

(2005) 09 KAR CK 0062

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 3229 of 2001

New India Assurance Company Limited and Another

APPELLANT

Vs

Shankar and Another

RESPONDENT

Date of Decision : 19-09-2005

Acts Referred:

Motor Vehicles Act, 1988 — Section 149 (2), 149 (7), 170

Citation : (2006) 2 ACC 306 : (2006) ACJ 685 : (2006) 1 KarLJ 309

Hon'ble Judges : Anand By rareddy, J

Bench : Single Bench

Advocate : A.M. Venkatesh, for the Appellant; S.P. Shankar, for Mahesh R. Uppin, for Respondent-1, for the Respondent

Judgement

Anand By rareddy, J.—This appeal is by the Insurance Company challenging the award of the Commissioner for Workmen's Compensation. The claim was in respect of an accident involving the use of an autorickshaw. The vehicle had turned turtle and the driver was injured. There was no dispute by the insured that the driver had suffered an employment injury in the course of and arising out of employment. The wage of the workman was however disputed. The insurer, the appellant herein, while admitting that the vehicle was insured and that the policy was in force, however, claimed that its liability was subject to the terms of policy. The percentage of disability to the workman on account of the injuries was assessed by the Medical Practitioner at 40 to 45%. The Commissioner however, has held that the percentage of loss of earning capacity is 100% and has awarded compensation accordingly.

2. The substantial question of law raised by the appellant is: whether the loss of earning capacity taken at 100% by the Commissioner, as opposed to the medical evidence was sustainable.

3. Sri A.M. Venkatesh, appearing for the appellant contends as follows.-

3-A. There is no basis to hold that the workman suffers from a loss of earning

capacity of 100%. On the other hand, the assessment by the medical practitioner of the percentage of disability at 45% rendered the finding untenable and capricious.

3-B. There is not only no evidence to demonstrate that the workman is not capable of carrying on the avocation of a driver. There is no evidence, whatsoever, to indicate that he is incapable of carrying on any work.

3-C. The Counsel for the appellant relies on the following judgments:

Nisar Ahmed Abdul Rahiman Killedar Vs. Babulal Achal Singh Raj Purohit and Another, Wherein a driver who was found not capable of driving any more, whether would be entitled to claim 100% loss of earning capacity - This Court held in the negative.

Syed Abdul Samad And Another Vs. Jabbar Hussain, Where a driver who had suffered injuries was assessed as suffering from a disability of 40%, whether the Commissioner was justified in awarding 100% loss of earning capacity - This Court had held that in the absence of medical evidence such a finding was erroneous.

To the similar effect is the judgment in the case of National Insurance Company Limited, Gokak, Belgaum District Vs. Nyaya Mathasab Ghouse Sab Muke and Another, .

He would hence contend that the appeal deserves to be allowed.

4. Per contra, Sri S.P. Shankar, Senior Advocate for Sri Mahesh R. Uppin for the claimant respondent would contend that since the injured was a driver by profession and as the injuries have caused fatal permanent disablement, the Commissioner was justified in awarding the amount of compensation.

4-A. The appellant not having taken up any special defence of claiming any right to defend the claim in the name of the assured and in the absence of an order u/s 170 of the Motor Vehicles Act, 1988, could not maintain the appeal challenging the quantum of compensation.

4-B. The award of compensation being on the basis of appreciation of evidence - it would fall in the realm of a finding of fact and hence there is no substantial question of law that arises for consideration.

4-C. Further, an insurer is not enabled to take any defence other than what is permitted u/s 149(2) as mandated u/s 149(7), without an order u/s 170 of the Motor Vehicles Act. Nor has the insurer raised a plea to contest the case in the name of the assured.

5. The Senior Advocate draws my attention to the line of cases to support the above contentions:

New India Assurance Co. Ltd. Vs. Raja Naika and another, To the effect that the scope of defence of the insurer in an action before the Commissioner for

Workmen's Compensation under the Workmen's Compensation Act, 1923, is not other than what is permitted under Sub-section (2) of Section 149 of the Motor Vehicles Act, 1988. Subject to a further condition that the grounds in appeal involved a substantial question of law.

Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, Wherein it is held that with permission having been granted u/s 170 of the Motor Vehicles Act, an Insurance Company cannot file an appeal against the award of the Tribunal on merits.

National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, , approving Shankarayy's case.

Besides the Counsel relied upon several unreported judgments of this Court to the effect that an insurer cannot maintain an appeal on questioning the quantum of compensation.

6. By way of reply, Sri A.M. Venkatesh for the appellant contends that in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, , the Supreme Court while dealing with the scope of defences open to an insurer u/s 96(2) and (6) of the Motor Vehicles Act, 1939, made the following observation.-

The statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and therefore to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do.

6-A. The Counsel draws my attention to a pro forma copy of Commercial Vehicles Package Policy and draws my attention to condition No. 2 under "Conditions" which reads as follows.-

No admission, offer, promise, payment or indemnify shall be made or given by or on behalf of the insured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in the name of the insured for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured shall give all such information and assistance as the company may require.

