IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

FRIDAY, THE 14TH DAY OF OCTOBER 2022 / 22ND ASWINA, 1944

WP(C) NO. 21669 OF 2012

PETITIONER/S:

NATITIONAL INSURANCE CO. LTD.
THIRUVANANTHAPURAM REP. BY ITS ASST. MANAGER, REGIONAL OFFICE, KOCHI.

BY ADV SRI.RAJAN P.KALIYATH

RESPONDENT/S:

1 STATE OF KERALA
REP. BY THE ADDL. CHIEF SECRETARY, FINANCE DEPARTMENT
THIRUVANANTHAPURAM-695 011.

2 INSURANCE OMBUDSMAN
PUNLINAT BUILDING, OPP. COCHIN SHIPYARD, M.G. ROAD,
ERNAKULAM PIN-682 015.

3 DIRECTOR
KERALA STATE INSURANCE DEPARTMENT, HOUSING BOARD JUNCTION, THIRUVANANTHAPURAM-695 011.

4 SMT. HAIRUNISSA M.U.
KALAKAT HOSUE, CHEMBUCHIRA POST KORECHAL THRISSUR, PIN-680 684.

R4 BY ADV SRI.AJAYA KUMAR. G
R1 BY SRI. JOBY JOSEPH, SR. GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07.10.2022, THE COURT ON 14.10.2022 DELIVERED THE FOLLOWING:

'C.R.'

SHAJI P. CHALY, J.

W.P.(C). No. 21669 of 2012

Dated this the 14th day of October, 2022.

JUDGMENT

The writ petition is filed by the National Insurance Company challenging Exhibit P9 award dated 03.01.2012 passed by the Insurance Ombudsman, Kochi in complaint No. IO/KCH/GI/11-003-986/2010-11 under the provisions of the Redressal of Public Grievances Rules, 1998, by which the Ombudsman allowed the complaint and directed the petitioner insurance company to pay an amount of Rs. 7,00,000/- to the 4th respondent, wife of the deceased/insured, within 15 days of receipt of the acceptance letter; and failing which to pay 9% interest from the date of filing of the complaint i.e., 17.03.2011 till payment.

2. Brief material facts for the disposal of the writ petition are as follows:

The 4th respondent's husband, namely one K.S. Shibu, who was employed as a Lascar in the Irrigation Department of the Government of Kerala, died on 19.05.2009 in an accident involving a motorcycle ridden by him and a tourist bus. The deceased was covered under Exhibit P1 personal accident Group policy, and

therefore, according to the 4th respondent, she is entitled to the death benefit under the policy. But, despite the claim raised before the petitioner company, the same was rejected on the ground that the death occurred while the deceased was under the influence of intoxicating liquor or drugs. According to the 4th respondent, the repudiation of the claim was not legal and proper and the deceased was not at all negligent in riding the motorcycle. It was also pointed out that an FIR and a charge sheet was laid against the driver of the bus and therefore, sought for appropriate direction before the Ombudsman for the release of the compensation in terms of the policy.

3. On the other hand, the petitioner Insurance Company contended that even though an accident occurred during the policy period from 01.01.2009 to 31.12.2009, as per the post mortem report, the stomach contained fluid with spirituous odour, and chemical analysis revealed that the blood sample contained 154.79 mgms of ethyl alcohol per 100 ml of blood and therefore, the death occurred while the deceased was under the influence of intoxicating liquor. Accordingly, based on the exception clause 5(b) contained in Exhibit P1 policy conditions, the claim was repudiated by the petitioner company. Whatever that be, it is an admitted case of the Insurance Company that the policy was issued covering the

Government employees and teachers for the period from 01.01.2009 to 31.12.2009. So also, as per the Memorandum of Understanding entered into by and between the Insurance Company and the Government of Kerala, the sum assured in the case of accidental death is Rs.7 lakhs.

4. The Ombudsman, after taking into account the available evidence before it, has found that charge is laid against the driver of the tourist bus under Sections 279 and 304A IPC; the contents of the final report would reveal that the motorcycle was proceeding from south to north along NH 47; that the offending tourist bus was proceeding from north to south along the same road; that as per the description of the accident, the tourist bus overtook a car which was proceeding ahead of it and in that process, the bus hit against the motorcycle, which was proceeding in the opposite direction; and that the description of the scene of occurrence would reveal that the accident took place at the extreme western margin of the road and therefore, it is clear that the deceased was keeping proper side. It is further found that the bus went over to the wrong side of the road and hit the motorcycle resulting in the accident. The Ombudsman has also relied upon the location sketch prepared by the Village Officer and it was found that the accident took place at the western road margin indicating that the deceased was keeping to the proper

side of the road.

