in its turn, refers to Section 95(2)(b), the insurer is liable only up to the limits in Section 95(2) and not for the entire award as passed against the insured. We shall now refer to Section 96(2) and (6).

"96(2). No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given, the insurer had notice through the court of the bringing of the proceedings or in respect of any judgment so long as execution is stayed thereon pending an appeal ; and an insurer to whom notice of the bringing of any such proceeding is so given, shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :--

(a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident.. . and that either the certificate of insurance was surrendered to the insurer ... or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation . . .

(b) that there has been a breach of a specified condition of the policy, being one of the following conditions . . .

(c) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

7. Section 96(6) which limits the defences for avoidance of the policy to the defences mentioned in Section 96(2), reads as follows :

"96(6). No insurer to whom the notice referred to in Sub-section (2)... has been given, shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in Sub-section (1). . . . otherwise than in the manner provided for in Sub-section (2) . . ."

8. As already stated, the point is whether the "reservation clause" in the policy in any manner conflicts with Section 96(2) and 96(4) so as to become ineffective. Before we go into the above aspect, we shall point out that such a clause, which is called an "excess clause", is a well-known clause in the law of insurance. It fell for consideration in *Beacon Insurance Co. Ltd. v. Langdale* (1939] 4 All ER 204 before the Court of Appeal. There the insured while driving a motor vehicle dashed against a pedal cyclist sometime before March, 1939, and injured the latter. The pedal cyclist sued for damages. The insurer, by reason of the reservation clause, entered into a settlement out of court with the pedal cyclist and paid him ₹45 and claimed ₹5 from the insured, as provided in the policy.

Then the insured refused to pay ₹5 as agreed by him in the policy. As he refused to pay, the insurer filed an action against the insured for ₹5. The insured contended that the insurer had no right to settle the matter with the claimants without notice to him (the insured) and also that the settlement was not bona fide. The said contention was rejected. We shall refer to the relevant clauses in that policy. They are as follows (at p. 205) :

"The company . . . 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 the name of the insured 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."

9. Another condition stated that the insured was "liable to pay the first ₹5 or any less amount for which the claim may be settled of each claim arising under this policy."

10. It was held by the Court of Appeal that the insurer was entitled to settle the claim with the claimant and that the settlement was bona fide and the insured had no right to be consulted before settlement. Slesser L.J. observed (at p. 206) :

"Once it is conceded, or once it is found, that the insurance company have the power to settle the claim, then the event which is contemplated in this provision has arisen. There has been a settlement, and thereupon the assured has agreed, it is declared, that he is liable to pay the first ₹5 for which the claim may be settled. That seems to me to conclude the matter."

11. The significance of the above decision which related to an accident that occurred just before March, 1939, is that, by that time, the Road Traffic Act, 1934, had come into force with effect from July 31, 1934, and Section 10(2) and (3) of that Act had directed that certain limited defences as specified in Section 10(2) and (3) alone could be taken by the insurer in an action by the claimants. No contention was raised that Section 10(2) and (3) were a bar to the defence that the insurance company was entitled to enter into a settlement in view of the reservation clause.

12. The provisions of Section 96(2) and (6) fell for consideration in two decisions of the Supreme Court. In *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, the Supreme Court held that the defences referred to in Section 96(2) which an insurance company could take, were exhaustive and no more defences could be added thereto, unless such a right was reserved. The passage reads thus (at page 66 of 29 Comp Cas) :

"The statute (Motor Vehicles Act, 1939) has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds, and, therefore, to the statute for reasons of hardship. We are

furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him ..."

13. The above decision is a 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 above decision is binding on us and has been, in fact, followed by various High Courts.

14. In *National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others*, their Lordships referred to *Itbar Singh's* case [1959] 29 Comp Cas 60 (SC) but distinguished the same. There the contention for the claimants was that the insurance company cannot file an appeal for restricting its liability to the pecuniary limits mentioned in Section 95(2) of the Act. The contention was that the same was not one of the defences mentioned in Section 96(2) of the Act. The Supreme Court rejected the said contention and held that Section 96(2) which restricted the insurer to a limited number of defences applied only if the insurance policy was to be either "cancelled" as in Section 96(2)(a) or if it was to be totally "avoided" on the ground of misrepresentation or suppression of material facts as in Section 96(2)(c) or where as in Section 96(2)(b), the insured had committed a breach of certain specified conditions of the policy thereby giving a right to the insurer to "avoid" the policy. It was held by their Lordships that when an insurer wanted to file an appeal contending that it could not be made liable for anything beyond the "liability required to be covered u/s 95(1) (b)", such a plea could not be described as a plea to "avoid" the policy itself in toto within Section 96(6).

