
(1998) 07 KL CK 0056
In the High Court Of Kerala
Case No : M.F.A. No. 312/96

The National Insurance Co. Ltd.

APPELLANT

Vs

Mary Janet and Others

RESPONDENT

Date of Decision : 23-07-1998

Acts Referred:

Motor Vehicles Act, 1939 — Section 96, 96(2), 96(6)

Motor Vehicles Act, 1988 — Section 147, 147(1), 147(3), 149, 149(1)

Citation : (1999) ACJ 736

Hon'ble Judges : P.A. Mohammed, J;G. Sivarajan, J

Bench : Division Bench

Advocate : George Cherian, for the Appellant; M. Rajagopalan Nair and P.C. Jeeva, for the Respondent

Final Decision : Dismissed

Judgement

Mohammed, J.—This is an appeal u/s 173 of the Motor Vehicles Act, 1988 (for short "the Act") filed by the National Insurance Company Limited, the insurer of an offending vehicle involved in a motor accident which occurred on 3rd May 1991, against the award passed by the Motor Accidents Claims Tribunal, Ernakulam in O.P. (M.V) No. 576 of 1991. The Respondents 1 to 3 herein are the claimants before the Tribunal. The Respondents 4 and 5 herein are Respondents 1 and 2, the owner and driver of the offending vehicle, who remained exparte before the Tribunal. The Respondents 1 to 3 herein who are respectively the wife, son and father of the deceased Vincent who died in the above accident filed application u/s 166 of the Act claiming an amount of Rs. 5 lakhs as compensation before the Tribunal. After the enquiry it passed an award fixing a total compensation of Rs. 3,97,500 with 12 per cent interest from the date of the petition till the date of realisation. The Tribunal allowed Respondents 1 to 3 to realise the award amount from the owner, driver and insurer of the offending vehicle. The Tribunal also directed the Appellant to pay the award amount within thirty days of the date of the award. Being aggrieved by the said award the present appeal has been filed.

2. The main contestants in this appeal are the Appellant Insurance Company and Respondents 1 to 3, the claimants. The other Respondents in the appeal remained ex parte. We heard learned Counsel appearing for the Appellant as well as Respondents 1 to 3.

3. The only question canvassed by the counsel for the Appellant centres round the adequacy of the compensation awarded by the Tribunal. In other words, the contention of the Appellant is that the amount of compensation awarded by the Tribunal is too excessive and hence liable to be reduced in view of the grounds urged in the appeal. Before dealing with this question it is apt to consider as to what extent the insurer of an offending vehicle can challenge an award of a competent Tribunal passed after conducting an enquiry.

4. Section 147 of the Act deals with requirements of policies and limits of liability of an insurer whereas Section 149 narrates the duty of an insurer to satisfy judgments and awards against persons insured in respect of third party risk. Sub-section (1) of Section 149 provides that if, after a certificate of insurance has been issued under Sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, Judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 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 such sum not exceeding the sum assured payable thereunder, as if he were a judgment-debtor, in respect of the liability, together with any amount payable in respect of interest and cost that may have been awarded. Sub-section(2) next provides that no sum shall be payable by an insurer under Sub-section (1) in respect of any Judgment or Award unless before or after the commencement of the proceedings in which the Judgment or Award is given the insurer had notice through the court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such Judgment or Award so long as execution is stayed thereon pending the appeal, and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and defend the action on any of the grounds mentioned thereunder.

5. The corresponding provision contained in Section 96 of the Motor Vehicles Act, 1959 has been interpreted by the Supreme Court in *Narendra Kumar and Another Vs. Yarenissa and Others*, and held thus:

The scheme of Section 96 to the extent relevant, therefore, is that before an insurer can be saddled with the liability to pay the sum awarded to the claimants as if he were a judgment-debtor, it is necessary that he must have prior notice of the institution of the proceedings before the Judgment is given, so that, if he has the defences set out in Clauses (a) to (c) available to him he may seek to be joined as a party to the proceedings and raise all or any of those defences. It is, therefore, obvious on a plain reading of the aforesaid three Sub-sections of

Section 96 that before any insurer can be saddled with the liability to answer Judgment he must have notice of the proceedings and an opportunity to defend on all or any of the grounds enumerated in Clauses (a) to (c) of Sub-section (2) of Section 96, if the same, in the facts and circumstances of the case, is or are available to the insurer. Once that opportunity is made available, Sub-section (6) of Section 96 says that the insurer shall not be entitled to avoid his liability to any person entitled to the benefit of any such Judgment otherwise than in the manner provided by Sub-section. (2).