5. The Ombudsman also evaluated the postmortem certificate and found that the cause of death was the head injury suffered by the deceased; and that the stomach contained 30ml of brownish fluid with a few white soft unidentified food particles with a spirituous odour. The blood sample was taken for chemical analysis and the certificate of chemical analysis and report shows that the quantitative analysis of the blood was done by gas chromatography method and the quantity of ethyl alcohol present in the blood was noted as 154.79 mgms in 100 ml of blood. It is based on that chemical analysis report that the petitioner Insurance Company had raised a contention that the deceased was under the influence of alcohol at the time of accident and therefore, the claim is hit by the exception clause 5(b) of Ext. P1 policy conditions.

6. It was accordingly that the Insurance Ombudsman observed that there is evidence that the deceased has consumed ethyl alcohol before the accident; however that mere consumption of alcohol is entirely different from the stage ‘under the influence of alcohol". Anyhow, the Ombudsman has found that all other police records, except the certificate of chemical analysis, show that the accident had occurred due to the negligence of the driver of the tourist bus and the deceased had not contributed to the accident.

It is true, certain findings are rendered with respect to the non acceptability of the chemical analysis report.

7. Anyhow, the Ombudsman has arrived at the findings to award compensation basically on the ground that no evidence was available before the Ombudsman that the deceased has made any contribution to the accident and the accident has occurred solely due to the negligence of the bus driver, and the deceased was riding his motorcycle on the proper side of the road. It is, thus, challenging the legality and correctness of the said findings, the writ petition is filed by the Insurance Company.

8. The paramount contention advanced by the learned counsel for the petitioner is that the liability of the Insurance Company is contractual and based on the terms and conditions of the contract of the Insurance Company and therefore, the direction given by the Ombudsman in the impugned order is contrary to the terms of contract. It is also contended that when the rights and liabilities of the contract are governed by the contract to which the parties have subscribed, the Ombudsman ought to have decided the matter in accordance with the terms and conditions of contract.

9. It is also submitted that Exhibit P1 contract of insurance and Exhibit P2 Memorandum of Understanding based on which the contract of insurance is issued, govern the rights and liabilities of

the parties, which specifically excludes the compensation for death or disability arising out of 'whilst under the influence of intoxicating drugs or alcohol'. Therefore, it is contended that since the parties are guided by the exclusion clause of 5(b) in Exhibit P1 contract of insurance and clause 4 of Exhibit P2 Memorandum of Understanding executed by and between the Insurance Company and the State Government, the petitioner Company is not liable to compensate the deceased, since the chemical analysis report clearly shows that the deceased had consumed alcohol exceeding the limit prescribed under Section 185 of the Motor Vehicles Act, 1988 ('Act, 1988' for short).

10. That apart, it is contented that since the limit prescribed in Section 185 of the Act, 1988 is below 30 mg per 100 ml of blood and the deceased has consumed alcohol exceeding the said limit, by the exclusion clauses contained under Exhibits P1 and P2, the Insurance Ombudsman ought to have dismissed the claim.

11. On the other hand, the learned counsel for the complainant/respondent No.4 submitted that there was no contribution from the part of the deceased, even though the deceased had consumed alcohol, to cause the accident; and therefore, the exclusion clause, as contended by the Insurance Company, would not come into play to have declined the

compensation to the 4th respondent. It is also submitted that the Ombudsman has rendered the findings in the award taking into consideration the entire evidence available before it and further that the deceased was on the extreme proper side of the road. It is further submitted that the accident occurred solely due to the rash and negligent driving of the tourist bus driver, and while overtaking a car and dashing against the motorcycle coming from the extreme left side of the road in the opposite direction.

12. I have heard the learned counsel for the petitioner Sri. Rajan P. Kalliyath, Sri. Joby Joseph, learned Senior Government Pleader for the State and Sri. Ajaykumar G for the 4th respondent, perused the pleadings and material on record.