15. That *Itbar Singh's* case [1959] 29 Comp Cas 60 (SC) permits the insurer to "reserve" his right to defend the case on grounds available to the owner as stated above, has been rightly accepted and followed by this court earlier in *United India Insurance Co. Ltd. v. Premakumaran* [1989] 66 Comp Cas 818 and in *United India Fire and General Insurance Co. Ltd, v. Kalyani* [1985] 58 Comp Cas 746 and also in *New India Assurance Co. Ltd. v. rAJU Markose* [1990] 67 Comp Cas 528. We are of the view that the decision to the contrary in *United India Insurance Co. Ltd. v. Surendran Nair* [1990] 1 KIT 10 is not correct and it is accordingly overruled.

16. The view we have taken, following *Itbar Singh's* case [1959] 29 Comp Cas 60 (SC) is in accord with the view taken in regard to the effect of the "reservation clause" by the Madras High Court in *Madras Motor and General Insurance Co. Ltd. Vs. Jagadeeswari and Others*, , the Delhi High Court in *Vanguard Insurance Co. Ltd. v. Rohini Bhan* [1970] ACJ 11 (Delhi), the Madhya Pradesh High Court in *Mangdal v. Prasram* [1970] ACJ 86 (FBI), the Orissa High Court in *Orissa Co-operative Insurance Society Ltd. v. Bhagban Sahu* [1971] ACJ 49 and the Jammu and Kashmir High Court in *United India Fire and General*

Insurance Co. Ltd. v. Lahshimi S. Ganjoo [1982] ACJ 470 We may point out that a Full Bench of the Orissa High Court in National Insurance Co. Vs. Magikhaia Das (After him) Mst. Laxmi Dibya and Others, has also, in principle, taken the same view as regards the effect of a reservation clause but in the end it did not allow the insurer to raise the defence, on facts, on the ground that the insurer did not choose to defend the action in the name of the insurer.

17. We may add that we are not in agreement with the latter point of view so expressed by the Orissa High Court in the last mentioned Full Bench case in National Insurance Co. Ltd. v. Magikhaia Das [1976] ACJ 239 that the reservation clause would help the insurer to raise all defences against third parties which could have been raised by the insured only in case the insurer expressly defended the action in the name of the insured. That leads us to the question as to what the rights of the insurer are, in the case of "assignment" by the insured, in favour of the insurer, in respect of the former's rights against third parties. For the purpose of deciding this question it is necessary to refer to the general law relating to insurance. Under that law, a distinction has been made between the cases where the insurer obtains assignment from the insured, and cases where the insurer becomes subrogated to the rights of the insured by way of paying the amount due to the insured. It is settled in the law of insurance that the insurer can avail of all the defences and grounds or remedies which the insured then has against third parties. The only difference is that in the case of assignment the insurer can take action in his own name, while in the case of subrogation, the insurer has to take action only in the name of the insured. In Halsbury's Laws of England, 4th edition, volume 25, paragraphs 523 to 527, it is stated that the doctrine of subrogation applies to all contracts of non-marine insurance which are contracts of indemnity, such as fire insurance, motor insurance and contingency insurance. It is further stated that in the strict sense of the term, subrogation expresses the right of the insurers to be placed in the place of the assured so as to be entitled to the advantage of all rights and remedies which the assured possesses against third parties, and that the most obvious case of subrogation arises in the law of torts. It is further stated that if an owner of a vehicle incurs third party liability, consequent to negligence of the owner's servants, then the insurer who discharges the liability of the insured gets subrogated to the rights of the insured against third parties : *Lister v. Romford Ice and Cold Storage Co, Ltd.* [1957] AC 555 . In the absence of a formal assignment of the rights of action, as stated in *King v. Victoria Insurance Co.* [1896] AC 250 (PC) the insurers cannot sue the third parties in their own name. *London Assurance Co. v. Sainsbury* [1783] 3 Doug KB 245. That is what is stated in Halsbury's Laws of England.