He would therefore contend that notwithstanding the provision u/s 149(2) restricting the defences available to an Insurance Company being confined to what are enumerated therein having regard to the reservation of a right under

the policy to urge the defences available to the insured - the appeal is maintainable.

6-B. He would draw my attention to the fact that a Full Bench of this Court in the case of Smt. Kavitha Dilip Patil and Others Vs. Ananda Gnanu Patil and Others, , has endorsed the observation of the Supreme Court in British India General Insurance's case as follows.-

16. As argued by the learned Counsel for the claimants, on the question whether the insurer has a right to take only the statutory defences as provided in Section 96(2) of the M.V. Act or whether he can take all the defences as an ordinary defendant, considering the Apex Court decision in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, , a learned Single Judge in the case of Kamla Devi v. Navin Kumar and Anr. 1973 ACJ 115, answered that the insurer has a right to take only the statutory defences unless by the terms of the policy the right to defend the action in the name of the assured has been reserved.

The Counsel relies on a Full Bench judgment of the Kerala High Court in the case of New India Assurance Co. Ltd. Vs. Celine and Others, , wherein, the Court was considering the question whether in a case where the insurance policy contains a reservation clause the insurance company can raise in its own name all the defences which are available to the insured without being confined to those mentioned in Section 96(2) of the Motor Vehicles Act, 1939 - corresponding to Section 149(2) of the Motor Vehicles Act, 1988. The Full Bench while quoting British India General Insurance Company's case, held that it is clear authority for the proposition that it is open to the insurer to reserve a right in the policy of insurance to defend the action in the name of the assured and in case there is such a reservation, all defences open to the assured can be urged by him (it). The Bench has further observed that this view is subscribed to by other High Courts in the cases of Madras Motor and General Insurance Company Limited v. Jagadeeswari 1974 ACJ 234; Vanguard Insurance Company Limited v. Rohini Bhan 1970 ACJ 11; Mangilal v. Parasram 1970 ACJ 86; Orissa Co-operative Insurance Society Limited v. Bhagaban Sahu 1971 ACJ 49 and United India Fire and General Insurance Company Limited v. Lakshmi Shori Ganjoo 1982 ACJ 470 .

The Counsel for the appellant also drew my attention to the case of National Insurance Co. Ltd. Vs. Leela and Others, , wherein a Division Bench of the Kerala High Court following the above Full Bench decision has held that in view of a condition reserving the right of the Insurance Company to raise all contentions in defending an action not only in its name but also in the name of the insured - the decision in British India General Insurance's case, would squarely cover the case and hence, in view of such a reservation all defences open to the assured can be urged by it. He would further point out that the Supreme Court in the case of Balbahadur Singh Vs. Oriental Insurance Co. Ltd. and Others, , while referring to the very question whether if the policy of insurance has reserved a right to the Insurance Company to raise all defences against the claim whether the Insurance Company is entitled to defend the action on all such permissible defences against

the Court refrained from pronouncing on the question since the contention had not been raised either before the Tribunal or the High Court.

The Counsel for the appellant would therefore contend that the Single Judge in *Kamla Devi v. Navin Kumar and Anr.* 1973 ACJ 115, having been approved by the Full Bench in *Kavitha Dilip Patil's* case, there can be room for further debate on the question.

7. In the light of the rival contentions, in my opinion, the maintainability of the appeal on the question that there is no order u/s 170 of the Motor Vehicles Act, 1988 and hence the Insurance Company is not in a position to challenge the award as regards quantum, is not tenable in view of the fact that the insurer has incorporated a condition in the policy, which is extracted above and this would provide a right to the appellant to raise defences that may be available to the insured. This is apart from a situation where the Tribunal (Commissioner) directing the Insurance Company to contest the claim on all or any of the grounds available to the insured, in terms of Section 170 of the Motor Vehicles Act, 1988, in the two circumstances contemplated therein, namely, that there is collusion between the claimant and the insured or the insured has failed to contest the claim.

8. Hence, the question of maintainability of the appeal would not survive for consideration. Insofar as the question whether the Commissioner was justified in holding that the claimant is entitled to compensation on the basis of 100% loss of earning capacity is concerned the question is no longer debatable in view of the Full Bench judgment of this Court in the case of *Shivalinga Shivanagowda Patil and Others Vs. Erappa Basappa Bhavihala and Others*, wherein the Court has laid down that determination of loss of earning capacity has to be with reference to "all the work" which the workman was capable of performing at the time of the accident resulting in such disablement? and not with reference to the work which the workman was performing at the time of the accident. However, this is subject to the condition that in case the workman established by acceptable evidence that after the injury not only he is not able to do the work which he was performing before the accident but he is not able to do any other work, the loss of earning capacity could be assessed on the basis of such evidence.

9. In the facts of the case on hand and the available material it cannot be said that a case was made out to hold that there was a loss of earning capacity of 100%.

10. In the result the appeal is partly allowed. The award of the Commissioner is modified. The amount of compensation shall be re-quantified on the basis of percentage of loss of earning capacity is 45% instead of 100%. The claimant shall be entitled to the amount of compensation so re-determined. The balance in deposit shall be refunded to the appellant.