13. As deliberated above, the learned counsel for the petitioner has advanced arguments stressing on the exclusion clause contained under clause 5(b) of Ext. P1 Insurance policy and the proviso to clause 4 of Exhibit P2 Memorandum of Understanding, and they read thus:

> "5. Payment of compensation in respect of death or disablement of the insured person.
>
> ...
>
> (b) Whilst under the influence of intoxicating liquor or drugs.
>
> 4"...
>
> "Provided that the compensation shall not be payable for Death or Disability as described above arising out of (a) intentional

> self injury, suicide or attempted suicide, insanity (b) whilst under the influence or intoxicating drugs or alcohol (c) whilst committing breach of law with criminal intent (d) pregnancy or childbirth or in consequence thereof (c) war and nuclear perils. The other terms and conditions of insurance shall be as per the Company's standard Group Personal Accident Insurance Policy, subject otherwise to the modifications mentioned in the scheme."

14. Placing reliance on the said clauses, learned counsel submitted that the exclusion clause makes it explicit that if the insured is under the influence of intoxicating liquor or drugs, irrespective of the contribution of the deceased to the accident, the claim of the legal heir for compensation had to be rejected.

15. In my considered opinion, the police records pertaining to the crime registered against the driver of the offending vehicle would establish that the accident had occurred while the deceased was riding his motorcycle from south to north on the extreme western side when the tourist bus overtook a motor car and hit against the motorcycle driven by the deceased at the western outer side of the road. The police have registered a case against the driver of the tourist bus under Sections 279 and 304A IPC. It is true, the chemical analysis report reveals that there was presence of ethyl alcohol to the extent of 154.79 mgms in 100 ml of blood, which is excessive of the penal provision contained under Section 185 of the Act, 1988.

16. But, fact remains, the deceased has not contributed to the accident and the accident has occurred, as per the police records, solely due to the rash and negligent driving of the driver of the tourist bus. The facts and evidence pertaining to the police records stand unchallenged. It is also clear that there was no evidence before the Insurance Ombudsman that there was any contribution of the deceased to the accident. Merely because a person has consumed alcohol in excess of the limit prescribed under the penal provisions of the Act, 1988 and remaining quiet in an incident, it cannot be said that he was under the influence of the alcohol so as to contribute to the road accident. However, the learned counsel for the Insurance Company relied upon the judgment of the Apex Court in ***IFFCO-Tokio General Insurance Co. Ltd. v. Pearl Beverages Ltd.,*** (2021) 7 SCC 704] to contend that mere presence of alcohol exceeding the limit alone is sufficient to repudiate the policy.

17. But going through the facts of ***IFFCO-Tokio General Insurance Co. Ltd.***, (supra), I find that it was clearly founded on a fact that the driver of the offending vehicle had consumed alcohol in excess of the prescribed limit and has contributed to the accident; and the Apex Court has allowed the appeal by relying upon on the facts, evidence and circumstances available in that case. The

following findings in ***IFFCO-Tokio General Insurance Co. Ltd.*** (supra) would explain the situation more clear:-

> **"2.** The question which arises in this appeal is, whether the NCDRC is correct in holding that the appellant is not entitled to invoke the shield of Clause (2)(*c*) of the contract of insurance, under which, it was not liable, if the person driving the vehicle, was under the influence of intoxicating liquor, or drugs. The State Commission rejected the complaint of the respondent finding that there was evidence to show that the person who drove the vehicle, had consumed liquor and was under the influence of liquor. The NCDRC, by the impugned order [*Pearl Beverages Ltd.* v. *IFFCO-Tokio General Insurance Co. Ltd.*, 2020 SCC OnLine NCDRC 437] , on the other hand, found that there was no material to establish that the driver of the vehicle was under the influence of intoxicating liquor within the meaning of the exclusion clause, as aforesaid.
>
> ***Pleadings***
>
> **7.** In the complaint filed under Section 17 of the Consumer Protection Act, 1986, we may notice the allegations, which are relevant:
>
> **7.1.** The exclusion clause is not applicable as the person driving the vehicle had not consumed any alcohol. Further assuming that he had consumed alcohol, the case would not fall under the

exclusion clause as he was, in any case, not intoxicated. Although the police had lodged FIR under Section 185 of the MV Act besides Sections 279/427 IPC, no charge-sheet has been filed against the driver till date, meaning thereby, that the police after investigating the case, could not find any evidence to prosecute the driver for any of the offences. It is the further case of the respondent, inter alia, that the respondent had informed the appellant that the MLC only says "smell of alcohol" and this does not imply or mean that the driver was under the influence of intoxicating liquor. It is also pleaded that in the legal notice, it was specifically noted that the driver had not consumed liquor. Section 185 of the MV Act was invoked to plead that unless a certain percentage of alcohol is found a person cannot be prosecuted for the offence of drunken driving. The law does not prohibit driving after consuming liquor. No test was performed in regard to the person driving to establish that he was under the influence of drugs or intoxicating liquor, as provided under Section 185 of the MV Act or the exclusion clause.