18. The law is also similarly stated in MacGillivray on Insurance Law, fourth edition, 1953, paragraph 1686 (accepted in later editions also) as follows:

"The legal right to compensation remains in the assured *King v. Victoria Insurance Co.* [1896] AC 250 ; *Crandall v. Goodwich* [1883] 16 Fed. Rep 75 and,

therefore, unless there has been an express assignment of the legal right, actions at law brought for the benefit of the insurer are brought in the name of the assured *London Assurance Co. v. Sainsbury* [1783] 3 Doug KB 245 ; *Wealkans v. Canada Southern* [1894] Ont A. R. 297 ; *Rochingham Mutual Fire v. Boshier* [1855] 39 MC 253. In Courts of Equity or of Admiralty, the insurer has always been allowed to sue in his own name *St. Louis Rly v. Commercial Insurance* [1890] 139 US 223 ; *Liverpool Steam Co. v. Phoenix* [1888] 129 US 397 ; and *Garrison v. Memphis Insurance* [1856] 19 How US 312."

19. The decision in *King v. Victoria Insurance Co.* [1896] AC 250 (PC) above referred to in fact decided that when there was assignment by the assured in favour of the insurer in respect of the assured's rights against third parties, the insurer can sue the third parties in his own name, and avail of all the defences and remedies of the assured against the third parties.

20. The above principle laid down in English law has been accepted by various High Courts in India. The principle has been accepted recently by the Madras High Court in a motor insurance case in *Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another*, That was a case where the insured had assigned his rights (as against third party) in favour of the insurer, and the insurer was held entitled to sue the third party in his own name. In the above said decision, the Madras High Court followed an earlier ruling of the same High Court in *Seethamma v. Venkataramanayya* AIR 1916 Mad 473 and also the decision of the Calcutta High Court in *Union of India v. Alliance Assurance Co. Ltd.* [1962] 66 CWN 419. It was further held in *Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another*, that such an assignment by the insured in favour of the insurer in respect of the rights covered by the motor insurance policy was not hit by Section 6 of the Transfer of Property Act, and that the assignment was valid as a transfer of a chose in action as defined in Section 130 of the Transfer of Property Act. In the other cases, the Madras and Calcutta High Courts also held that Section 6(e) of the Transfer of Property Act was not attracted to cases of assignment of rights by an assured in favour of the insurer. The decision of the Madras High Court in *Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another*, , has been followed by the Karnataka High Court in *Union of India v. Commercial Union Assurance Co.* [1974] 2 KLJ 521.

21. In the light of the above principles of law, it is, therefore, clear that the insurance company has a right to defend or take action against the third party in its own name, on the basis of the assignment by the insured in favour of the insurer in respect of the former's rights against third parties. It is not necessary in the case of assignment that the action by the insurer should be in the name of the insured.

22. The further question that arises is as to the meaning of the words in the reservation or assignment clause in question. We have already referred to the said clause, but we shall again refer to the relevant portion thereof. It reads :

"No admission, offer, promise, payment or indemnity shall be made or given by or on behalf of 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 . . ."

23. We have already noticed that in the case of assignment of rights by the insured in favour of the insurer the insurer has a right to conduct the proceedings in its own name. Therefore, we have to understand the relevant words in the above said reservation clause in the light of the said principle. In our view, the words "if it so desires", gain considerable importance in such a context. In our view, the insurer is given a choice "if it so desired" to conduct the proceedings in the name of the insured. But this does not mean that the insurer is precluded from defending or prosecuting the proceedings in his own name, and there are no words in the reservation clause which take away such a right in favour of the insurer which is available under the general law of insurance.

24. For the aforesaid reasons, we hold that the appellant-insurance company can take advantage of the "reservation clause" which is in the nature of assignment by the insured of his rights against the third party, and the insurer can defend any action filed by the third party by conducting the same in its own name (insurer). In such a case, the insurer can raise all defences which the insured could have raised, and obviously the insurer is not confined to the limited defences mentioned in Section 96(2) of the Motor Vehicles Act. Therefore, when there is a reservation or assignment clause as stated above, the insurer can even take a defence that there is no negligence on the part of the insured or that the quantum of compensation awarded to the third party is excessive, even when the said quantum is below the pecuniary limit mentioned in Section 95(2) of the Motor Vehicles Act. We hold accordingly on point No. 1.

