

(1998) 11 KAR CK 0068
In the Karnataka High Court
Case No : M.F.A. No. 1787 of 1998

National Insurance Co. Ltd.

APPELLANT

Vs

Obalesh and Another

RESPONDENT

Date of Decision : 23-11-1998

Acts Referred:

Motor Vehicles Act, 1988 — Section 149 (2), 149 (2), 167, 170, 173
Workmens Compensation Act, 1923 — Section 2 (1) (m), 30, 4

Citation : (1999) 1 ACC 471 : (2000) ACJ 1329

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hari Nath Tilhari, J.—Heard the counsel for the appellant Mr. S.V. Hegde Mukund.

This appeal arises from the judgment and award dated 30.9.1997 given by the Workmen's Compensation Commissioner, Davanagere in Case No. Kanappa: CR 92 of 1996 awarding compensation to the tune of Rs. 1,57,427 in favour of the respondent No. 1, cleaner of the lorry in question.

2. The facts of the case in a nutshell are that, while moving in the goods vehicle belonging to the employer, in his capacity as the cleaner of the vehicle on 23.2.1996, the claimant, respondent No. 1 sustained injuries causing permanent disablement.

The claimant made the claim for compensation and according to him he was getting Rs. 1,500 as monthly wages and Rs. 40 as bhatta per day. The claimant's case was that he suffered injuries on account of the accident in and during the course of employment.

3. The notices were issued, the employer put in appearance through his counsel. He has not filed any written objections. Whereas the insurance company has filed the objections denying the claim of the claimant alleging that the claimant has to prove his case.

4. The Workmen's Compensation Commissioner after perusal of the evidence on record held that the claimant, present respondent No. 1, was the workman, who suffered injuries in accident arising during and in course of employment. The Workmen's Compensation Commissioner further found that the injured employee, that is the claimant, was aged about 30 years and he further found that his monthly wages were Rs. 2,073.75 (the monthly salary and the bhatta to be taken as Rs. 2,073.75), in round figure he assessed the monthly wages in total to be Rs. 2,000, in view of the provisions of the Workmen's Compensation Act, as amended by Act of 1995, for short, "the Amending Act of 1995", vide Explanation II to Section 4 of the Workmen's Compensation Act (for short, "the Act"). The Commissioner applied the multiplier and arrived at a conclusion that he was entitled to compensation for permanent disablement and injuries to the tune of Rs. 1,37,266. It further concluded that the claimant has been entitled to a sum of Rs. 20,161 as interest on that amount of compensation and as such it passed the award for a total sum of Rs. 1,57,427.

5. Feeling aggrieved from the award of the Compensation Commissioner and of the Workmen's Compensation Commissioner having imposed a penalty of Rs. 20,589 on respondent No. 2, the owner of the vehicle (that is the insured) on account of the delayed payment, that is, from the award given by the Workmen's Compensation Commissioner, the insurance company has come up in appeal u/s 30 of the Act, but the owner of the vehicle has not filed any appeal against the award.

6. The learned counsel for the appellant contended that the appeal involves a substantial question of law to the effect that the respondent No. 1, who is claimant petitioner had not produced any evidence that he was getting bhatta of Rs. 40 for 26 days. He further claimed that bhatta is not to be included for determining the wages of the workman. Therefore, the learned counsel contended that as such the compensation determined and awarded to the claimant, that is, to the injured has not been correctly determined and it is not in accordance with law, and that it has been assessed in an illegal manner and as such it is excessive as well and it is contrary to the provisions of Section 2(1)(m) of the Act.

7. In a nutshell the insurance company has challenged the quantum of compensation awarded to the claimant, respondent No. 1. The basic question to be considered firstly is:

Whether the ground of attack and challenge to quantum of compensation awarded is available to the insurance company in view of the Division Bench decision of this court in the case of New India Assurance Co. Ltd. Vs. Raja Naika and another, , the decision of this court in Oriental Insurance Co. Ltd. Vs. Veronica Obrin (Smt.) and Others, .