13. The State Commission also found it fit to apply the principle of *res ipsa loquitur*, having regard to the circumstances surrounding the accident. The proceedings under the Consumer Protection Act, being summary in nature, the Commission was not required to go into the technicalities of criminal or civil jurisprudence. The impact of the accident was such that the

vehicle turned upside down and caught fire. The vehicle of the Fire Brigade had to be pressed into service. The vehicle turned into a total wreck. The State Commission also found that there appeared to be a breach of Condition 4 of the Policy of Insurance ("The insured shall take all reasonable steps, to safeguard the loss of damage"). It is found that at the time of the accident, the vehicle was being driven rashly and negligently and the driver had consumed liquor, which by itself was in violation of the policy conditions.

22. The expression "*under the influence of intoxicating liquor*" does not appear to be of recent origin in a contract of insurance. It has been around for quite a while. In this regard, we may notice the judgments of the English courts. In *Mair* v. *Railway Passengers Assurance Co. Ltd.* [*Mair* v. *Railway Passengers Assurance Co. Ltd.*, (1877) 37 LT 356 DC] , Lord Coleridge, the Chief Justice made the following observations, while dealing with the very same words "*under the influence of intoxicating liquor*", and held as follows:

"… I should think, speaking only for myself, that the words "under the influence of intoxicating liquor" would be sufficiently satisfied by construing them to mean under such influence of intoxicating liquor as disturbs the balance of a man's mind. There is a point up to which any stimulating liquor, with most people at least, possibly benefits, at any rate for the time, the exercise of the intellect. There is a point beyond which it certainly impedes—disturbs it. I concede that it is very difficult even in language—certainly in the English language—to ascertain with precision where that point is; but it is enough to say that there is a point, and it seems to me these words would be satisfied when the influence of intoxicating

liquor is found in point of fact to be such as to disturb the quiet and equable exercise of the intellectual faculties of the man who has taken the liquor. Of course, if I think there is evidence to satisfy me that the intoxication in this case was enough to have gone to the point of contributing to the accident, it follows a fortiori that it had arrived at the disturbing point which I think, speaking for myself, would be enough to satisfy the words of the proviso.…"

This, in fact, was not a case where a vehicle was being driven and it was alleged that the driver was under the influence of alcohol. On the other hand, it was a case where the deceased had been drinking for a while. In this condition he rudely accosted a woman and tried to put his arms around her. He was knocked down by a man who was in the company of the woman. He died as a result of the injury. The insurer sought protection under a clause which excluded liability if the assured was under the influence of intoxication of liquor.

23. Nearly a century later, in *Louden* v. *British Merchants Insurance Co. Ltd.* [*Louden* v. *British Merchants Insurance Co. Ltd.*, (1961) 1 WLR 798 (QB)] , the plaintiff, claimed under a policy, in regard to a bodily injury suffered by her husband. The insurer invoked the exclusion clause, which again protected it in a case where the person was under the influence of drugs or intoxicating liquor. It was a case of a motor vehicle accident, which proved fatal for the plaintiff's husband. One of the contentions raised by the plaintiff was that the words "*sustained whilst under the influence of drugs or intoxicating liquor, were so uncertain as to their meaning that no effect should be given to them*". Lawton, J., while dealing with this contention drew support from *Mair* [*Mair* v. *Railway Passengers Assurance Co. Ltd.*, (1877) 37 LT 356 DC] , and

what is more, reiterated the principles laid down therein. We may advert to the following : (*Louden case* [*Louden* v. *British Merchants Insurance Co. Ltd.*, (1961) 1 WLR 798 (QB)] , WLR p. 801)

