

(2023) 01 GAU CK 0046
In the Gauhati High Court
Case No : MFA No. 25 Of 2019

National Insurance Company Limited

APPELLANT

Vs

Omar Ali And Anr

RESPONDENT

Date of Decision : 24-01-2023

Acts Referred:

Employees Compensation Act, 1923 — Section 2(b), 2(c), 2(e), 3, 12, 12(2), 12(13), 13, 14, 19, 20
Motor Vehicles Act, 1988 — Section 95, 95(5), 96, 96(1), 96(1), 167
Motor Vehicles Act, 1939 — Section 110AA

Citation : (2023) 01 GAU CK 0046

Hon'ble Judges : Malasri Nandi, J

Bench : Single Bench

Advocate : R D Mozumdar, A R Sikdar

Final Decision : Dismissed

Judgement

1. Heard Ms. R.D. Mozumdar, learned counsel for the appellant. Also heard Mr. M. Khan, learned counsel for the respondents.

2. This appeal has been preferred by the appellant insurance company u/s 30 of the Employees Compensation Act, 1923 against the judgment and award dated 25/11/2014 passed by the Commissioner Workmen's Compensation, Abhayapuri, Bongaigaon in EC case no 115/2013 awarding compensation of Rs. 1,79,371/- in favor of the claimant/respondent no 1.

3. The brief facts of the case is that the claimant/respondent no. 1 filed a case before Workmen's Compensation Commissioner Abhayapuri, stating inter alia that on 03/10/2012 at about 10.25 P.M. as a driver of a vehicle bearing no AS-19E-0486 (Maruti Swift) while proceeding from Guwahati towards Chalandapara and when reached near Delhicacy Dhaba over 37 National Highway suddenly one unknown vehicle (truck) coming in a rash and negligent manner knocked down the said Maruti Swift from backside as a result of which, the driver of the vehicle/claimant Omar Ali sustained grievous injuries on his person.

Immediately after the accident the injured was taken to the Arya Hospital Guwahati and admitted there and treated as an indoor patient from 03/10/2012 to 5/10/2012 and later on, injured was shifted to Rahman Hospital, Guwahati wherein he also had undergone treatment for some period.

4. The owner of the vehicle has admitted in his written statement about the accident, employment of the injured Omar Ali as a driver of his vehicle. After considering the evidence of the witnesses as well as the documents available on the record, the Commissioner Workmen's Compensation awarded compensation as aforesaid in favor of the claimant/ respondent no 1.

5. Being highly aggrieved and dissatisfied with the judgment and award passed by the Commissioner, Workmen's Compensation dated 25/11/2014, the appellant has filed this appeal.

6. It is submitted by the learned counsel for the appellant that the learned Commissioner has failed to appreciate that in view of the specific provision of the Workmen's Compensation Act, 1923 insurance company is not liable to satisfy the award at the first instance and if at all it accrues any liability out of the contract of insurance, it is only to indemnify the owner of the involved vehicle/ insured and not to pay the award on behalf of the owner/insured as held. Thus the judgment deserves to be set aside.

7. It is also the submission of the Learned counsel for the appellant that under Workmen's Compensation Act (now Employees Compensation Act) the employee is not the third party therefore, the said employee or his representative once chosen the provision of E.C. Act is entitled to receive the compensation and /or awarded amount from the insured/ employer at the first instance and not the insurance company as wrongly held. Thus the judgment deserves to be set aside.

8. Learned counsel for the appellant has also contended that as per the E.C. Act, 1923 it is the employer who has to pay the compensation to the employee if any personal injury is caused to the employee in the course of his employment. Thus, as the petitioner was not an employee of the appellant company, in the first instance, the appellant company cannot be directed to pay the compensation to the claimant. It is also submitted that just after the accident it is the employer who has to make the payment and later on he can be indemnified by the appellant company. Thus, the Commissioner was wrong in directing the appellant to make the payment of compensation to the claimant/respondent no 1.