In these two Division Bench cases this Hon'ble Court considered the scope of appeal as well as right of insurance company, that is, the insurer and the extent

of its right to challenge the award in the context of provisions of Section 30(1) of the Act read with Sections 149(2) and 149(7) of the Motor Vehicles Act. The court also considered Section 167 of the Motor Vehicles Act, 1988, for short "the MV Act, 1988" and after considering the entire scheme as well as after having referred to the earliest Supreme Court decision in the case of *British India General Insurance Co. Ltd. v. Captain Itbar Singh* 1958 65 ACJ 1 (SC), firstly this court observed at page 526 under the reported case in *New India Assurance Co. Ltd. Vs. Raja Naika and another*, , as follows:

Therefore, if the action for compensation arising in the use of a motor vehicle in a public place is taken against the insured person by institution of a proceeding before a Claims Tribunal envisaged under the MV Act by making the insurer, who has issued "a certificate of insurance" under Chapter XI of the MV Act covering the liability of the insured person, the insurer could seek to defend such action only by raising any of the grounds made available to him under Sub-section (2) of Section 149 of the MV Act and no other. From this it follows, as a necessary corollary, that an award made by the Claims Tribunal envisaged under the MV Act, cannot be appealed against by the insurer by filing an appeal u/s 173 of the MV Act, unless the ground urged in support of such appeal could be any of the grounds in Section 149(2), on which an action for compensation could have been defended by him (it).

8. The Hon'ble Judges of this court constituting the Division Bench further observed at page 527 as under:

Scope of defence of the insurer in an action brought by an employee or his legal representatives (dependants) for fixing the liability of the employer under the WC Act cannot, therefore, be other than what is permitted under Sub-section (2) of Section 149 of the MV Act when he (it) is impleaded as required under Sub-sections (1) and (2) of Section 149 of the MV Act to make it liable to satisfy the judgment or award to be made by the Commissioner. An argument advanced on behalf of the insurer that a reference to "Claims Tribunal" in the Explanation found in Section 149 of the MV Act should make us hold that limiting of grounds of defence of the insurer under Sub-section (2) of Section 149 of the MV Act should apply only when the action taken is before a Claims Tribunal, does not appeal to us since the court referred to in Sub-section (2) of Section 149 is wide enough to take within its ambit "Commissioner" under the WC Act inasmuch as in the provision in the MV Act of 1939 corresponding to Section 149 of the MV Act of 1988, there was no mention of "Claims Tribunal" at all and yet defences to be taken before the Claims Tribunal by the insurer under the MV Act of 1939 were those limited by that provision. Hence, when the insurer in a proceeding under the WC Act cannot defend an action for fixation of the liability of an employer for payment of compensation to his employee for his death or bodily injury on grounds other than those permitted by statute under Sub-section (2) of Section 149 of the MV Act, it must follow as a necessary corollary that no appeal by an insurer u/s 30(1) of the WC Act against an award made by the

Commissioner could lie on grounds other than those specified under Sub-section (2) of Section 149 of the MV Act, subject to further condition that such grounds involve substantial questions of law required to be considered in appeal.

(Emphasis added)

A reading of these decisions reveals that the Division Bench has been pleased to lay down that when an employee suffers in motor accident injuries, if he makes a claim for compensation against the employer and the insurance company is also impleaded, the right of defence of the insurance company is limited and restricted and controlled by Section 149 (2) and (7) of the Motor Vehicles Act, 1988, for short, "the Act, 1988" and only those defences are available to it, i.e., insurer even before the Workmen's Compensation Commissioner which are permitted u/s 149 excluding the cases where the power is exercised u/s 170. The Division Bench further laid down as a corollary to which the right of appeal from the order of the Workmen's Compensation Commissioner is circumscribed by the two conditions, one, namely, that the grounds challenging the award must be those which come within the scope of defences permissible to the insurance company vide Section 149(2), MV Act and secondly those grounds must involve or raise substantial questions of law and unless these two conditions or grounds are available and established, the insurer has got no right to appeal.