"… The words used in the exemption clause of the policy before me have probably been used for many years in policies giving assurance against injury. Counsel for the defendants referred to *Mair* v. *Railway Passengers Assurance Co. Ltd.* [*Mair* v. *Railway Passengers Assurance Co. Ltd.*, (1877) 37 LT 356 DC] The policy in that case provided that the assurance should not extend to any death or injury happening while the assured was under the influence of intoxicating liquor. The case came before Lord Coleridge, C.J. and Denman, J. by way of an application for a new trial on the ground that the verdict had been against the weight of evidence. Both Judges construed the words, "whilst the assured is under the influence of intoxicating liquor," although it may not have been necessary for the purposes of their judgment to do so. Neither seems to have thought that the words were so uncertain as to be incapable of construction. Both were of the opinion that these words connoted a disturbance of the faculties, Lord Coleridge using the words "as disturbs the balance of a man's mind," and Denman, J. the words 'disturbing the quiet, calm, intelligent exercise of the faculties'. Mr Everett, whose experience in matters of personal injury insurance is extensive, was unable to refer me to any case in which a different construction had been put upon these words. In those circumstances, I find that the words are not so uncertain as to be incapable of construction, and I adopt the constructions in *Mair* v. *Railway Passengers Assurance Co. Ltd.* [*Mair* v. *Railway Passengers Assurance Co. Ltd.*, (1877) 37 LT 356 DC] , albeit they have been expressed in mid-nineteenth century idiom. *I add no gloss, as to do so might add confusion where none may have existed amongst insurers and policy holders during the past 84 years*."

(emphasis supplied)

This was the case of alleged driving under the influence of alcohol. The deceased was travelling in a car with a friend after having drinks (beer). They appeared to be sober. While so, the motor car attempted to negotiate a bend and it knocked off the warning

post and an accident ensued, the vehicle having fallen to a ditch. The Court went on to find that the blood alcohol was 260 mg in 100 ml and in favour of the insurer.

34. The Supreme Court of Alabama in *Standard Life Accident Insurance Co.* v. *Jones* [*Standard Life Accident Insurance Co.* v. *Jones*, 94 Ala 434 (1891)] , decided in November 1891, had occasion to consider the question as to whether the phrase "under the influence of intoxicating drinks" had a different connotation in law from that it carried in common parlance. No doubt, it was a case whether a workman was covered by an insurance policy and he met with an accidental death while he was discharging his duty as a Swtichman. We find the following discussion:

"… To be under the influence of whiskey, is not necessarily to be intoxicated. One may well be said to be under the influence of strong drink when he is to any extent affected by it—when he feels it; and this condition may result from potations so small as not to impair any mental or physical faculty, and when the passions are not visibly excited, nor the judgment or any physical function impaired. This is very far short of intoxication, which is the synonym of inebriety, drunkenness, implying or evidenced by undue and abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently….

But the phrase "under the influence of intoxicating drinks," as used in policies of this character and in this connection, has a legal significance, differing from the popular one, and implying such influence as in reality amounts to intoxication. In a well considered case, it was said by the Supreme Court of New York, that "to be under the influence of intoxicating liquors, within the meaning of this policy, the insured must have drunk enough to disturb the action of the physical or mental faculties, so that they are no longer in their natural or normal condition. When, therefore, the defendant imposed upon persons insured by it the condition that

it would not be liable when death or injury should happen while the insured was under the influence of liquor, the intention manifestly was to require the insured to limit its use in such a degree as that he retained full control over his faculties of mind and body…."

35. Therefore, an analysis of the principles as laid down both by the English courts/Scottish court and decisions from the United States would persuade us to hold as follows : the exclusion from the liability of the insurer would depend upon the exact terms of the insurance. We are in this case not dealing with a third-party claim. Under the aegis of the Motor Vehicles Act, we are not oblivious of the provisions of Section 149(2) in the unamended provisions of the Motor Vehicles Act, 1988 which are captured in Section 150 of the present avtar after the amendment as regards the defences available to the insurer regarding such claims. We are dealing with a case of own damage and the clause which extricates the insurer on the basis of the driver being under the influence of alcohol, inter alia. We would find that the there are two variants. One of the models is represented by the American cases where all that is required is that the person has in his body alcohol in any degree. Under the said model, it need not influence his conduct. Under the said model, it is not necessary for the insurer to show that person concerned was intoxicated or under the influence of intoxicating liquor.