6. Thus it is axiomatic that before an insurer can be saddled with the liability to pay the sum awarded to the claimants as if he were a judgment-debtor it is imperative that he must have prior notice of the institution of the proceeding before the Judgment or Award is given. When such notice is given, the insurer can raise any defence statutorily recognised as provided in Clauses (a) and (b) of Sub-section (2) of Section 149. Of course, the challenge against the quantum of compensation claimed in an application u/s 166, is not a defence available under the above clauses. This defence, no doubt, will be available to an insurer only in a case where the provision of Section 170 is attracted. In order to attract Section 170 the Claims Tribunal in the course of any enquiry shall be satisfied that there is a collusion between the person making the claim and the person against whom the claim is made or has failed to contest the claim. When these requirements are satisfied, the Tribunal after recording the reasons in writing direct that the insurer who may be liable in respect of such claim shall be impleaded as a party to the proceeding. Then the insurer so impleaded shall 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. However, this will not in any way prejudice the defence available to an insurer under Sub-section (2) of Section 149.

7. In the present case the counsel on behalf of the insurer filed I.A. No. 2330 of 1992 before the Tribunal u/s 170 of the Act alleging that Respondents 1 and 2 in the claim petition, though entered appearance, failed to file written statement and contest the claim. However, there was no allegation in the petition to the effect that there was collusion between the claimants and the owner of the vehicle. Nonetheless, the insurer-third Respondent therein was allowed to contest the claim.

However, the Tribunal has not recorded any reason for doing so. The question that arises in this context is whether the procedure adopted by the Tribunal in this regard is in conformity to the provisions contained in Section 170 of the Act which is extracted below:

170. Impleading insurer in certain cases. - Where in the course of any inquiry, the Claims Tribunal is /satisfied that-

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

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

it may, for reasons to be recorded 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, without prejudice to the provisions contained in Sub-section (2) of Section 149, 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.

8. On a plain reading of the above section it would appear that the two conditions specified therein are alternative, but on a closer scrutiny, it would appear to be otherwise; they are conjunctive in application in the present context. The word "or" may of course connect alternative objects but not necessarily. It is often used not to connect real alternatives but merely to connect different words expressing the same or cognate idea. (See *Rickerby v. Nicholson* ILR (1912) 343]. The word may sometimes be used in conjunctive sense meaning "and" as observed by Luxmoore, J. in *In re Hayden Pask v. Perry* 1931 (2) Ch. 333. "When the word "or" is used in relation to two or more alternatives, it is not necessarily the case that the alternatives are mutually exclusive. The question as to whether they are mutually exclusive or not must be determined by applying the general rule that words should be construed to ascertain the intention of the provision in question to be collected from the whole of its terms", so held by the High Court of Australia in *Horsey v. Caldwell* (1946) 73 C.L.R. 304. Harlan, J. of the Supreme Court of United States in *De Sylva v. Ballentine* 100 L Ed. 1415 observed:

We start with the proposition that the word "or" is often used as a careless substitute for the word "and"; that is, it is often used in phrases where "and" would express the thought with greater clarity. That trouble with the word has been with us for a long time". See, *United States v. Fisk* (US) 3 Wall 445, 18 L.ed 243.

In *Green v. Premier Glynrhonwy Slate Company Limited*, 1928 (1) K.B. 561, Scrutton L.J. said that the word "or" should not be read as "and" unless you are obliged because "or" does not generally mean "and" and "and" does not generally mean "or". In *The State of Bombay Vs. R.M.D. Chamarbaugwala*, the Supreme Court read "or" as "and" to give effect to the clear intention of the legislature as expressed in the Bombay Lotteries and Prize Competitions Control and Tax Act.

