(2002) 04 KAR CK 0057

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 2805 of 1999 (along with cross-objections)

National Insurance Company Limited — APPELLANT

Vs

Smt. Prema and Others — RESPONDENT

Date of Decision : 16-04-2002

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Motor Vehicles Act, 1988 — Section 173

Citation : (2002) 2 ACC 671 : (2002) ILR (Kar) 2490 : (2002) 5 KarLJ 307 : (2002) 3 KCCR 249 SN

Hon'ble Judges : N.K. Jain, C.J;N. Kumar, J;H. Rangavittalachar, J

Bench : Full Bench

Advocate : M. Sowriraju and K. Giridhar, for the Appellant; M. Sowriraju, for Respondent-1, K. Giridhar, for Respondent-1 to 3 and Kesvy and Company for Respondent-2 and 4, for the Respondent

Judgement

N.K. Jain, C.J.—A learned Single Judge of this Court found that the earlier Division Bench has not considered the provisions of Order 41, Rule 22 of the CPC which enables the cross-objector to take grounds which could have been taken in respect of the findings which are against him and therefore, the decision of this Court in United India Insurance Co. Vs. Balasubramanyam, relying on the earlier decision in National Insurance Company Limited v. H.N. Rama Prasad and Ors., 1986(2) Kar. L.J. 482 : 1985 ACJ 864 (Kar.) holding that in appeal filed by the Insurance Company, the scope of appeal is limited and the question of quantum cannot be gone into by filing crossrobjections, requires reconsideration. Hence, he referred the matter to the Hon''ble Chief Justice to constitute a larger Bench vide order dated 22-1-2002.

2. Thus vide order dated 1-4-2002 passed by the Hon''ble Chief Justice, this reference is placed before us on 8-4-2002.

3. The necessary facts leading to the order of reference are: One Prakash Jogi

while he was going on moped on 20-10-1996 collided with a lorry and died. Respondents 1 to 3 and one Devappa, petitioners 1 to 4, filed a petition u/s 166 of the Motor Vehicles Act, 1988 claiming compensation of Rs. 10,00,000/- on 30-11-1996. Respondent 2 the Insurance Company filed counter denying the allegations. Owner of lorry, respondent 1 remained ex parte. After hearing the parties, the Tribunal awarded compensation of Rs. 1,61,095/- with costs and also awarded interest at 9% p.a. from the date of filing of the petition till the date of payment, vide order dated 9-3-1999. Aggrieved by the judgment and award passed, the appellant-National Insurance Company Limited has filed this appeal alleging that the Tribunal was not justified in fixing the liability on the Insurance Company as it is not liable to pay compensation because as on 20-10-1996, the date of accident, the driver was not having a valid driving licence. The claimants, respondents 1 to 3 after notice have filed cross-objections under Order 41, Rule 22 of the CPC seeking enhancement of the compensation amount.

4. The learned Counsel for the appellant-Insurance Company contended that the appellant is not liable to pay compensation as the lorry driver had no valid licence and further submitted that when this appeal is filed by the Insurance Company challenging the liability to pay compensation and has not challenged the quantum at all, the respondents cannot file cross-objections for enhancement of compensation. The learned Counsel relied on the following judgments in National Insurance Company Limited''s case, supra; Pannalal Vs. State Bombay and Others, ; United India Insurance Company''s case, supra and United India Insurance Company Limited and Anr. v. Smt. V. Nagarathna and Ors., 2001 (1) Kar. L.J. 462 : ILR 2000 Kar. 4618

5. The learned Counsel for respondents 1 to 3 contended that the Division Bench has said that when the Insurance Company has filed an appeal to the extent of its liability the respondents have no right to file cross-objections on that ground. It is submitted that in an appeal filed by the Insurance Company cross-objections filed by the claimants is maintainable in view of the provisions of Rule 256 of the Motor Vehicles Rules read with Order 41, Rule 22 of the CPC. The learned Counsel relied on the decisions in United India Insurance Company''s case, supra and Panna Lal''s case, supra.

6. The point for reference is whether the provisions of Order 41, Rule 22 of the CPC enable the cross-objectors to take grounds which could have been raised by way of appeal in respect of findings against them.