9. In support of his submission, learned counsel has placed reliance on the following case laws –

- i. GHC case no MFA 186/2017 (Oriental Insurance Company Ltd vs. Rupchan Ali.
- ii. AIR 2016 SC 5382 (Golla Rajanna etc vs. Divisional Manager and Another etc)
- iii. 2001 ACJ 1690 (New India Assurance Company Ltd vs. Sanjit Kumar)
- iv. (2009) 1 GLT 370 (National Insurance Company Ltd vs. Bimal Nath and others)

10. On the other hand, learned counsel for the respondent no 1/claimant has submitted that direction by the learned Commissioner to the insurance company for the payment of compensation would not amount to waiver of the right of the insurance company to challenge the order of compensation but it is the insurance company who has to indemnify the order as such the commissioner has rightly passed the order directing the insurance company for the payment of the compensation to the claimant/ respondent no 1.

11. I have considered the submissions of the learned counsel for the parties and also perused the materials on record of the EC Case No. 115/2013 and the judgment/ order passed by the Commissioner.

12. In the case in hand, the insurance company has not challenged the factum of employment, age, wages of the claimant and also the factum of accident arising out of and in the course of employment involving the vehicle in question. The only question raised by the learned counsel for the insurance company is whether the insurance company can be directed to pay the compensation as the first instance awarded to a workman.

13. The contention of the learned counsel for the appellant is that such order passed by the Commissioner to pay compensation by the insurance company could not have been passed within the four corners of Employees Compensation Act. The rival submission of the learned counsel of the claimant/ respondent no 1 is that the insurer is also liable to pay compensation under the Workmen's Compensation Act (E.C. Act), if attention is paid to certain provisions of the M.V. Act.

14. The Employees Compensation Act, 1923 ensures that workers are adequately compensated for injuries sustained in the line of duty. The E.C. Act is a self contained code and its provisions are required to be borne in mind while deciding the question of quantum of compensation as well as the liability of the persons to pay compensation. As the approach in this case was to the Commissioner appointed under the Employees Compensation Act, 1923, it is urged by the learned counsel for the insurance company that the provisions of the MV Act would not apply. If attention were to be confined to the provisions of the E.C. act, it is submitted that the appellant could have been made liable only u/s 14 of the Act which has no application in the case at hand.

15. To appreciate these contentions of the learned counsel for the parties, let the provisions of The Employees Compensation Act, 1923 be defined. Before this is done, it may be pointed out that this act was enacted to provide for the payment by certain classes of employers to their workmen of compensation for injuries by accident.

16. "(i) Section 2(b) defines Commissioner which means commissioner for Workmen's Compensation appointed u/s 20, (ii) Section 2(c) defines Compensation means compensation as provided for by this Act, (iii) Section 2 (e) defines Employer which includes anybody of persons whether incorporated or not

and any managing agent of an employer and the legal representative of a deceased employer and when the services of a workmen are temporarily lent on hire or let on hire to another person by the person with whom the workmen has entered into a contract of service or apprenticeship, means such other persons while the workmen is working for him.

Section 3 - Employer's liability for compensation which reads as follows –

(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provision of the Act.

Section 12 reads as follows– Contracting–

(1) Where any person (herein after in this section referred to as the principal) in the course of or for the purpose his trade or business contracts with any other person (herein after in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of any trade or business of the principal amount. The principal shall be liable to pay to any employee employed in the execution of the work any compensation which he would have been liable to pay if that employee have been immediately employed by him and while compensation is claimed from the principal this act shall apply as if references to the principal were substituted for reference to the employer except that the amount of compensation shall be calculated with reference to the wages of the employee under the employer by whom he is immediately employed.

(2) Where the principal is liable to pay compensation under this section he shall be entitled to be indemnified by the contractor for any other person from whom the employee could have recovered compensation and where a contractor who is himself a principal is liable to compensation or to indemnify a principal under this section shall be entitled to be indemnified by any person standing to him in the relation of contractor from whom the employee could have recovered compensation and all questions as to the right and the amount of any such indemnity shall in default of agreement be settled by the Commissioner.

Section 13 - Remedies of employer against stranger–

Where a workman has recovered compensation in respect of any injury caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid to pay damages in respect thereof, the person by whom the compensation was paid and any person who has been called on to pay an indemnity under section 12 shall be entitled to be indemnified by the person so liable to pay damages as aforesaid.

Section 14 - Insolvency of employer–

(1) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any 1 employee, then in the event of the

employer becoming insolvent or making a composition or scheme of arrangement with his creditors or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in any law for the time being in force relating to insolvency or the winding up of companies, be transferred to and vest in the 1 employee, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the 1 employee than they would have been under to the employer.

