

(2012) 03 BOM CK 0018

In the Bombay High Court

Case No : C.A.J. First Appeal No. 2289 of 2011

New India Assurance Co. Ltd.

APPELLANT

Vs

Prakash Dhondiram Nade and Another

RESPONDENT

Date of Decision : 13-03-2012

Acts Referred:

Citation : (2012) 133 FLR 597

Hon'ble Judges : Mridula Bhatkar, J

Bench : Single Bench

Advocate : Ramesh K. Cheulkar, for the Appellant; Dilip Mendaria for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Mridula Bhatkar, J.—Admit. Notice made returnable forthwith. Notice waived by the learned Counsel for the Respondents. By consent, heard finally at the stage of admission.

This Appeal is filed by the Insurance Company against the Judgment and order dated 12th July, 2010 passed by the learned Commissioner for Workmen's Compensation, 9th Labour Court, Mumbai. The Commissioner has granted compensation of Rs. 2,42,197/- and if the Opponents failed to deposit the said amount of compensation, they will be liable to pay interest @12% p.a. The Insurance Company has challenged the said order. This being a matter under the Workmen's Compensation Act, a substantial question of law is framed whether the Appellant is not entitled to pay compensation as there is a breach of conditions of the insurance policy.

The original Applicant is a rickshaw driver. He used to drive the rickshaw bearing No. MH-03-AA-2671 owned by opponent No. 1. He met with an accident on 21st December, 2005 when he was driving the rickshaw. He sustained injuries, so he filed a claim for Rs. 4,99,152/- towards compensation. He claimed that he was 30 years old and he was drawing the salary of Rs. 3,000/- per month.

2. Learned Counsel for the Appellant submits that Opponent No. 1, who was initially owner of the rickshaw, has sold the rickshaw to the other person and there is no privity of contract between Applicant and Opponent No. 1. Hence, Insurance Company is not liable to pay compensation. Learned Counsel in support of his submission relied on the terms and conditions of the policy. It was pointed out that the Opponent No. 1 did not appear before the Commissioner. Therefore, the matter proceeded ex parte against him. Learned Counsel for the Appellant submits that the Appellant has failed to prove that the accident has taken place in the course of employment. He submits that the Insurance Company is not liable to pay any compensation as, at the relevant time, the Opponent No. 1 has already sold the rickshaw. Learned Counsel further submits that on the point of proof of employment, he relied on the ruling in the case of Rashida Haroon Kupurade Vs. Div. Manager, Oriental Ins. Co. Ltd. and Others, . Learned Counsel further submits that the learned Commissioner ought to have accepted that there was a 49% partial disability sustained. The Applicant suffered a minor injury. In support of his submission, he relied on a decision in the case of Hindustan Copper Corporation Vs. Sanjay Ghosal, .

3. Learned Counsel for the Respondents opposes the claim of the Appellants. While opposing the Appeal, he pointed out that the Applicant has examined himself and also examined Dr. Khanna in support of the injury. Thus, the Applicant has proved his case on the point of employment that the accident occurred in the course of employment and also on the point of disability. He submitted that the Insurance Company did not cross-examine either of the witnesses.

4. Perused the Judgment passed by the learned Commissioner, compilation of the documents filed by the Appellant and cases cited by the learned Counsel for the Appellant. At the outset, it is to be noted that the Appellant was directed to file compilation of the entire documents. Though the relevant documents, the written statement and the investigation report are filed, the evidence adduced by the Appellant before the Court is not produced. It is the responsibility of the Appellant to produce the entire documents including the evidence tendered by both the parties. It is an admitted fact that the Appellant-Insurance Company though filed a written statement, remained totally silent and it did not appear and did not examine the Applicant and also Dr. Khanna.

5. Perused evidence of the witnesses. The Applicant has deposed that he met with an accident when he was driving the rickshaw of Opponent No. 1. The Opponent No. 1 did not remain present and did not file a written statement. The evidence of the Applicant was not controverted by either of the Opponents. The Applicant was a rickshaw driver and was plying the rickshaw owned by the Opponent No. 1. The insurance policy shows that at the relevant time rickshaw was insured with the Appellant-Insurance Company. Insurance was valid under the terms and conditions. The Insurance Company is bound to indemnify the insurer. It appears that the Insurance Company did not bother to file any

documents like report of the investigator and also did not lead its own evidence to that effect. The learned Commissioner, therefore, has rightly considered the evidence of the Applicant and has accepted the injuries caused to the Applicant when he was driving the rickshaw and when he was in the employment of the Opponent No. 1. The said rickshaw was insured with the Appellant-Insurance Company. If at all any breach of conditions of the policy is committed, the Insurance Company is required to specify in written statement and also lead evidence to that effect. Mere presentation of the policy is not sufficient to appreciate the defence of the Insurance Company. No doubt, the Applicant to prove the fact of the accident and the accident has taken course of his/her employment. Once that burden is discharged, it is on the Insurance Company to prove that there is a breach of terms of the policy. It cannot be expected that certain facts or policy conditions or other terms or breaches are within the knowledge of the Applicant. The ruling of Rashida Haroon Kurpurade (supra) is not helpful to the Appellant Company as the workman has in the present case given a proof that he was in the employment of the Opponent No. 1 as a driver.

6. On the point of quantum, the Applicant has tendered evidence that he has sustained minor fracture his right clavicle and right shoulder. Perused the evidence of Dr. Naresh Khanna. He was working as an Orthopedic surgeon. He has examined the Applicant on 1st March, 2008. He gave injury certificate at Exhibit U-14. He assessed the disability of the Applicant that it was in partial permanent nature and the degree of disability was assessed to 49%.

7. Learned Counsel for the Insurance Company has submitted that the injury was of a minor nature. Therefore in view of the judgment of the Division Bench of the High Court of Jharkhand at Ranchi in the case of Hindustan Copper Corporation (supra), the claim of the Applicant is not sustained.

8. In the said Judgment, the Applicant has suffered some minor injuries. Therefore, the Division Bench held that it was a minor injury not resulting in any surgery or fracture. Therefore, the findings given by the learned Commissioner that it was a case of partial disablement was not correct. However, in the present case, the Doctor has stepped into the witness box. The injury caused though it is a minor fracture, yet it is a fracture in the right clavicle with right shoulder of the Applicant. So disability is assessed to 49%. Hence, case is distinguishable from the facts of this case. The Applicant was working as a driver on the Auto rickshaw. Though his work was of a sanitary nature, it requires manual effort therefore the disability assessed by Doctor is rightly accepted by the Tribunal. Moreover, assessment of the disability is not controverted before the Tribunal. Under such circumstances, I do not find any merit in the Appeal. The order passed by the Tribunal is not interfered. Hence, the Appeal is dismissed.