36. This brings us to the other model which model is applicable in the facts of the case viz. the insurer must show that the person driving the vehicle was under the influence of liquor. The contrast between the models is stark and perceptible. As far as the exclusion of the nature we are concerned with, which requires driving of the vehicle by a person under the influence of intoxicating liquor, it would appear to be clear that mere presence of alcohol in any small degree would not be sufficient. This is for

> the reason that the court cannot rewrite the contract and hold that the mere presence of the alcohol, in the slightest degree, is sufficient to exclude the liability of the insurer. It requires something more, namely, that the driver of the vehicle was at the time of the accident acting under the influence of intoxicating liquor. Now it is clear that the decisions of the English courts are closer home and of assistance in the laying down of the law. It must be shown that in the facts and circumstances of each case that the consumption of liquor had, if not caused the accident, which undoubtedly would bring the accident within the mischief of the clause but at least contributed in a perceptible way to the causing of the accident."

18. Therefore, it cannot be said that the principles of law laid down in the said judgment would apply to the facts of this case. The learned counsel for the Insurance Company even went to the extent of arguing that even if an accident had occurred while the insured was standing on the footpath or the road consuming excessive quantities of alcohol, thus violating penal provisions of the Act, 1988. the Insurance Company will not be liable to pay any compensation, in view of the exclusion clauses discussed above. In my considered opinion, the contention so advanced is a far-fetched one beyond comprehension and the terms and conditions of the policy.

19. I am of the view that the exception 5 (b) of Exhibit P1 Insurance policy, and clause 4 of Exhibit P2 Memorandum of Understanding would have come into play to the detriment of the

insured, if the accident had occurred due to any contributory factor referable to the insured, consequent to "under the influence of alcohol".

20. Here in the case on hand, the complainant could very well establish before the Ombudsman by producing adequate and convincing evidence that there was no contributory negligence on the part of the deceased in the accident. That apart, the expression 'under the influence of intoxicating liquor or drugs' would depend upon person to person, irrespective of the quantity of alcohol or the drug consumed. Sometimes, there could be a situation where a person who has consumed only a lesser quantity of alcohol would be under the influence of alcohol than a person consuming more amount of alcohol. This is to say, the influence of alcohol would depend upon the bodily strength and capacity of person to person and there cannot be any static and rigid principle on that aspect.

21. To put it differently, the influence of alcohol on the senses and faculties varies from person to person. Influence of alcohol, in my considered view, would mean that due to the consumption of alcohol, the normal senses and faculties of the person should have been overpowered by the alcohol and thereby lost the average mind temporarily; or that he was not in a position to control himself; or an inebriated condition prevailed upon the

person, thus losing the capability, strength, and fitness to control and ride the motorcycle by himself and thereby fully or partially contributing to the accident.

22. There is no case for the Insurance Company that the deceased was in such a condition and contributed at least partially to the accident. But, the only case projected by the Insurance Company is on the basis of the chemical analysis report that the alcohol content in blood is exceeding the limit prescribed in Section 185 of the Act 1988, which by itself is not sufficient to have the advantage of the exclusion clause in favour of the insurer. Facts being so, I propose to consider a few judgments rendered by the Apex Court. The learned counsel for the 4th respondent/complainant has relied upon the judgment of the Apex Court in ***Sivaram Chandra Jagarnath Cold Storage (M/s) and another v. New India Assurance Company Ltd., and others*** [2022 KHC 6116] and ***Haris Marine Products v. Export Credit Guarantee Corporation (ECGC) Limited*** [2022 KHC 6460].

24. In ***Sivaram Chandra Jagarnath Cold Storage (M/s)*** (supra), the Apex Court has held thus in paragraph 15 thus:

> 15. Another instance where exception clauses may be interpreted to the benefit of the insured is when the exception clauses are too wide and not consistent with the main purpose or object of the insurance policy. In B. V. Nagaraju v. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, (1996) 4

SCC 647, a two - judge Bench of this Court read down an exception clause to serve the main purpose of the policy. However, this Court clarified that the breach of the exception clause was not so fundamental in nature that would have led to the repudiation of the insurance policy. In that case, the terms of the insurance policy allowed an insured vehicle to carry six workmen, excluding the driver. When the vehicle met with an accident, it was carrying nine persons apart from the driver. The insured had moved a claim for repair of the vehicle, which was rejected by the insurer. Allowing the claim, this Court held thus:

"7. It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry 6 workmen, excluding the driver. If those 6 workmen when travelling in the vehicle, are assumed not to have increased any risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the poser, keeping apart the load it was carrying. Here, it is nobody's case that the driver of the insured vehicle was responsible for the accident. In fact, it was not disputed that the oncoming vehicle had collided head - on against the insured vehicle, which resulted in the damage. Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which, by themselves, had gone to contribute to the causing of the accident. In the instant case, however, we find no such contributory factor. In Skandia case

[(1987) 2 SCC 654] this Court paved the way towards reading down the contractual clause by observing as follows: (SCC pp. 665-66, para 14)

"... When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of 'reading down' the exclusion clause in the light of the 'main purpose' of the provision so that the 'exclusion clause' does not cross swords with the 'main purpose' highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose. The theory which needs no support is supported by Carter's 'Breach of Contract' vide paragraph 251. To quote:

"Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule, usually referred to as the 'main purpose rule', which may limit the application of wide exclusion clauses defining a promisor's contractual obligations. For example, in Glynn v. Margetson & Co. [1893 AC 351 : (1891-94) All ER Rep 693] (AC at p. 357),Lord Halsbury, L.C. stated: 'It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard... as its main purpose, one must

> reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.'

But the judgment in ***Haris Marine Products*** *(supra)*, is in respect of own damage.

25. The learned counsel for the 4th respondent has also relied upon a Division Bench judgment in ***Babu K and another v. Union of India*** [2017 (4) KHC 137] considered in the realm of a railway accident, and wherein it is held that mere consumption of alcohol or liquor is not at all sufficient to bring a person under the exception of 'intoxication'. The following findings rendered by this Court would be relevant to arrive at a logical conclusion:

> "6. The expression "intoxication" which is greater in gravity has to be understood under this perspective, rather than a mere "drunkenness". Further, the expression "intoxication" has to be read along with the purpose of the Section as it is an exception attached to Section 124A which is resting on the principle of no-fault liability in the grant of compensation to the victim who suffered injury or death due to an untoward incident as defined under the Act. So, "intoxication" must have a dominant role in the real cause of untoward incident. In other words, "intoxication" represents the state of the victim at the time of incident, due to consumption of alcohol or drugs which lead to him/her as victim to the incident. The initial burden to prove the role of intoxication in causing the accident is on the Railway/respondent. ..."

26. Thus, taking into consideration the factual and legal

circumstances discussed above, I am of the considered and clear opinion that the petitioner Insurance Company has not made out a case to interfere with the award of the Ombudsman, there being no arbitrariness, illegality, unfairness, or any other legal infirmities justifiable to be interfered with in a proceeding under Article 226 of the Constitution of India**.**

Needless to say, writ petition fails and accordingly, it is dismissed.

sd/- **SHAJI P. CHALY, JUDGE.**

Rv

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1:	TRUE COPY OF THE TERMS AND CONDITIONS OF THE CONTRACT OF INSURANCE.
EXT.P2	TRUE COPY OF THE MEMORANDUM OF AGREEMENT BETWEEN THE PETITIONER AND THE FIRST RESPONDENT.
EXT.P3	TRUE COPY OF THE CLAIM SUBMITTED BY THE FOURTH RESPONDENT TO THE PETITIONER.
EXT.P4	TRUE COPY OF THE FIR IN CRIME NO. 332/2009 OF OLLUR POLICE STATION.
EXT.P5	TRUE COPY OF THE CHEMICAL ANALYSIS REPORT IN CRIME NO. 332/09 OF OLLUR P.S.
EXT.P6	TRUE COPY OF REPUDIATION LETTER LETTER DT. 18.03.2010 ADDRESSED TO THE FOURTH RESPONDENT BY THE PETITIONER.
EXT.P7	TRUE COPY OF COMPLAINT DATED 15.03.2011 BY THE FOURTH RESPONDENT BEFORE THE SECOND RESPONDENT.
EXT.P8	TRUE COPY OF SELF CONTAINED NOTE SUBMITTED BY THE PETITIONER TO THE 2ND RESPONDENT.
EXT.P9	TRUE COPY OF AWARD DT. 03.01.2012 OF THE SECOND RESPONDENT.

RESPONDENTS' EXHIBITS: NIL

True Copy

PS to Judge.

rv