

(1989) 02 KL CK 0008
In the High Court Of Kerala
Case No : M. F. A. No. 410 of 1987

New India Assurance Co. Ltd.

APPELLANT

Vs

Raju Markose and Others

RESPONDENT

Date of Decision : 27-02-1989

Acts Referred:

Motor Vehicles Act, 1988 — Section 92A, 96(2)

Citation : (1989) 1 KLJ 420

Hon'ble Judges : P.C. Balakrishna Menon, J;P. Krishnamoorthy, J

Bench : Division Bench

Advocate : P.V.R. Kaimal, for the Appellant; P.N. Ramakrishnan Nair and R. Harikrishnan, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Menon, J.—The 2nd respondent insurer appeals against the award of the Motor Accidents Claims Tribunal, Quilon in OP (M. V) 206 of 1985 directing the insurer to pay compensation Rs. 2,10,000/- to, the petitioners for the death of their mother Grace Markose in a car accident on 7-12-1978. The claim was for compensation Rs. 6,00,000/- from respondents 1 and 2. The 1st respondent is none other than the father of the claimants. The claimants are minors represented by their next friend.

2. The car KLI 1050 belonged to the 1st respondent. The 1st respondent himself was driving the car bringing his children home from their boarding school at Trivandrum. Their mother Grace Markose was in the front seat. The accident took place at 5.30 p.m. at road junction on the M. C. Road, south of Kottarakkara town. The vehicle capsized causing serious injuries to Grace Markose. She succumbed to the injuries on the same day at about 9 p.m. The petitioners are the children of Grace Markose and the 1st respondent. They claim compensation for the death of their mother who was a medical officer in the St. John's Hospital, Kattappana drawing a salary of Rs. 2500/- p.m. The case was posted from time to time and on 6-3-1981 it was posted to 4-4-1981 allowing the

respondents a chance to file written statements. The 2nd respondent insurer filed a written statement on 4-4-1981, No written statement was filed by the 1st respondent. Much later on 8-5-1981 the 1st respondent filed a written statement wherein he has raised a contention that the liability, in any, is of the insurer as the vehicle is covered by a policy of insurance. According to him the cause of death of Grace Markose was an accident and not due to his negligence. The 2nd respondent insurer disclaimed its liability to compensate the petitioners for the death of Grace Markose in the accident. The Tribunal found rashness and negligence on the part of the 1st respondent as, according to the tribunal, the accident itself speaks for the same. The Tribunal awarded a consolidated sum of Rs. 2,10,000/- as compensation. The award is against both respondents 1 and 2. But the 2nd respondent insurer is directed to pay the amount and on failure of payment, there is a further direction that execution steps should be taken first against the 2nd respondent insurer

3. In the petition itself it is stated "the accident involving the death of the deceased was only accidental". There is no averment of rashness or negligence on the part of the 1st respondent in driving the vehicle. The 1st respondent in his written statement, though filed at a belated stage, had also raised a contention that the accident was not due to negligence on his part When examined as R. W. 1 the 1st respondent spoke about the incident as a pure accident which could not have been avoided by him while driving the vehicle. PWs. 1 to 4 examined on behalf of the petitioners also spoke about the incident as a pure accident. There is neither pleading nor proof that the accident was due to negligence on the part of the 1st respondent, A Division Bench of this Court in K. A. Kurup v. P. Sukumaran Nair (1980 KLT 750) following the decisions of the Supreme Court in Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another, and Bishan Devi and Others Vs. Sirbaksh Singh and Another, :-

A liability can be cast on another only if he is in any way responsible for the accident which occasioned the injury In other words there is no scope for any absolute liability on the owner of the vehicle to compensate the injured. The provisions of the Motor Vehicles Act do not contain any statutory provision to that effect-The Act does not provide a new right or a new remedy, to a person who is injured by an accident. The provisions of the Act do not in any way interfere with the substantive common law on the subject. It follows the petitioner has to prove that opposite party used the vehicle in such a negligent way and occasioned the injury for which compensation is claimed."

In Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another, referred to above the conclusion is stated at page 1259:

We conclude by stating that the view of the learned Judges of the High Court has no support in law to hold that proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claim case."

4. The accident it- the present case was on 7-12-1978 long before S. 92A of the Act came into force. S. 92A was introduced by the Amendment" Act 47/1982 that came into force with effect from 1-10-1982. S. 92A introduced by the amendment dispenses with proof of negligence in the matter of award of compensation to the extent indicated therein The section indicates that the substantive law is changed only to the extent altered by the Amending Act. In Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai (AIR 1987 SC 1890) it is stated at page 1697:

Section 92-A of the Act provides that where the death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may, be the owners of the vehicle shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of the said section. The amount of compensation which is payable there under in respect of the death of any person is a fixed sum, of fifteen thousand rupees and the amount of compensation payable under it in respect of the permanent disablement of any person is a fixed sum of seven thousand and five hundred rupees. Sub-section (3) of S. 92-A of the Act provides that in any claim for compensation under sub-s. (1) of S. 92-A, the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made" was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person. It is thus seen that to a limited extent relief has been granted under S, 92 A of the Act to the legal representatives of the victims who have died on account of motor vehicles accidents. Now they can claim Rs. 15,000/- without proof of any negligence on the part of the owner of the vehicle or of any other person. This part of the Act is clearly a departure from the usual common law principle that a claimant should establish negligence on the part of the owner or driver of the motor vehicle before claiming any compensation for the death or permanent disablement caused on account of a motor vehicle accident. To that extent the substantive law of the country stands modified".

It is thus clear that but for the - modification thus effected, the substantive law continues to be in force and no claim for compensation is sustainable without proof of negligence except to the extent such proof is dispensed with by S. 92-A of the Act.

5. In the present case the petition itself shows that there was no negligence on the part of the 1st respondent who was driving the vehicle at the time of the accident. The evidence of all the witnesses examined on behalf of the petitioners as well as of the 1st respondent examined as R. W. I also is to the same effect. We are therefore clearly of the view that no case has been made out for award of compensation in the present case. Counsel for the respondents submits that the defences open to the insurer are only those enumerated in sub-sec. (2) of S. 96 and a plea that the accident was not due to the negligence of the 1st respondent

is not available to the 2nd respondent. It is also contended that such a defence cannot be the basis of an appeal under S. 110 D of the M. V. Act. Counsel for the respondents relies on the decision of a Division Bench of this Court in *New India Assurance Co. Ltd. v. Radhakrishnan* (1983 KLT 547) wherein it is held that it is not open to the insurer to canvass the merits of the award for the reason of the prohibitions contained in sub-sec. (2) and (6) of S. 96 of the M. V. Act. The restrictions in regard to the defences available to an insurer relate to the insurer's liability under S. 96(I) and in a case where there is no such liability, there is no question of the defences being restricted as provided for under S. 96(2) of the Act. That apart, in the present case the insurer is also entitled to take all the defences by virtue of the provisions contained in S. 110-C of the Act. As adverted to earlier, the 1st respondent did not file a written statement within the time allowed by the Tribunal. It is seen that a written statement is filed subsequently without even furnishing a copy of the same to the insurer. There was also no petition to receive the written statement. The written statement filed at a belated stage was not even brought to the notice of the Tribunal and it is apparently for that reason that the Tribunal in its order has stated that the 1st respondent had not filed any written statement in the case. The insurer was impleaded as a party to the proceedings by the petitioners themselves, and the insurer is entitled to contest the claim on all or any of the grounds available to the 1st respondent by virtue of the provisions contained in S. 110-C of the Act.

For the aforesaid reasons we allow the appeal and set aside the award of the Tribunal as against the appellant. The parties will suffer their " respective costs.