Kerala High Court
National Insurance Co. vs Madhusoodhanan on 11 April, 2001
Equivalent citations: I (2002) ACC 508, 2002 ACJ 508
Author: K Radhakrishnan
Bench: K Radhakrishnan, G Sasidharan
JUDGMENT K.S. Radhakrishnan, J.

1. This appeal is preferred by National Insurance Company Limited along with one Calliope under S. 173 of the Motor Vehicles Act, 1988 challenging the award dated 23.6.1998 in O.P. (M.V.) No. 793 of 1994 on the file of the M.A.C. Tribunal, Palakkad. Challenge is against the quantum of compensation fixed by the Tribunal. Tribunal fixed 75% contributory negligence in favour of the second appellant who was the owner of the vehicle. They wanted to fix the entire negligence on the claimants and pleaded that they are not liable to pay the compensation. Accident occurred while respondent-claimant's car collided with the lorry driven by the first respondent before the Tribunal of which second appellant herein is the owner and the first appellant is the insurer. The Tribunal fixed the liability at the ration of 75% : 25% and directed the Insurance Company to pay the amount of Rs. 7,37,500/- and interest at the rate of 12% per annum from 26.4.1994 till date of realisation. Aggrieved by the same this appeal has been preferred by the Insurance Company along with the owner of the vehicle.

2. When the matter came up for hearing, counsel appearing for the respondent Smt. Sumathi Dandapani raised a preliminary objection regarding the maintainability of this appeal. Relying on the decision of the Supreme Court in Chinnamma George & Ors. v. N.K. Raju & Anr. 2000 (2) KLT 155 = (2000 (4) SCC 1303), counsel contended that none of the grounds as given in S. 149 existed for the insurer to contest the claim petition before the Tribunal. Consequently no grounds existed for the insurance company to file appeal against the award of the Tribunal. The contended that insurance company is not a person aggrieved by the award. Therefore, it is debarred from filing any appeal against the award of the Claims Tribunal. Further, she contended that Insurance Company has not moved before the Tribunal under S. 170 of the Motor Vehicles Act, 1988 and satisfied the conditions laid down therein and got permission to agitate the matter on merits. Therefore insurance company is estopped from raising any contention on the basis of merits in the present appeal.

3. Counsel appearing for the appellant submitted that joint appeal is maintainable as per the decision of the Apex Court in Narendrakumar & Anr. v. Yarennissa & Ors. ((1998) (9) SCC 202) and the Insurance Company can transpose the owner as respondent and proceed with the appeal. For the said purpose appellant filed C.M.P. No. 2938 of 2001 under O.I, R. 10 read with S. 151 C.P.C. to strike out the name of the second appellant form the array of parties and add his name as additional 2nd respondent in the appeal in the interest of justice. Appellant also filed another application, C.M.P. No.2939 of 2001, under S. 170 of the Motor Vehicles Act, 1988 seeking permission to raise all or any of the grounds available to the insured int he interest of justice.

4. Counsel also placed reliance on the decision of a Full Bench of this Court reported in National Insurance Co, Ltd. v. Celine (1993 (1) KLT 159) and contended that it is open to the insurer to

reserve a right in the policy of insurance and defend 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 the insurance company. Reliance was also places on an unreported decision of this Court in M.F.A. No. 938 of 1999. In view of the above controversy, we have to examine the preliminary objection raised by the counsel for the respondent.

5. The following questions are to be examined for the disposal of the points raised.

(i) Whether insurance company can maintain a joint appeal along with owner or driver of the vehicle and take defence on any of the grounds under S. 149(2) which is not available to the insurance company.

(ii) Whether insurance company after having filed a joint appeal under S. 173 of the Act along with he owner can strike out the na,me of the owner and transpose as respondent and proceed with the appeal challenging the quantum of compensation.

(iii) Whether insurance company can file an appeal on merits without obtaining orders of the Tribunal under S. 170 of the Motor Vehicles Act, 1988.

(iv) Whether conditions laid down in S. 170(a) and (b) have to be cumulatively satisfied by the insurance company before the Tribunal before contesting the claim on merits under S. 173 of the Motor Vehicles Act.

(v) Whether the insurer can have right of appeal on all grounds where it has reserved a right in the terms of the insurance policy to raise all defences for and on behalf of the insured.

We are of the view almost all the questions formulated above have already been settled by the recent decision of the Apex Court. Therefore, we do not labour much to examine those questions in detail. We are in this case primarily concerned with the scope of S. 149(2) as well as S. 170 of the Motor Vehicles Act, 1988 and S. 173 of the Act which corresponds to S. 110-D, S. 96(2) and S. 110-C(2A) of the Motor Vehicles Act, 1939. We are referring to the old Act since Full Bench of this Court has dealt with the provisions of the old Act. Before we deal with the latest decision of the Apex Court on the issues framed, we may refer to one of the earliest decision of the Apex Court in British India General Insurance Co. Ltd. v. Capt. Itbar Singh & Ors. (AIR 1959 SC 1331) wherein the Supreme Court was dealing with the provisions of S. 92(2)(vi) of the Motor Vehicles Act, 1939 analogus to S. 149(2)(vii) of the present Act. It is profitable to extract some of the reasonings made by the Apex Court.