7. The decision of this Court in United India Insurance Company''s case, supra, wherein it was held that in an appeal filed by the Insurance Company, no cross-objections can be filed and the question of quantum cannot be permitted to be raised as per the earlier decision of this Court in National Insurance Company Limited''s case, supra, requires reconsideration.

8. We have heard the learned Counsels for the parties, perused the material on record, gone through the relevant observations and the case-laws on the point.

9. It will be appropriate to refer to the following relevant provisions of CPC --

Order 41, Rule 2

"2. Grounds which may be taken in appeal.--The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground".

Order 41, Rule 22:

"22. Upon hearing respondent may object to decree as if he had preferred a separate appeal.--Any respondent, though he may not have appealed from any part of the decree, may not only support the decree, but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal:

Provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow".

Order 41, Rule 33:

"33. Power of Court of appeal.--The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or taxies may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order u/s 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order".

A bare reading of the Order 41 and Rule 22 of the CPC, reveals that in an appeal the respondent can not only support any part of the decree but he can also challenge the finding against him contending that it should have been in his favour, and can also take any cross-objection to the decree which he could have taken by way of an appeal. Order 41, Rule 33 of the CPC reveals that the

Appellate Court can exercise its power under the Rule to pass any order even if the appeal is filed only against a part of the decree of the lower Court and thus this Rule comes to the rescue of the objector even if the objections are not raised under Order 41, Rule 22 against the co-respondent. Therefore, it is clear that in an appeal cross-objections can be filed contending that the finding given against him ought to have been given in his favour and further Order 41, Rule 2 reveals that the appellant can urge any ground of objection, in his support after obtaining leave of the Court even if the same is not taken in the memorandum of appeal. However, while permitting, the other party has to be given an opportunity of contesting the case on that ground. In view of the clear provisions, one cannot give a restricted meaning to the provisions in the absence of any restrictions in the Motor Vehicles Act. Therefore, the provisions of Order 41, Rule 22 will be applicable in all cases. So in case an appeal is filed one has a right to file cross-objection.

10. While considering the scope of Order 41, Rules 33 and 22, their Lordships in Panna Lal''s case, supra, observed as follows:

"18. In our opinion, the view that has now been accepted by all the High Courts that Order 41, Rule 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, that an objection under Order 41, Rule 22 can be directed against the other respondents, is correct. Whatever may have been the position under the old Section 561, the use of the word "cross-objection" in Order 41, Rule 22 expresses unmistakably the intention of the Legislature that the objection has to be directed against the appellant".

11. In the case of Mahant Dhangir and Another Vs. Madan Mohan and Others, while considering the maintainability of the cross-objection against co-respondent, the Supreme Court observed thus:

"Generally, the cross-objection could be urged against the appellant. It is only by way of exception to this general rule that one respondent may urge objection as against the other respondent. The type of such exceptional cases are also very much limited. For instance, when the appeal by some of the parties cannot effectively be disposed off without opening of the matter as between the respondents inter se. Or in a case where the objections are common as against the appellant and co-respondent. The Court in such cases would entertain cross-objection against the co-respondent".

The Supreme Court further while holding that if the objection is not maintainable under Rule 22 the same can be considered under Rule 33 observed thus:

"Rules 22 and 33 are not mutually exclusive. They are closely related with each other. If objection cannot be urged under Rule 22 against co-respondent, Rule 33 could take over and come to the rescue of the objector. The Appellate Court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower Court. The Appellate Court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The Appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The Appellate Court could also pass such other decree or order as the case may require. The words ''as the case may require'' used in Rule 33 of Order 41 have been put in wide terms to enable the Appellate Court to pass any order or decree to meet the ends of justice. The only constraint, may be these: That the parties before the lower Court should be there before the Appellate Court. The question raised must properly arise out of the judgment of the lower Court".