9. In the other Division Bench case also, namely, Oriental Insurance Co. Ltd. Vs. Veronica Obrin (Smt.) and Others, , the Division Bench considered the right of appeal in the context of Section 30 of Workmen's Compensation Act, as well as Section 110-A and Section 96 (2) of the MV Act, 1939 and it has laid down that: An appeal from the award of workmen's compensation officer at the instance of insurer cannot be preferred on the grounds other than those on which he should have defended the claim u/s 96 (2). The grounds available to the insured are not available to the insurer.

The question of scope of right of an appeal of an insurer has also been considered in the context of Section 170 of the MV Act, 1988 and also Section 173 especially with reference to the insurance company which has been impleaded as a party by the claimant himself when the claim was filed.

10. Their Lordships of the Apex Court in Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, , have been pleased to observe in para 4 as under:

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 a 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. It is true that the claimants themselves had joined respondent No. 1, insurance company in the

claim petition but that was done with a view to thrust the statutory liability on the insurance company on account of the contract of insurance. That was not an order of the court itself permitting the insurance company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Section 170. Consequently, it must be held that on the facts of the present case, the respondent No. 1, insurance company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal.

11. A reading of the decision of their Lordships of the Supreme Court reveals that unless the procedure prescribed u/s 170 is followed and the conditions precedent mentioned in Section 170 are found to be satisfied, namely, those conditions which are mentioned in Clause (a) or (b) or I may say unless collusion between the claimant and the person, against whom the claim is made, is shown, that is, the insured has with mala fide intentions failed to contest the claim and unless the authority trying the matter, that is, the Claims Tribunal is satisfied about the existence of these conditions, the insurance company cannot have wider defences on merits, than what is available to it by way of statutory defence. Section 170 further requires that satisfaction has only to be substantive, but it should have been and should be recorded by the court or Tribunal dealing with that case and should be based on reasons to be recorded in writing. Then only, if the Tribunal permitted the insurer to raise even those defences which are available only to the insured then and then only, it could have raised those defences and unless the Tribunal or court has not recorded a reasoned and speaking order permitting the availability of other defences, the insurer is not entitled to have wider defences than those specified in Section 149(2) and as such it cannot claim to be entitled to challenge the award on the defences which might be available to the insured.

12. Learned counsel for the appellant submitted that when the insurer has been made a party in the claim petition and insurer has not been made a party at the instance of the Tribunal either u/s 149 or 170, then he may be said to be entitled to the wider defences than those mentioned in Section 149(2). This aspect of the matter has very clearly been dealt with by the Division Benches in those two cases and especially the quotation referred to earlier. Even their Lordships of the Apex Court have taken into consideration this aspect of the matter and then observed that: If the claimant has joined the insurance company as the party respondent in the claim petition, that has been done and that was done with a view to impose and thrust a statutory liability on the insurer or insurance company under Sections 147 and 149 of the MV Act. They further observed that there being no order of the court as required u/s 170 showing the satisfaction and establishment of the two conditions, then on the facts of the case, respondent insurance company cannot be said to be entitled to appeal on merits of the claim made against the insured.

13. Learned counsel for the appellant made a reference to a single Judge

decision of this court in the case of Oriental Insurance Co. Ltd. Vs. Vasantha Pitambar and Another, .

14. A perusal of the decision of learned single Judge of this court relied by the learned counsel for the appellant reveals per se that attention of the court was not invited to the material provisions, namely, Section 96 (2) of the Act, as observed in para 40.