"5. To start with it is necessary to remember that apart from the statue an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-s. (2) of S. 96 however gives him the right to be made a party to the suit and to defend it. The right therefore, is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that sub-s. (2) makes available to an insurer? That clearly is a question of interpretation of the sub-section.

6. Now the language of sub-s. (2) seems to us to be perfectly plain and to admit of no doubt or confusion. IT is that an insurer to whom the requisite notice of the action has been given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified they cannot be added to. To do that would be adding words to the statute.

7. Sub-s. (6) also indicates clearly how sub-s. (2) should be read. It says that no insurer to whom the notice of the action has been given shall be entitled to avoid his liability under sub-s. (1) otherwise than in the manner provided for in sub-s. (2). Now the only manner of avoiding liability provided for in sub-s. (2) is by successfully raising any of the defences therein mentioned. It comes then to this that the insurer cannot avoid his liability except by establishing such defences. Therefore sub-s. (6) clearly contemplates that he cannot take any defence not mentioned in sub-s. (2). If he could, then, he would have been in a position to avoid his liability in a manner other than that provided for in sub-s. (2). That is prohibited by sub-s. (6)".

Aforementioned decision of the Apex Court would indicate that insurance company can be permitted to defend the claim on any of the grounds provided under S. 96(2) which is pari materia with S. 149(2) of the Act, 1988. The question is whether a joint appeal by the insurance company as well as the owner of the offending vehicle is maintainable under S. 110-D of the 1939 Act and also whether the owner of the vehicle can proceed with the appeal on finding that the insurance company's Appeal is incompetent came up for consideration before the Apex Court in Narendrakumar's case (supra). In that case the court held as follows:

"The insurance company has no right to prefer an appeal under S. 110-D of the Act (S. 173 of the present Act) unless it has been impleaded and allowed to defend on one or more of the grounds set out in sub-s. (2) of S. 96 (S. 149(2) of the Present Act) or in the situation envisaged by sub-s. (2-A) of S. 110-C of the Act (S. 170 of the present Act). IF then the insurer and the owner of the offending vehicle file a joint appeal and if the court comes to the conclusion that the insurer had no right to prefer an appeal under S. 110-D of the Act because none of the defences mentioned in sub-s. (2) of S. 96 were available to him or had a situation of the type envisaged by sub-s. (2-A) of S. 110-C arisen, it cannot be permitted to file an appeal whether on its own or in association with one or more of the tortfeasors against whom the award is made which the insurer is liable to answer as if a judgment debtor."

In the aforementioned case, Apex Court held that even though a joint appeal as such is not maintainable that does not snatch away the right of the tortfeasors who are jointly and severally liable to answer the judgment from preferring an appeal under S. 110-D of the Act. The court further held:

"If for some reason or the other the claimants desire to execute the award against the tortfeasors because they are not in a position to recover the money from the insurer the law does not preclude them from doing so, and therefore, so long as the award or decree makes them liable to pay the

amount of compensation they are aggrieved persons within the meaning of S. 110-D and would be entitled to prefer an appeal. But merely because a joint appeal is preferred and it is found that one of the appellants, namely, the insurer was not competent to prefer an appeal, we fail to see why the appeal by the tortfeasor, the owner of the vehicle, cannot be proceeded with after dismissing or rejecting the appeal of the insurer".

The afore-mentioned decision of the Apex Court would positively show that as far as the insurance company is concerned, they cannot make a joint appeal along with the tortfeasor.

6. The aforementioned decision was considered by the Apex Court in Chinnamma George v. N.K. Raju (2000 (2) KLT 155 = 2000 (4) SCC 130) wherein the Apex Court dealt with the provisions of S. 149(2), 146 and 173 of the Motor Vehicles Act, 1988. Dealing with joint appeal the Apex Court held as follows:

"There is no dispute with the proposition so laid by this Court. But the insurer cannot maintain a joint appeal along with he owner or the driver if defence on any ground under S. 149(2) is not available to it. In that situation a joint appeal will be incompetent. It is not enough if the insurer is struck out from the array of appellants. The appellate court must be satisfied that a defence which is permitted to be taken by the insurer under the act was taken in the pleadings and was pressed before the Tribunal. The appellate court on being so satisfied the appeal may be entertained for examination of the correctness or otherwise of the judgement of the Tribunal on the question arising from/relating to such defence taken by the insurer. If the appellate court is not satisfied that any such question was raised by the insurer in the pleadings and/or was pressed before the Tribunal the appeal filed by the insurer had to be dismissed as not maintainable."