Point No. 2-- It is the contention of the respondents-claimants that Section 110C(2A) of the Motor Vehicles Act, 1939, introduced by the Central Act 56 of 1969 with effect from March 2, 1970, leads to the inference that the insurer can raise all defences open to the insured against the third party, only in a case where the Tribunal has chosen to implead the insurer upon being satisfied that there is collusion between the insured and the third party or where the insured has remained ex parte. The contention is that if the said situations are not in existence, the insurer cannot raise any defences other than those specified in Section 96(2).

25. For the purpose of understanding the above contention, it is necessary to refer to Section 110C(2A). It reads :

"110C(2A). Where in the course of any inquiry, the Claims Tribunal is satisfied that-

(i) there is collusion between the person making the claim and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed to contest the claim,

it may, for reasons to be recorded by it in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made." (emphasis* supplied)

26. We have already held on point No. 1 that in view of the reservation or assignment clause, the insurer is vested with all the defences or grounds of the insured against the third party, and can take action in his own name. Therefore, prima facie, Section 110C(2A) cannot come in the way of the exercise of the rights under the reservation clause by the insurer.

27. Even otherwise, Section 110C(2A) which deals with the "procedure" before the Tribunal, can only be treated as an enabling provision. In our view, it does not exhaust all the situations in which the insurer can raise defences open to the insured against the third party. The provisions of Section 110C(2A) may, however, govern a case where there is no reservation clause or assignment of the rights of the insured in favour of the insurer, but otherwise, it cannot help the respondents. We hold, therefore, that even if there is no collusion between the insured and the third party or even if the insured has not remained ex parte the insurer can raise all defences open to the insured against the third party, provided there is a reservation or assignment clause by the insured in favour of the insurer. For the aforesaid reasons also we overrule the decision in *United India Assurance Co. v. Surendran Nair* [1990] 1 KLT 10. Point No. 2 is found accordingly.

Point No. 3.--This point concerns Section 96(3). We shall refer to the said provision. It reads as follows :

"96(3). Where a certificate of insurance has been issued under Sub-section (4) of Section 95 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in Clause (b) of Sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under Clause (b) of Sub-section (1) of Section 95, be of no effect :

Provided that any sum paid by the insurer in or towards the discharge of any, liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person."

28. Section 96(3) states that if there is any restriction in the insurance policy which purports to restrict the insurance of the persons insured, because of incorporation of any conditions other than those in Section 96(2)(b), then such conditions will be of no effect, for the purpose of making the insurer discharge its liabilities as are required to be covered by a policy u/s 95(1)(b). We should first know what the restrictions u/s 96(2)(b) are, the violation of which by the

insured, permits the insurer to avoid the policy. u/s 96(2)(b), the insurer can avoid the policy for breach (by the insured) of (i) a condition that the insured should not use the vehicle (a) for hire or reward, where the vehicle is, on the date of the contract of insurance, a vehicle not covered by a permit to ply for hire or reward ; or (b) for organised racing or speed-testing ; or (c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle ; or (d) without side car being attached, where the vehicle is a motor cycle ; (ii) a condition excluding driving by a named person or unlicensed drivers, etc., (iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion. Therefore, u/s 96(3) if the policy permits avoidance of the insurer's liability u/s 95(1)(b) on the basis of conditions other than the above ones specified in Section 96(2)(b), such conditions will be of no effect as against the third party.

29. So far as the proviso to Section 96(3) is concerned, it states that if on account of the above disability statutorily incurred by the insured in not being able to enforce the conditions other than those in Section 96(2)(b) as against the third parties, the insurer becomes liable to pay to the third party any excess sum which, but for the said statutory disability, it was not obliged to pay, then such excess sum could be recovered by the insurer from the insured.

30. We fail to see how Section 96(3) can be of any help to the respondents-claimants against the insurer. If the insurer takes out a defence under the law of torts that the insured has not been negligent or if the insurer contends that the quantum of compensation awarded is high (though it is within Section 95(2) limits)--then such defences are permissible in view of the reservation clause and in view of our decision on Point No. 1, and it cannot be said that the insurer is raising defences not covered by Section 96(2)(b), nor that the said defences are of no effect. The raising of the above defences by the insurer in the written statement or in the appeal-as permitted by the reservation clause--does not, in our view, amount to imposing conditions other than the permissible conditions specified in Section 96(2)(b) so as to become ineffective by reason of Section 96(3).

31. The further contention based on the proviso to Section 96(3) that the insurance company must first pay the compensation in full cannot also be accepted inasmuch as raising defences in the written statement or in the appeal on the basis of the reservation clause--cannot be treated as imposing extra conditions (outside Section 96(2)(b)) which are ineffective. Point No. 3 is decided accordingly.

