

CR.No.428/2003.

State Life Insurance

Faisal Tahir, etc

- . **17.06.2011.** *Mr. Jahanzaib Khan Bharwana Advocate for petitioner.*
Mr. Khalid Aseer Chaudhary Advocate for respondents.

The respondents being legal heirs/legal representative of one Muhammad Tahir, filed an application for issuance of succession certification claiming that their predecessor in interest Muhammad Tahir Saleemi S/O Ch. Lal Din was kidnapped and is not traceable, his whereabouts are not known to them and as such a succession certificate may be issued about his debts. The petition was allowed, subsequently respondents filed an application for amendment of succession certificate claiming the payment of insurance claim of deceased. The said application was also allowed vide order dated 20.12.2000.

2. The petitioner then filed application for setting aside order dated 20.12.2000 claiming that succession certification has been issued in their absence, they were never served and as such same may be set-aside. Reasons for setting aside order for grant of succession certification has been shown that death of insured could not be

presumed before elapse of 7 years and as such impugned order be set-aside.

3. The learned trial court framed the issues, recorded the evidence and finally dismissed the petition on 11.9.2002. The petitioners assailed the said order through an appeal before the learned Addl. District Judge Jhang which was dismissed on 23.1.2003, hence the present petition.

4. Learned counsel for petitioner submits that petitioner being the insurer could not pay the claim unless it is established that the insured has died. He further submits that death claim is only payable under the insurance policy of insured Muhammad Tahir Saleemi and as such the claim is not payable for the reasons that insured has been kidnapped. Further submits that there is no evidence available on record confirming that the insured has died.

4. Learned counsel for respondents submits that learned courts below have specifically held that whereabouts of insured are not known and as such he is deemed to be died. Learned counsel for respondents has relied on *Gul Zaman V. Sher Zaman and others* (PLD 1972 Azad J & K 26) and submits that court can make

inference of death of a person even before seven years if sufficient evidence is available.

5. Heard. Record perused.

6. It is an admitted fact between the parties that Muhammad Tahir Saleemi an insured person was kidnapped on 28.3.1999 and after that his whereabouts are not known to respondents. The respondents being the wife and children of Muhammad Tahir Saleemi filed an application for grant of succession certificate with reference to his account maintained with Muslim Commercial Bank Bhakkar Road, Jhang Sadar. The application was allowed after recording evidence. The respondents then filed another application for amendment in the earlier succession certificate on 10.11.2000, the said application was also allowed. Learned trial Court while allowing the application recorded the evidence and granted succession certificate to Mst. Nasim, wife of Muhammad Tahir Saleemi with reference to his life insurance policy No.50/9716048.

7. The petitioner on coming to know the said order, filed an application for setting aside the same on 02.3.2001 claiming that they have not been served and as such order for grant of succession certificate to the extent

of life insurance policy is liable to be set-aside. Learned trial court framed issues, recorded the evidence of both the parties and finally came to the conclusion that petitioner has failed to prove on record the date of knowledge about the issuance of succession certificate and dismissed the application for setting aside order for grant of succession.

8. The argument of learned counsel for petitioner is that insured person could not be presumed to be died unless 7 years have expired from the date when he has not been seen by any person. The application for succession certificate was admittedly filed before expiry of seven years. Under Article 124 of Qanun-e-Shahadat Order, the burden for proving that person is alive or not rests on the person who claims refuge under Article 124 of Qanun-e-Shahadat Order. Article 124 of Qanun-e-Shahadat Order is reproduced as under:-

“124. Burden of proving that person is alive who has not been heard of for seven years. When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who affirms it.”

9. This article is equated with Article 108 of the then Evidence Act. The interpretation of Article 108 of the

Evidence Act 1872 came up for resolution before the Full Bench of this Court and the Hon'ble full Bench of this Court in Pun ab and othes V. Natha and others (**A.I.R 1931 Lahore 582**) held as under:-

“Section 108, Evidence Act, came into operation and raised a presumption that at the institution of the suit he was dead, but no presumption as to the date of his death could or did arise and the date of his death had to be proved by the plaintiffs-appellants in the same wy as any other relevant fact in the case.

10. The said issue came up before the Hon'ble Supreme Court of Pakistan in Muhammad Sarwar and another V. Fazal Ahmad and another (**PLD 1987 Supreme Court 1**) and it was held as under:-

“ The upshot is that Section 108 of the Evidence Act merely creates a presumption that the person who has not been heard for seven years, is dead at the date of the suit, and does not refer in any way as to the date of his death, which has to be proved in the same way as any other relevant fact in the case.”

11. From the above said dictum of law it is clear that presumption under Article 124 of the Qanun-e-Shahadat Order is that a person who has not been heard for seven years will be presumed to be dead if the date of his death is claimed that have to be proved by the person who is claiming.

12. The facts of this case are that insured person was kidnapped on 28.3.1999 and admittedly till today no body has heard about his whereabouts nor he appears on the scene. It means that 12 years have elapsed and no one has heard about the kidnapped insured person meaning thereby it will be now presumed that he is dead.

13. The legal heirs of insured appeared before the court and recorded their statements and learned courts below came to conclusion that Muhammad Tahir Saleemi has died. No doubt at the time of institution of application for setting aside ex-parte order, seven years were not elapsed but today seven years have been elapsed and presumption is now that insured is dead.

14. Now the question arose, whether petitioner is liable to pay the insurance claim in terms of policy purchased by the kidnapped person. This is not the case of petitioner that insured has not paid the premium but their case is that seven years have not been elapsed and as such it could not be presumed that he is a dead person and as such claim payable to legal heirs of insured is not matured.