9. M.S. Menon, J. (as the learned Judge then was) in *Travancore Forward Bank Limited v. State of Kerala* 1958 KLT 537 observed:

When the word "or" is used in relation to two or more alternatives, it is not necessarily the case that the alternatives are mutually exclusive. The question as to whether they are mutually exclusive or not must be determined by applying the general rule that words should be construed to ascertain the intention of the provision in question to be collected from the whole of its terms.

When the question is examined in view of the above legal premise, the two

conditions mentioned in Section 170 cannot be said to be mutually exclusive. When there is collusion between the person making the claim and the person against whom the claim is made the second condition that the person against whom the claim is made has failed to contest the claim is a condition inclusive of the former. Both the conditions connote a cognate idea and also envisage an intention of generality meaning thereby, the collusion between the parties can also be by failing themselves to contest the claim. These Clauses (a) and (b) of Section 170 cannot be interpreted as mutually exclusive because the former clause does not exclude the latter clause and the latter clause includes within the operative premises of the former clause. Therefore, in order to attract the provision contained in Section 170 the two conditions provided in Clauses (a) and (o) thereof must be satisfied. As earlier pointed out, the Appellant had no case that there was collusion between the person making the claim and the person against whom the claim was made in the petition submitted by him before the Tribunal and therefore the insurer is not entitled to invoke the provisions contained in Section 170 of the Act.

10. The next point in the present context is whether the Tribunal is justified in granting the insurer to contest the claim u/s 170, without recording any reasons. The provisions contained in the said section signify that the Tribunal is authorised to exercise the power only when the collusion is established. It must be proved beyond any reasonable doubt and proof cannot be based merely on surmises and conjectures. The words "for reasons to be recorded in writing" contained in the section have significance in this context. What the section provides is when the Tribunal is satisfied that there is collusion between the parties and consequent failure to contest the claim, it can direct the insurer to contest the claim provided there are reasons to be recorded in writing. In other words, the satisfaction of the Tribunal must be revealed from the reasons recorded. Thus the recording of reasons is imperative and it cannot be dispensed with. What follows from the above analysis is that the Tribunal shall allow the insurer to contest only for recorded reasons. That the allowing of a petition by the insurer to contest the claim without recording reasons is contrary to the provisions of Section 170 and hence invalid.

11. Inasmuch as the provisions contained in Section 170 are not attracted for the reasons aforesaid the Appellant is not entitled to challenge the quantum of compensation awarded by the Tribunal. It can only contest on the statutory defences available u/s 149(2) of the Act. Notwithstanding the above, we will hereunder briefly examine the question whether the compensation fixed by the Tribunal in this case is in any way unjust or unreasonable.

12. The Respondents 1 to 3 claimed Rs. 8,40,000 as damages for loss of dependency on account of the death of Vincent in addition to the claims under Part I. It is alleged that the deceased was aged 33 at the time of death and he used to earn Rs. 5,400 per montu as a car driver. However, the Tribunal after enquiry fixed the compensation for loss of dependency at Rs. 3,60,000 adopting

the multiplier of 15 as against 20 claimed by Respondents 1 to 3. The salary certificate issued by M/s Kumar Taxis has been relied on by the Tribunal for ascertaining the monthly salary of the deceased. The salary certificate dated 16th May 1992 issued by M/s Kumar Taxis has been produced before the Tribunal as Ext. A-12 and not as Ext. A-7 as referred to in the impugned award. That certificate reveals the monthly income of the deceased Vincent by way of salary, batta etc. was Rs. 3,000 and in addition to that he was getting Rs. 2,000 tips from passengers carried by him. Nevertheless the Tribunal has fixed the monthly income of the deceased only as Rs. 3,000, that is to say Rs. 36,000 per annum. After deducting one-third for personal expenses from the yearly income, loss of dependency was determined at Rs. 24,000 per annum. This is the multiplicand arrived at by the Tribunal. We cannot attribute any infirmity either in fixing the total yearly income or determining the multiplicand. A practical formula has been evolved which we find just and proper in the circumstances of this case.