Section 19- Reference to Commissioners-

(1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not an employee) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement, be settled by a Commissioner."

17. These provisions show that it is the employer who is to pay the compensation provided for by this Act and who can in the situations visualized by sections 12 and 13 get himself indemnified by the persons mentioned in these sections. It is in case of insolvency of the employer or his making composition with his creditors or where the employer is a company which is being wound up, then the insurer becomes directly liable to pay the compensation.

18. In the case of *R.V. Moondra and company vs. Bhanwari* reported in AIR 1970 Rajasthan 111, it was held that the compensation under the Workmen's Act is payable by an employer and the insurance company does not come within the ambit of the definition, it was therefore held that the commissioner appointed under the Act will have no jurisdiction to award compensation to a workmen against an insurer unless the case falls u/s 14 of the Act.

19. In the case of *Oriental Fire and General Insurance Company Ltd vs Govind Singh* reported in 1972 ACJ 137, it was observed that in a proceeding under the Workmen's Act the Commissioner has no jurisdiction to pass a decree against the insurer of the motor vehicle though it was accepted that the amount awarded against the employer could be realized by the claimant from the insurance company under the provisions of section 96 of the MV Act.

20. In the case of *K.P. Kurian vs. Managing Partner Hindustan shipping company*, reported in 1975 lab IC 130 (Kerala), it was held that except in the case of the insolvency of the employer the claim for compensation has to be made against the employer alone. It has been further stated that the provisions of the MV Act do not require that a claim under the Workmen's Act should be in accordance with the provisions of the section 95 of the former Act.

21. In the case of *G. Shreedharan vs. Hindustan Ideal Insurance Corporation*

reported in 1976 LIC 732 (Andhra Pradesh), it was observed that though a stranger (like insurer) could be asked to indemnify an employer by virtue of what has been provided in section 13 of the Workmen's Act, right u/s 13 could be enforced only by filing a regular suit in civil court.

22. In another case *New India Assurance Company Ltd vs. Parmeshwari* (1976) 32 FACLR 371 (Kerala), it was stated by the court that section 14 of the Workmen's Act is the sole provision under which the liability of the employer extended to the insurer also.

23. In the case of *Charag Chemical industry vs. R.G. Ganesam* reported in 1981 ACJ 532, the right conferred on an employer by section 13 of the Workmen's Act was held by the court to be enforceable by taking resort to civil proceedings. As to the jurisdiction of the commissioner to determine the liability of "any person" u/s 19 of the Workmen's Act, it was stated that the amount that could be realized by the employer or the insured from the insurer by virtue of the terms of the policy cannot strictly be termed to be compensation within the meaning of the Act.

24. Contrary views have, however, been expressed in number of decisions. In *MFA 62/72 (Ratanlal Sethia vs. Pronoy Kumar)* wherein it has been held after referring to sections 95 and 96 of the MV Act, that insurance company is a necessary party in a proceeding under the Workmen's Act and it is liable to pay compensation awarded under this Act to the extent covered by the policy.

25. In *Hindustan Ideal Insurance Company Ltd vs. Pappu Poojari* 1972 ACJ 433, it was held that though section 96 (1) of the MV Act does not contemplate passing of a decree against the insurer himself, it did not follow from this proposition that in a proceeding before the Commissioner on an application claiming compensation the insurer could not be impleaded as party u/s 96 (2) of the M.V. Act and that the commissioner could not declare that the insurer was liable to pay the claimants any sum awarded against the employer as if the insurer were the judgment debtor. It is apparent that this view was taken because the court was satisfied that the provisions of sections 96 (1) and (2) of the MV Act apply to a proceeding under the Workmen's act also. Similar view was expressed in *Kamala Devi vs. Navin Kumar* reported in AIR 1973 Raj 79. It was held that sections 95 and 96 of the MV Act are applicable to claims under the Workmen's Act provided that the accident arose out of the use of the motor vehicle in a public place and the employee concerned was covered by the limits laid down u/s 95(2) of the M.V. Act.

26. In *Sital Prasad vs. Afsari Begum* 1977 ACJ 486, the court took the view that provisions of the MV Act apply while determining the liability under the Workmen's Act. The expression "any person" finding place in section 19 of the EC Act was made about section 95(5) of the MV Act which has started with the nonobstante clause stating that a person issuing a policy of insurance shall be liable to indemnify or classes of person specified in policy in respect of a liability

which the policy purports to cover in the case of that person or those classes of persons. The legislative friction created by section 96(1) of the MV Act in regarding the insurer on satisfaction of the conditions mentioned in the section as judgment debtor was also emphasized.