12. In National Insurance Company Limited''s case, supra, the Division Bench, while considering an appeal filed by the Insurance Company against the order of the Tribunal, wherein an employee who was travelling in the course of the employment sustained injuries due to accident and the Tribunal awarded compensation limiting the liability of the Insurance Company to the extent of Rs. 50,000/-, held that the liability of the Insurance Company is limited to the liability under the workmen''s compensation. In that appeal filed by the insurer, cross-objection was also filed by the respondent contending that the quantum of compensation awarded is on the higher side, and on this point, the Division Bench held that the cross-objection against an appeal filed by Insurance Company was not maintainable for the reason that the liability of the Insurance Company is limited.

13. In United India Insurance Company''s case, supra, the Division Bench was dealing with an appeal filed by the Insurance Company which contended that the 3rd party risk covered by the policy issued by the appellant-company was limited to Rs. 50,000/- in view of Section 95(2)(b)(I) of the Motor Vehicles Act. The appeal was filed against the order of the Tribunal, wherein on a claim petition presented by the injured owner-driver of the car, who sustained injury as a result of accident due to colliding of car with the hind portion of the lorry, the Tribunal recorded the finding of contributory negligence to the extent of 75% and 25% on the driver of the lorry and the claimant and awarded compensation of Rs. 88,500/- and on the question of liability, the Division Bench held that the owner of the lorry and the Insurance Company were jointly and severally liable to pay the compensation awarded. Cross-objection was also filed contending that the finding of the Tribunal on the contributory negligence by the cross-objector and the claimant at 75:25 was erroneous and it should be 50:50 and relied on decision in National Insurance Company Limited''s case, supra, wherein it was held that when the appeal was by the insurer as to the extent of its liability, in a

cross-objection in such an appeal by the respondent-owner of the vehicle, quantum of compensation awarded cannot be questioned. But, however, the learned Counsel submitted that once an appeal was filed and a notice was served on the respondent, the provisions of Order 41, Rule 22 of the CPC are attracted and in the cross-objections filed by the respondent, he was entitled to raise all questions which he was entitled to raise in the original proceedings as well as in appeal if he had chosen to prefer an appeal independently. On this point, the Division Bench while interpreting the scope of the cross-objections in an appeal presented by an insurer u/s 110-D of the Act, held that:

"Under the provisions of the Motor Vehicles Act, both in the original proceedings as well as in the appeal, an insurer is entitled to raise only such of the grounds as are specifically provided in Section 96(2) of the Act .... The combined effect of Section 110-D and Order 41, Rule 22 of the CPC is that in an appeal presented by an insurer in which the only ground of challenge is about the extent of liability of the Insurance Company, the cross-objector in such an appeal cannot be permitted to contest the quantum of compensation or the findings recorded on any other issue".

14. The aforesaid interpretation was placed in the context of the legal position as then existed to the effect that insurer cannot prefer an appeal challenging the quantum of compensation and the insurer''s right was confined only to the liability to pay the compensation. However, in view of the law declared by the Supreme Court in the case of United India Insurance Co. Ltd. Vs. Bhushan Sachdeva and Others, where it has been held that u/s 173 of the Act, the insurer cannot file an appeal at all is based on an erroneous assumption. It has been held that so long as the insured has not challenged the award passed against him and so long as the liability would only fall on the Insurance Company it is inequitable to deny a remedy of appeal to the Insurance Company. Further, it has been held any interpretation denying such aggrieved insurance companies the opportunity to seek the legal remedy of appeal should not be adopted unless there is a statutory compulsion. There is nothing in Section 173 or in the other relevant provisions of the Act, which debars the Insurance Company to resort to the remedy of appeal when it knows that the award is unjust. Therefore, it was held when the insured does not prefer an appeal against the quantum of compensation, in such an eventuality the Act enables the insurer to contest it on all grounds available to the insured including preferring an appeal against the award. Therefore, in view of this legal position any appeal preferred by the insurance companies either challenging only the liability to compensate or the quantum of compensation, the respondent/claimant is entitled to prefer a cross-appeal seeking enhancement of compensation.

15. As discussed above, the appeal is a continuation of the original proceedings and the entire subject-matter of the claim petition is before the Appellate Court and therefore even if the appellant has filed the appeal only against a part of a decree the Court can consider the entire matter and pass appropriate orders.

Therefore, as stated in our view cross-objection is maintainable.

In view of what we have discussed above, the question is answered in affirmative.