13. Next point that arises for consideration is what would be the correct multiplier to be adopted in this case. In a motor accident claim the accepted measure of damages awarded to the dependants is the pecuniary loss suffered by them as a result of the death. In *Davies and Anr. v. Powell Duffryn Associated Collieries Limited* 1942 A.C. 601 Lord Wright observed thus:

The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt.

In Economics "multiplier" is the ratio between a given increase in new investment and the ultimate increase in notional income resulting from it but in developing jurisprudence of motor accident claims "multiplier" represents the "number of years purchase" as propounded in *Davies'* case 1942 A.C. 601. This multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the facts of the case and capitalising the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. *Davies'* case 1942 A.C. 601, *supra*, later came up for examination in *Nance v. British Columbia Electric Railway Co. Ltd.* 1951 A.C. 601.

The Supreme Court in a case where a 39 year old Major died in a motor accident, adopted the multiplier of 24 for fixing the damages. (See: *Hardeo Kaur and others Vs. Rajasthan State Transport Corporation and another*, . In General

Manager, K.S.R.T.C. v. Susamma Thomas 1994 (2) S.C.C. 176 while adopting the multiplier of 12 in the case of a person aged 39 at the time of death, the Supreme Court made the following remarks:

While the choice of the multiplier is determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant whichever is higher, the ascertainment of the multiplicand is a more difficult exercise. Indeed, many factors have to be put into the scales to evaluate the contingencies of the future. All contingencies of the future need not necessarily be baneful. The deceased person in this case had a more or less stable job. It will not be inappropriate to take a reasonably liberal view of the prospects of the future and in estimating the gross income it will be unreasonable to estimate the loss of dependency on the present actual income of Rs. 1032 per month. We think, having regard to the prospects of advancement in the future career, respecting which there is evidence on record, we will not be in error in making a higher estimate of monthly income at Rs. 2,000 as the gross income. From this has to be deducted his personal living expenses, the quantum of which again depends on various factors such as whether the style of living was spartan or bohemian. In the absence of evidence it is not unusual to deduct one-third of the gross-income towards the personal living expenses and treat the balance as the amount likely to have been spent on the members of the family and the dependents. This loss of dependency should be capitalized with the appropriate multiplier. In the present case we can take about Rs. 1,400 per month or Rs. 17,000 per year as the loss of dependency and it capitalized on a multiplier of 12, which is appropriate to the age of the deceased, the compensation would work out to (Rs. 17,000 X 12 = Rs.2,03,000) to which is added the usual award for loss of consortium and loss of the estate each in the conventional sum of Rs. 15,000.

Later in *Smt. Sarla Dixit and another Vs. Balwant Yadav and others*, the Supreme Court observed that a scientific basis for arriving at proper multiplicand and multiplier is supplied by the decision in *General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others*, . However, the court adopted the multiplier of 15 in the case of a captain for the reason that he was cut short in the prime period of the life at the age of 27. In this context it may further be noted that in *U.P.S.R.T.C. v. Trilok Chandra* 1996 (2) KLT 218 (S.C.) after pointing out that the calculation of compensation and the amount worked out in the schedule suffer from several defects, the Supreme Court held thus:

What we propose to emphasise is that the multiplier cannot exceed 18 years purchase factor. This is the improvement over the earlier position that ordinarily it should not exceed 16. We thought it necessary to state the correct legal position as Courts and Tribunals are using higher multiplier as in the present case where the Tribunal used the multiplier of 24 which the High Court raised to 34, thereby showing lack of awareness of the background of the multiplier system in

Dames" case.

14. In view of what is said above, the multiplier of 15 adopted by the Tribunal in the facts of the present case does not suffer from any infirmity. It is quite just and reasonable.

15. In the result, the appeal is dismissed. No order as to costs.