

(2013) 06 KL CK 0060

In the High Court Of Kerala

Case No : M.F.A. (WCC) No. 197 of 2006 and connected cases

National Insurance Company Ltd.

APPELLANT

Vs

Murali

RESPONDENT

Date of Decision : 10-06-2013

Acts Referred:

Employees Compensation Act, 1923 — Section 17, 30, 30(1)
Motor Vehicles Act, 1988 — Section 147

Citation : (2014) 1 ACC 58 : (2014) 1 AnWR 452 : (2013) 139 FLR 942 : (2013) 3 ILR (Ker) 225 : (2013) 3 KHC 55 : (2013) 3 KLJ 233 : (2013) 3 KLT 209 : (2013) 3 LLJ 563

Hon'ble Judges : K.M. Joseph, J;A. Hariprasad, J

Bench : Division Bench

Advocate : Rajan P. Kaliyath, for the Appellant; T.A. Shaji, T.V. Neema and K.N. Padmakumar, for the Respondent

Final Decision : Dismissed

Judgement

A. Hariprasad, J.—M.F.A. (WCC) No. 197 of 2006 is an appeal filed by the insurer/2nd opposite party disputing the correctness of the order passed by the Commissioner for Workmen's Compensation, Thrissur in W.C.C. No. 208 of 1997 in favour of the employee/1st respondent. The challenge is against the nature and extent of liability of the insurer. M.F.A. No. 1 of 2007 is filed by the employer/1st opposite party disputing the correctness of the award to the extent which is against him. Parties are hereinafter referred to as insurer, employer and employee respectively. Brief facts relevant for the decision of the appeals are as follows: Employee was working as a toddy tapper. On 25.09.1995, at about 5.30 p.m. he fell down from a coconut tree and the accident occurred in the course of his employment He was working for the employer. According to the employee, he sustained commuted fracture of right hip, dislocation of right elbow with fracture head of radius, fracture of metacarpal bones of right hand, bilateral calcaneal fracture and dislocation of bones of right hand. Contention raised by the employee is that on account of the injuries, he sustained permanent partial

disability, seriously affecting his earning power. Hence he claimed compensation of Rs. 5,00,000/- from the employer and the insurer.

2. Employer admitted that the employee was in his service at the time of accident. Contention of the employee that he sustained injury in the course of employment is denied by the employer. Employer disputed the quantum of claim and the liability to pay compensation. Further, he contended that if at all the employee is eligible for any compensation, it shall be paid by the insurer as there was a contract of insurance subsisting at the material time between the employer and the insurer.

3. Insurer opposed the claim of the employee by raising the following contentions: Insurer has no liability under the Employee's Compensation Act, 1923 (in short, "Act of 1923"). The insurance company has not issued a policy covering such a liability of the employer. Employer has taken a Personal Accident Insurance Policy (Group). By the terms of that policy, the insurer has no liability at all to pay compensation under the Act of 1923. The terms and conditions in the Personal Accident Insurance Policy (Group) will make it clear that only an ascertained sum need to be paid by the insurance company and the insurance company has no liability to pay interest.

4. Heard the learned counsel for the insurance company and the employee. We carefully perused the records.

5. It is noticed on perusal of the records that in M.F.A. No. 1 of 2007 filed by the employer, no substantial question of law was raised as mandated in S. 30 of the Act of 1923.

6. Substantial questions of law urged for consideration in M.F.A. (WCC) No. 197 of 2006 are the following:

a) When there is no contract between the employer and the appellant insurance company to indemnify the liability of the former in respect of Workmen's Compensation Act, is it competent for the Commissioner to make the insurance company liable to pay the statutory compensation fixed under the Employee's Compensation Act?

b) When the liability of the appellant insurance company is purely contractual, can the Commissioner fasten an altogether different liability on the appellant insurance company?

c) Can the Commissioner pass an order contrary to the evidence before him and is not the order passed in this case perverse?

d) Is not the loss of earning capacity to be assessed with respect to all types of employment as laid in the Full Bench decision in Vanajakshan Vs. Joseph, and whether the loss of earning capacity fixed in this case is legal?

e) Can the insurer be made liable to pay interest in the light of the contractual provisions?

7. Learned counsel for the insurer, Shri Rajan P. Kaliyath submitted that the Commissioner committed a grave legal error in rejecting the contentions of the company in spite of production of relevant documents and examination of DW1. Ext.M1 is the copy of insurance certificate produced by the insurer. It is contended that no provision in the Act of 1923 makes an employer statutorily liable to enter into a contract of insurance. Ext.M1 policy will reveal the fact that it is a Personal Accident Insurance Policy (Group). Rights and liabilities of the parties under Ext.M1 policy are controlled by the provisions of the Insurance Act, 1938. It is also contended by the learned counsel for the insurer that there is a marked difference between the statutory liability under S. 147 of the Motor Vehicles Act, 1988 and the liability undertaken by the insurance company by issuing a Personal Accident Insurance Policy (Group). As there is no statutory provision compelling the employer to insure the employees against accidents, the rights and liabilities of the parties will have to be decided with reference to the terms and conditions in the personal accident insurance policy. In Clause (e) of Ext.M1 policy the following statements have been made:

(e) If such injury shall within twelve (12) calendar months of its occurrence be the sole and direct cause of the total and irrecoverable loss of use or of the actual loss by physical separation of the following, then the percentage of the Capital sum insured applicable to such Insured Person in the manner indicated below:

Percentage of the Capital Sum Insured

From Ext.A5 medical certificate and Ext.X1 report of the Medical Board, it can be seen that the injuries sustained by the employee will not fall either within the categorization of injuries in the Schedule to the Act of 1923 or within any of the injuries described in sub-clause (i) to (xi) in Clause (e) to Ext.M1. It squarely fits within sub-clause (xii) of Clause (e) to Ext.M1. Considering the oral and documentary evidence adduced, we find no tangible reason to disbelieve that the employee sustained a permanent partial disablement Percentage of permanent partial disablement assessed by the Medical Board as per Ext.X1 is 10%. Learned counsel for the insurer submitted that the Commissioner went wrong in directing the insurance company to pay compensation on the basis of assessment of permanent partial disablement and also on the basis of the loss of earning capacity. In other words, it is the contention of the insurance company that neither the percentage of permanent disability nor the loss of earning capacity has any bearing on the liability of the insurance company by virtue of Ext.M1 policy for the reason that the contract entered into between the employer and the insurer was for an ascertained sum. More so because the rights and liabilities of the parties arise by virtue of the terms and conditions in Ext.M1 policy.

8. Our attention was drawn to one of the conditions in Ext.M1 that no sum payable under the policy shall carry interest Learned counsel for the insurer contended that since there is an exclusion Clause in Ext.M1 policy, the insurance company is not liable to pay interest and the award in this respect is illegal. The

specific contention raised by the insurance company is that their liability is limited to the sum mentioned in the policy and there is no liability to pay interest. If at all the employee is entitled to get any amount over and above the liability undertaken by the insurance company, it will have to be paid by the employer.

9. Learned counsel for the insurance company relied on the decision in *New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and Another*, . The question posed for decision of the Supreme Court was whether interest is payable by the insurer while indemnifying the insured on account of a contract of insurance, wherein the liability was contracted out. Considering the various provisions of the Act of 1923, principles stated in paragraphs 14 and 15 are thus:

14. By reason of the provisions of the Act, an employer is not statutorily liable to enter into a contract of insurance. Where, however, a contract of insurance is entered into by and between the employer and the insurer, the insurer shall be liable to indemnify the employer. The insurer, however, unlike under the provisions of the Motor Vehicles Act does not have a statutory liability. S. 17 of the Act does not provide for any restriction in the matter of contracting out by the employer vis-à-vis the insurer.

15. The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance Act, an insured is bound to pay premium which is to be calculated in the manner provided for therein. With a view to minimize his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute. Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in law.

10. It is evident that in the Act of 1923, there is no provision corresponding to S. 147 of the Motor Vehicles Act, 1988 insisting on the insurer to cover the entire liability arising out of an accident. There is no law restraining an insurance company and an insured from entering into a contract, confining the obligation of the insurance company to indemnify a particular head or a particular amount. In these circumstances, obligation of the insurance company stands limited to the terms and conditions in the policy. Therefore, relevant provisions in the contract providing for exclusion of liability of interest or limiting their liability to a particular amount will have to be given effect to. Hence, we find that the award passed by the Commissioner against the insurance company, beyond the liability undertaken by them as per Ext.M1 policy, is legally unsustainable. It is seen from the schedule to Ext.M1 policy that 326 toddy tappers were insured for a sum of Rs. 1,25,000/- each. Going by the condition stipulated in Clause (e)(xii) of Ext.M1 extracted above and considering the permanent disability assessed by the Medical Board for the employee at 10% as per Ext.X1, it can be seen that the liability of the insurer is only to compensate to an extent of Rs. 12,500/- because

the terms and conditions in Ext.M1 is binding on the insurer and the employer. Insurer's liability to indemnify the employer springs out of the contract and not under the provisions of the Act of 1923. Terms in Ext.M1 make it clear that the insurer has no liability to pay interest in this case.

11. One of the substantial questions of law raised is regarding the inaccuracy in assessing 30% loss of earning capacity. However, the contention of the insurance company based on the Full Bench decision of this Court in Vanajakshan v. Joseph (supra) does not arise for our consideration, since we have already found that the liability of the insurance company is limited to the terms in Ext.M1 policy. Stated differently, the liability of the insurance company is only for an ascertained sum and that too, without any liability to pay interest. Therefore, legal question referred to above does not arise for consideration and hence we do not consider the same. The appeal (M.F.A. No. 1 of 2007) filed by the employer does not raise any question of law, much less a substantial question of law. Further, the questions posed are purely questions of facts. We do not find any merit in the appeal filed by the employer and it is liable to be dismissed.

In the result,

I. M.F.A. (WCC) No. 197 of 2006

(i) Appeal is partly allowed.

(ii) The impugned order passed by the Commissioner for Workmen's Compensation in W.C.C. No. 208 of 1997 is modified as under:

The insurance company is found liable to pay an amount of Rs. 12,500/- (Rupees Twelve thousand and five hundred only) under Ext.M1 policy.

It is made clear that the insurance company is not liable to pay any interest as per the said policy. We confirm the finding of the Commissioner for Workmen's Compensation regarding the quantum of compensation determined and the liability of the employer. The employee is legally entitled to recover the compensation, in excess of the liability of the insurance company, from the employer.

(iii) The insurance company is allowed to withdraw excess amount deposited u/s 30(1) third proviso to the Act of 1923.

II. M.F.A. No. 1 of 2007

Appeal stands dismissed.

Parties are directed to suffer costs in both the appeals.