32. Point No. 4.--It is not disputed by the appellant's counsel that in some of these cases, the insured has paid extra premium to make the insurer's liability an unlimited liability. But the question then arises whether the insurer is liable to pay the entire assessed liability over and above its statutory liability u/s 95(2) and whether the insurer is to recover the excess amount over and above such statutory liability, from the insured, in view of Section 96(4) of the Act. Section

96(4) reads as follows :

"96(4). If the amount which an insurer becomes liable under this Section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person."

33. The provisions of Section 96(4) fell for consideration in M. F. A. No. 298 of 1987 before this very Full Bench (National Insurance Co. Ltd. v. Roy George [1993] 77 Comp Cas 134). In that case, the insurer filed an appeal contending that the Tribunal was wrong in making it liable for the entire amount payable by the insured, but that its liability should have been limited to the figure specified in Section 95(2). It was, no doubt, not a case of extra premium. It was contended for the claimants that in view of Section 96(4), the insurer should pay the entire amount and recover the difference from the insured. We rejected the said contention in that case. We referred to the relevant rulings of the Privy Council in Free Lanka Insurance Co. Ltd. v. A. E. Ranasinghe [1964] AC 541 (PC) the majority decision of the Court of Appeal, Harker v. Caledonian Insurance Co. [1979] 2 Lloyds Rep 193 and to the judgment of the House of Lords in the appeal from that case, viz., Harher v. Caledonian Insurance Co. [1980] 1 Lloyd's Rep 556 (PC). In all these cases, the provisions were similar to Section 96(4). We held that the words "the amount which an insurer becomes liable under the section" in Section 96(4) meant the liability to the third party covered by Section 96(1), namely, the statutory liability u/s 95(1)(b), as further limited by the pecuniary limits in Section 95(2). It was held that Section 96(4) only meant that in a case where the insurer avoided the policy on grounds stated in Section 96(2), the insurer could then recover from the insured u/s 96(4) the compensation paid by the insurer to the third party in its entirety. That would be a case of "excess" over "nil", as pointed out by Lord Diplock in Harker's case [1980] 1 Lloyds Rep 556 (PC). Again, in a case where the policy, was not avoided, but the insurer paid the actual amount mentioned in Section 95(2) and interest and costs to the third party, Section 96(4) could mean that the insurer could recover from the insured, if he wanted to do so, the interest and costs, that being the sum not payable if Section 96(1) did not apply. We held that the basic principle was that the right of the third party against the insurer was limited always to the liability covered by Section 95(1)(b) and Section 95(2) in view of Section 96(1).

34. In the present case, a further question arises. Here, in view of the extra premium paid by the insured, the insurer's liability to the insured is unlimited. In other words, it is more than the statutory limits prescribed in Section 95(2). But the point is whether the third party claimant could seek the benefit of the extra premium and claim for the entire award amount, over and above the statutory limits specified in Section 95(2), from the insurer ?

35. In abstract principle, in view of Section 96(1), it must be held that the third

party cannot have a remedy against the insurer for anything above the limits specified in Section 96(1), which means, the "amount as is required to be covered by Section 95(1)(b)". Section 95(1)(b), in its turn, refers to Section 95(2). Thus the third party's rights against the insurer cannot, in the abstract, exceed Section 95(2) limits. The fact that the insured had paid extra premium might help the insured to resort to his remedies against the insurer for the amount recovered from the insured, apart from what is recovered from the insurer by the third party. In fact, this very question relating to additional premium arose before the Privy Council as an additional point in *P.W.G. Suttle v. Eleanor Joyce Simmons* [1989] 2 Lloyd's Rep 227 (PC). That case arose under the Bermudan Motor Car Insurance (Third Party Risks) Act, 1943. Section 6(1) of that Act corresponds to Section 96(1) of our Act, while Section 6(4) corresponds to Section 96(4) of our Act. They read as follows :

"6(1). If, after a certificate of insurance has been delivered under Sub-section (4) of Section 4 to the persons by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Sub-section (1) of Section 4 (being a liability covered by the terms of the policy) . . .