15. The learned counsel for the respondents further contended that insurance company has no locus standi to file this appeal, in view of Section 96 (2), except what is provided in Section 110-C (2-A) (ii). Thereafter the learned single Judge referred to a Division Bench case of the Bombay High Court and after having made certain observations therefrom observed that: As stated earlier, employer remained absent, the vehicle in question was insured. Therefore, the claim was lodged before the Commissioner for Workmen's Compensation, still insurance company is entitled to take defence u/s 110-C. Section 95 (2) by itself does not deal with the scope of defences available to the insurance company. Section 95 (2) only provides that subject to proviso to Sub-section (1), the policy of insurance shall cover any liability in respect of any one accident up to the following limits, namely...it means Sub-section (2) of Section 95 deals with the extent of liability in respect of any one accident. Section 110-C, Sub-section (2) of MV Act, 1939 is in same terms as Section 170 of MV Act, 1988 and also Section 149(2) is analogous to and almost in same terms as Section 96 (2) of the MV Act, 1939.

I am quite sure if Section 96 (2) of the MV Act, 1939 and Section 110-C (2-A) would have been read in extenso and have been placed in extenso, the learned Hon"ble single Judge might have taken a different view. He definitely would have marked the extent of the limits of defence available to the insurance company, he would have also marked that Sub-section (2-A) of Section 110-C requires the court or Tribunal to be satisfied about existence of either of the conditions of Sub-section (2-A) as in Clauses (i) and (ii) of Sub-section (2-A) of Section 110-C and also to be satisfied and for reasons to be recorded in writing, he could grant the permission to the insurer to take the defences available to the insured. Anyway, I might have said that this decision when it has been rendered without taking note of the expressions used in the section, that decision has been arrived at by the learned single Judge, it may not operate as a binding precedent being per incuriam. A decision is per incuriam which is given without applying mind to the terms of this section and the provisions of the Act or without application of mind or it being brought to the notice of the court what the larger Bench or higher court has laid down. Even apart from that the Apex Court in Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, , has very clearly laid it down that unless the procedure prescribed u/s 170 is followed and conditions mentioned in the section are found to be satisfied and unless the Tribunal has recorded an order granting permission in writing, a reasoned order in writing means, that is, the order based on reasons permitting the availability of those

defences which are ordinarily available to the insured are not available to insurer and nor can the insurer challenge the award on those grounds.

16. The Supreme Court case being the latest one on the proposition and it appears to have laid down the law, particularly by applying mind to Section 170 of the Act which is analogous to Section 110-C (2-A). The present is the case in which provisions of Section 170 of the MV Act, 1988 have not been availed.

17. In this view of the matter and keeping the law laid down by the Supreme Court and Division Benches of this court referred to above, even if there is a question of law which does not stand covered by any of the defences available u/s 149(2) of MV Act then, the appeal u/s 30 of the Act on behalf of the insurer is not maintainable on those grounds of defences which are not covered by Section 149(2) of the Act because it cannot be deemed to be a person aggrieved from the order. If person aggrieved only means, that a person who is aggrieved against the decision rejecting the claim or pleas raised by the person and available to him under the law. Thus considered, in my opinion, the grounds of challenge on which the insurer has sought to challenge the award are not available to it. Further the bhatta paid is also the part of the charges or wages paid to him, to be a benefit to the employee estimated in terms of law. Definition of wages includes in it the bhatta when it reads wages include any privilege or benefit which is capable of being estimated in money, other than travelling allowance or the value or travel concession or contribution paid by employer of a workman towards any person or provident fund or a sum paid by the workman to cover any personal expenses entailed by nature of his employment.

It is not the case of any of the parties, particularly of the insured that bhatta does not come within remuneration. The insurer is not entitled to raise it at this stage. The wages may include any benefit and bhatta could also be included. As such, it cannot be said that the Commissioner committed any error of law or of fact in taking into consideration that as part of the wages and in awarding the compensation.

18. Thus considered, the appeal is devoid of merits and as such it is hereby dismissed. Costs made easy.