We may now examine the contentions raised int he light of the aforementioned decisions of the Apex Court with regard to the statutory right of the insurance company to file an appeal on merits. For appreciating the contentions it is necessary to extract the following provisions:

149(1). If, after a certificate of insurance has been issued under sub-s.(3) of S. 147 in favour of the person ny whom a policy has been effected, judgement or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-s. (1) of S. 147 (being a liability covered by the terms of the policy) or under the provisions of S.163-A 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 an enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-s.(1) in respect of any judgment or award unless, before the commencement of proceedings in which the judgment or award is given the insurer had notice through 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

an 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 there to and to defend the action on any of the grounds mentioned in the said sub-section.

S.149(2) contemplated that if there has been a breach of condition relating to the conditions prescribed in the aforesaid provision, S.149(2)(b) contemplates that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by representation of fact which was false in some material particulars. S. 170 of the Motor Vehicles contemplates that where in the course of any inquiry, the Claims Tribunal is satisfied that (a) there is collusion between 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-s.(2) of S. 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.

7. When we read the aforementioned provisions together it is clear that insurance company can defend the claim only on the ground contemplated in S. 149(2) that policy is void or breach of the conditions stipulated in the policy. However, insurance company can challenge the award and can contest the claim on merits under S. 170 of the Act which provides that if there is collusion between the person making the claim and the person against whom claim is made, if insurance company comes forward court can permit insurance company for reasons to be recorded to defend the claim on all or any of the grounds. We may indicate this is an exception to S.149(2). Aforementioned provisions would make it clear that under the new Act, S. 149(2) statute has given some statutory defence available to insurance company and that on getting an order form the Tribunal under S. 170, insurance company can agitate the matter on merits before the Tribunal if conditions in (a) and (b) are satisfied. We are fortified by the decision of the Apex Court in Sankarayya v. United India Insurance Co.Ltd (1998 (3) SCC 140). In that case the Apex Court was dealing with scope of S.170. The Apex Court held as follows:

"In our view, the Insurance Company was clearly incompetent to file an appeal on the merits of the claim before the High Court.....It clearly shows that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for that purpose the Insurance Company has to obtain order in writing from the Tribunal and which should be reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence."

In Chinnamma George's case (supra), the Apex Court was dealing with the scope of S.149(2). The Apex court quoted with approval the principle laid down by the Apex Court in Narendrakumar's case (supra) and dismissed the petition preferred by the Insurance Company as incompetent since no grounds were available to the company to defend the claim petition. The Apex Court held that appellate court also must satisfied that defence which is permitted to be taken by the insurer under the Act was taken in the proceedings before the Tribunal and the appellate court on being so

satisfied may entertain the appeal for examination of the correctness or otherwise of the judgment of the Tribunal on the question arising form or relating to such defence taken by the insurer. It is therefore evident from the aforementioned judicial pronouncements that unless and until insurance company satisfies and gets an order from Tribunal after satisfying S.170(a) and (b) cumulatively, insurance company is estopped from raising the contentions on merits in an appeal under S. 173 of the Act. In any view of the matter, in this case, Insurance Company has not produced the policy either before the Tribunal or before this court. Therefore, we are not n a position to examine the terms and conditions of the policy. Therefore we are not examining the correctness or otherwise of the decision of the Full Bench of this Court in National Insurance Co. Ltd. v. Celine (1993 (1) KLT 159) or the decision of the Bench of this Court in M.F.A.No. 938 of 1999. We leave that question open.

8. Counsel for the Insurance Company submitted that policy reserves various grounds available to insurance company. We are of the view even if there is any reservation clause, permission under S. 170 of the Act is required from the Tribunal to raise all defence on behalf of the insured due to non-prosecution or in case of collusion between insured and the insurer. Apex Court in British India General Insurance Company's case held that the insurer has the right to defend the action in the name of the assured, provided it has reserved its right by the policy. But we are of the view that insurance company can exercise their right in the Tribunal effectively by taking the plea in the written statement and cross-examining the witnesses. If such a right to take all defence on behalf of the insured has not been taken before the Tribunal in the claim petition, he cannot be allowed in the appeal to raise the defence under S. 149 of the Act. We are also forfeited in this view by the Division Bench decision of the Madhya Pradesh High Court in United India Insurance Co. Ltd. v. Ramdas Patil & Ors. (AIR 2000 MP 63).

9. A joint appeal has been preferred by the Insurance Company along with owner of the vehicle. We have indicated in the earlier part of the judgment that a joint appeal cannot be maintained. We are also not inclined to allow the petition filed by the Insurance Company CAMP No.2938 of 2001 so as to strike out the name of the owner of the vehicle and transpose him as additional respondent in the appeal. No affidavit has been filed by the owner for transposing him as additional respondent. In the absence of any affidavit by the owner of the vehicle for transposing him as an additional respondent we have to proceed with the matter as if it is a joint appeal in the event of which this appeal is not maintainable. We may also refer to the decision of the Apex Court in Rita Devi v. New India Assurance Co. (2000 (2) KLJ (NOC) 32) wherein the Apex Court took the view that since the insurance Company had not obtained leave from the Tribunal before filing the appeal the court was not justified in entertaining the appeal.

We therefore dismiss the appeal as not maintainable.