6(4). If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person." (emphasis* supplied)

36. In that case, the respondent was injured by the negligent driving of Mr. Kenneth Simmons. The car was owned by Mrs. McCallan and was insured with the appellants under a policy. The respondent claimed damages for personal injuries against Mr. Simmons, for \$ 100,000 and costs by consent. The respondent-claimant wanted that the entire sum be paid by the insurer-appellant even though by virtue of the provisions of the Act of 1943, the statutory liability was restricted to \$ 24,000. The Court of Appeal at Bermuda held the appellant liable for the whole amount. Allowing the appeal, their Lordships held the appellant liable only to an extent of \$ 24,000. Section 3(1) of the Act is similar to Section 94, while Section 4(1) is similar to Section 95(1)(b). The proviso to Section 4(1) corresponds to Section 95(2) limiting the liability of the insurance company to \$ 24,000 and to other amounts in various situations. Again, Section 6(1) of the Act corresponds to Section 96(1) while Section 6(4) corresponds to Section 96(4). Their Lordships followed the decision in *Harker's case* [1980] 1 Lloyd's Rep 556 (HL) and *Ranasinghe's case* [1964] AC 541 (PC). The contention that *Marker's case* [1980] 1 Lloyd's Rep 556 (PC) was wrongly decided and that the view of Lord Denning, M. R. in the Court of Appeal in *Harker's case* [1979] 2 Lloyd's Rep 193 was correct, was rejected.

37. A further point was also argued that in *P.W.G. Suttle's case* [1989] 2 Lloyd's Rep 227 the policy there covered \$125,000 while the statutory liability of the

insurance company was only \$24,000, and the award is for \$ 100,000 and that Harker's case [1980] 1 Lloyd's Rep 556 (PC) was distinguishable. But Lord Keith of Kinkel observed :

"It is true that Harker's case [1980] 1 Lloyd's Rep 556 (PC) was in certain respects different in its facts from the present one. But the reasoning of Lord Diplock may nevertheless be applicable. That reasoning indicates that so far as the 1943 Act is concerned, the words in Section 6(1)-

"... such liability as is required to be covered by a policy under paragraph (b) of Sub-section (1) of Section 4 . . ."

do not include liability in respect of any sum in excess of \$ 24,000 arising out of any one claim by any one person, since by virtue of proviso (iii) to Section 4(1) (b), such a liability is not required to be covered. It is, in their Lordship's opinion, nothing to the point, so far as the construction of Section 6 is concerned, that the insurers might under the terms of the policy be bound to indemnify the insured in respect of any excess over the statutory minimum for which an injured third party might have obtained judgment against the insured. The effect of Section 6(1) is to limit the amount which the injured third party can recover directly from the insurers."

38. Therefore, going strictly by the legal principles above stated, the third party cannot by resorting to Section 96(1) seek to recover from the insurer any amount over and above the statutory limits specified in Section 95(2) even though, as between the insurer and the insured, the limit of liability of the insured is unlimited.

39. But, in practice, in our country, the nationalised insurance companies have been paying directly to the third party, the amount up to the limit covered by the extra premium, even though the limit u/s 95(2) may be less. We do not want to disturb the existing procedure, whatever may be the principle in the abstract. In our view, there is not much benefit in following the strict rule laid down by the Privy Council in *P. W. G. Suttle v. Eleanor Joyce Simmons* [1989] 2 Lloyd's Rep 227 (PC).

40. In our view, that may only lead to multiplicity of proceedings, namely, of the third party recovering the amount (beyond Section 95(2) limits) from the insured and the insured reimbursing himself from the insurer. We, therefore, do not want to extend the principle in *P. W. G. Suttle v. Eleanor Joyce Simmons* [1989] 2 Lloyd's Rep 227 (PC) in so far as the said case relates to the amount covered by the extra premium, to Indian conditions.

41. We, therefore, hold that where the insured has paid extra premium, the third party can claim the award amount, over and above Section 95(2) limits, directly from the insurer. We hold accordingly on Point No. 4.

42. In the result, we overrule *Surendran Nair's* case [1990] 1 KLT 10. We hold that the insurer is entitled where there is a reservation clause to raise all

defences open to the insured against the third party, in the proceedings initiated by the third party. This he could do in his own name. The insurer could plead that the insured was not negligent or that the third party was guilty of contributory negligence or that the quantum assessed was wrong or high. If there was liability in excess of the limits in Section 95(2) because of extra premium, the third party could be allowed to proceed against the insurer for the amount in excess of the limits in Section 95(2).

43. We answer the reference accordingly. We send back the matters to the Division Bench to decide the appeals on merits.