27. In another case Premier Insurance Company vs. C. Thomas 1984 1 Lab LJ 149, it was pointed out in the said decision that when the Workmen's Act had been passed scheme of compulsory insurance for motor vehicles dealt with by chapter VIII of the MV Act was not in existence which has, however, brought out far reaching changes. It was then stated that provisions of section 12(2), 13 and 19 of the WC Act indicted that persons other than the employer and the employee could also be brought before the Commissioner and the claim against them could also be considered by the Commissioner. By preferring to the proviso to section 95(1) of the MV Act it was held that the legislature definitely had in mind the WC Act and made the provisions of that act a basis to cover the claim of the workmen under the MV Act also. Then by referring to sections 110 AA of the MV Act it was stated that this provision made abundantly clear that the claim against the insurer could be agitated by a workmen not only before a claims tribunal but also under the WC Act.

28. After going through the different provisions of the WC Act and the provisions of old and present MV Act, it reveals that the provisions of the WC Act cannot be viewed in isolation when the MV Act has specifically stated that a policy of insurance taken out under the provisions of chapter VIII cannot exclude the liability arising under the Workmen's Act. The awareness of the liability under the WC Act even while dealing with the liability under the MV Act has been clearly shown in the proviso to section 95(1) of the MV Act.

29. Realization of the compensation from the employer alone even where the insurer is to bare the loss as per the terms of the policy would put the victims in a difficult situation in as much as it is well known that realization of compensation is easier when it is fastened on the insurer than on the insured. The financial position of the latter may in many cases thwart that realization of the dues. The policy taken out for the benefit of the workmen has to allow him to reap the full advantage of the same.

30. Section 12 (2) and (13) of the WC Act do indicate that persons other than employers can be made liable to pay compensation under the provisions of the WC Act. In this context a narrow meaning to the expression "any person" in section 19 of the act would militate against the wide sweep of the expression, especially when it is viewed in the background of the provisions finding place in the MV Act.

31. The thinking that the person visualized by section 19 of the WC Act has to be one who has to pay compensation as defined in this Act, does not stand against the broad view indicated above because the word compensation has been defined to mean compensation as provided for by this Act. By asking the insurer

to pay the compensation as provided by the WC act nothing is being done against section 19 of this Act.

32. Section 110 AA of the old MV Act (now section 167 of the MV Act) having given an option to the claimant to proceed either under the WC Act or under the MV Act but not under both, it cannot be visualized that different consideration would arise regarding the liability of insurer in respect of the same claim depending upon the forum chosen. The liability of the insurer being a very material part relating to granting of compensation under the provision of the MV Act, the legislature incorporating section 167 in the MV Act, could not have intended that the insurer would cease to be liable at the hands of the commissioner under the WC Act in case approach were to be made to him under the latter Act.

33. The MV Act is not only latter law than the WC Act but is also a special law dealing with the liability of an insurer arising out of a motor accident for which compensation can be awarded against the insured for which the insurer has undertaken to indemnify. In the case of C.I. T vs. Shahjada Nand and sons AIR 1966 SC 1342, it was held that when there is a conflict between a general and the special provision, the latter shall prevail. The same view was taken in the case of State of Gujarat vs. Ramji Bhai AIR 1979 SC 1098, Union of India vs. India Fisheries Pvt Ltd AIR 1966 SC 35, Pradip Port Trust vs. Their Workmen AIR 1977 SC 36.

34. There can be no doubt that the provisions finding place in the MV Act regarding the liability of insurer and his obligation to indemnify the insured have to be regarded in the nature of special provisions in so far as compensation for motor accident is concerned, where as the provision in the WC Act are of general nature covering compensation for all types of accidents. So the special provisions finding place in the MV Act have to prevail over those incorporated in the WC Act in case of conflict in so far as compensation to a victim of motor accident and liability of an insured and insurer therefor are concerned.

35. Because of the reasons aforesaid, I hold that the insurer was rightly made liable in the present case to pay compensation to the claimant/respondent no 1.

36. No other point has been raised in the appeal.

37. In the result the appeal stands dismissed.

38. Send back the LCR.