15. The petitioners are liable to pay the death claim as per terms of policy and the only question require for

resolution is whether the insured is dead or not? The petitioner is not claiming that insured is alive but their argument before the learned courts below was that seven years have not been elapsed and as such it could not be presumed that insured is dead. This argument is not available to petitioner today as 12 years have been elapsed and admittedly the insured has not contacted the petitioners nor paid any premium after 28.3.1999. The insured was an advocate by profession. Punjab Bar Council has paid his insurance claim presuming that he is dead. The Banker of insured has also paid his credit balance to his legal heirs. The decree of court, payment of insurance claim by the Punjab Bar Council and payment of credit balance by the Bank is sufficient to prove that insured is dead. Admittedly no one has approached the Punjab Bar Council or Muslim Commercial Bank negating the order of court.

16. The main requirement of petitioner to pay the insurance claim is the fact of death of insured. Admittedly court has declared that the insured is dead, subsequent events of payment of insurance claim by the Punjab Bar Council and the payment of credit balance by the Muslim Commercial Bank has further strengthen this presumption

that insured is dead. 12 years have been elapsed and no one has informed to petitioner about the whereabouts of insured. Only the claimants of insured are his legal heirs who are categorically deposed on oath before the court that insured is dead. No doubt under Article 124 of Qanun-e-Shahadat Order there is no presumption as to the time of death of a person and the onus to prove that person has died at a particular time within seven years from certain year is on the person alleging it. It is an admitted fact that the relevant persons about the presumption of death of a person are those who could naturally heard about the person as if he had been alive, meaning thereby the wife as well as sons and daughter are the first persons who can claim the refuge under the above said article. It is an admitted fact that insured ha not contacted the wife and his children from the date of his kidnapping.

17. Under the Succession Act, the beneficiary of the succession order have to submit an indemnity bound equal to the claim and in case any other legal heir or claimant came subsequent to payment of debts of deceased, his/their right is secured under the indemnity bound submitted by the beneficiary of succession certificate. In the present case, the court while granting the certificate to

respondents directed them to submit indemnity bound equal to the insurance claim. Risk of petitioner is then secured against the said indemnity bound.

18. The fact of death of insured is further confirmed from the fact that no insurance premium has been paid after the date of his abduction. This has not been denied by learned counsel for petitioner. The above said facts shows that after the elapse of 12 years no one has claimed that he has seen the insured person, further the petitioner is not claiming that they have the evidence about the fact that insured is alive and as such it is a proven fact that the insured is dead, the insurance policy is covered against the death of insured and as such petitioner is bound to pay the insurance claim to the legal heirs of insured in terms of Succession certificate issued by the competent court of law. Infact the insurance claim stand matured from the date of expiry of seven years which commenced from 28.3.1999.

19. The argument of learned counsel for petitioner is that under the Insurance Ordinance 2000, it is the insurance tribunal constituted under Section 121 of the Order can decide the fact of death of insured person with

reference to the payment of insurance policy and as such civil court is not competent to issue succession certificate.

20. Under Section 122 of Insurance Ordinance, powers of Tribunal has been given which is read as under:-

“122. Powers of Tribunal.--- (1) *A Tribunal shall:*

- (a) *in the exercise of its civil jurisdiction have in respect of a claim filed by a policy-holder against an insurance company in respect of, or arising out of a policy of insurance, all the powers vested in a Civil Court under the Code of Civil Procedure, 1908 (Act v of 1908):*
 - (b) *In the exercise of its criminal jurisdiction, try the offences punishable under this Ordinance and shall for this purpose, have the same powers as are vested in the Court of Sessions under the Code of Criminal Procedure, 1898 (Act V of 1898):*
 - (c) *exercise and perform such other powers and functions as are, or may be, conferred upon, or assigned to it, by or under this Ordinance; and*
 - (d) *in all matters with respect to which procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1898 (Act V of 1898) as the case may be.*
- (2) *The jurisdiction of a Tribunal shall not extend to appeals to which Section 33 and Section 34 of the SECP Act apply.*
- (3) *No Court other than a Tribunal shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Tribunal extends under this Ordinance, including a decision as to the territorial limits and the execution of a decree, order or judgment passed by a Tribunal.”*

21. Perusal of Section 122 of the Ordinance, shows that Tribunal in exercise of its jurisdiction enjoys the powers in respect of claim filed by policy holder against insurance company in respect of or rising out of a policy of insurance.

22. In the present case, this is not the issue. The issue is about the death of insured. Question of payment of claim will only arise when it is established that insured is dead. The argument of learned counsel for petitioner is only that seven years have not been elapsed and as such the insured could not be presumed to be dead. He is not disputing the payment of claim but he is claiming that unless and until it is proved that insured is dead, the claim does not mature. As there is no dispute between the insurer and insured about the payment of claim, the only dispute stands resolved by the competent court of law. Further if it is admitted for the sake of arguments that order passed by the learned civil court was before expiry of seven years, even then at present more than 12 years have been elapsed and the petitioners have no information of the fact that insured is alive and as such the fact of death of insured will be presumed in affirmative.

23. The upshot of the above said discussion is that it is proved on record from the facts, circumstances and record that insured is dead and petitioner is bound to pay the insurance claim to the legal heirs of insured in terms of succession certificate issued by the competent court of law, this petition thus fail and dismissed.

(Muhammad Khalid Mehmood Khan)
Judge
Special Bench Civil-III

*Imran/**

Approved for Reporting