

(2007) 01 KL CK 0007
In the High Court Of Kerala
Case No : M.F.A. No. 810 of 2002

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Kuttan Nair

RESPONDENT

Date of Decision : 09-01-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 195
Workmens Compensation Act, 1923 — Section 14, 19, 19(1), 19(2), 2(1)

Citation : (2007) ACJ 2261 : (2007) 1 ILR (Ker) 560

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : M. Jacob Murickan, for the Appellant; B.V. Joy Sanker, for the Respondent

Final Decision : Dismissed

Judgement

K.T. Sankaran, J.—In this appeal filed by Oriental Insurance Co. Ltd., appellant challenges the jurisdiction of the Commissioner for Workmen's Compensation to pass an order allowing recovery from the appellant, the compensation awarded to the workman, respondent No. 1.

2. The respondent No. 1 herein, applicant before the Commissioner, was working as a mahout of the elephant by name "Dhananjaya" owned by the respondent No. 2 herein. On 28.3.1998, while the applicant was engaged in his work as a mahout at a festival of Maniyoor Temple, he fell down while he was getting down from the top of the elephant as he was kicked by the elephant. The applicant sustained injuries. He was treated as an inpatient in the Medical College Hospital, Kozhikode from 28.3.98 to 25.4.1998. He had to undergo a surgery, as he sustained fracture of his right femur. The Assistant Professor of Surgery, Medical College Hospital, Kozhikode certified that the applicant sustained disablement and it was assessed at 30 per cent. A sum of Rs. 2,00,000 was claimed by the applicant as compensation. The employer, who is the owner of the elephant, as well as the insurance company were made opposite parties before Workmen's

Compensation Commissioner. The Commissioner found, on evidence, that the applicant is entitled to compensation of Rs. 45,494.40.

3. Insurance company was arraigned as one of the opposite parties on the ground that the insurance policy, Exh. R2, was available to cover the accident. The insurance company contended in the written statement that since no policy was issued indemnifying the employer under Workmen's Compensation Act, the insurance company is not liable to pay compensation. The Commissioner found that the Exh. R2 policy covers the claim for compensation by the mahout under the Workmen's Compensation Act and, therefore, held that the insurance company is liable to pay the amount of compensation.

4. The learned Counsel for the appellant contended that the Commissioner has no jurisdiction to fix the liability on the insurance company. Exh. R2 policy is not a policy under the Workmen's Compensation Act. The policy was intended for the protection of the elephant and to compensate its owner. The policy does not cover the claim for compensation for the injury sustained by the employee during the course of employment. The counsel submitted that in respect of the policies issued to cover claims under Workmen's Compensation Act, it would be so specified and the policy available in this case is not such a policy. He also submitted that in the case of policy issued to cover workmen's compensation, there would be no mention of any sum assured as the compensation is to be fixed by the Commissioner under the Workmen's Compensation Act, whereas in Exh. R2 policy the sum assured is mentioned, which indicates that Exh. R2 is not a policy which can be availed of by the workman in respect of the accident. The counsel also contended that insured has not approached the insurer and, therefore, the mahout is not entitled to file an application before the Commissioner. He contends that remedy, if any, of the mahout is to approach the civil court.

5. Learned Counsel for the applicant-respondent No. 1 contended that there is no difference between Exh. R2 policy and any other policy. There can be no dispute that the employer is liable. If so, the insurer is liable to indemnify the employer. The counsel also relied on the decisions in *New India Assurance Co. Ltd. Vs. R. Shridhara and another*, and *United India Insurance Co. Ltd. v. Vasudevan* 1989 ACJ 405 .

6. Exh. R2 policy shows that certificate of insurance is issued "for the insurance of elephant for the members of All Kerala Elephant Owners' Association". As against the column "Name of the insured", it is mentioned as "All Kerala Elephant Owners' Association" and "K. Govindan Chettiar". The period of insurance is from 19.6.1997 to 18.6.1998. Name of the elephant and the description of the elephant are shown in the policy. As against the column "the purpose for which used", it is recorded as "temple and timber". The total sum assured is Rs. 4,00,000. Under the head "third party liability cover", there is a column as "mahout coverage" and under the head "name of the mahout", it is recorded as "2 unnamed mahouts". Exh. R3 is the agreement on the basis of

which the policy was issued. Agreement was executed between All Kerala Elephant Owners" Association and insurance company and it is termed as "master policy agreement for group elephant insurance scheme for the members of All Kerala Elephant Owners" Association". In the agreement, para 7 covers the "third party liability" and there is "mahout cover" as well. The Assistant Divisional Manager of the company, who was examined as RW 1, admitted in evidence that the policy was given for covering personal accident injury and death of two mahouts employed by Govindan Chettiar and that the mahouts had been insured for a sum of Rs. 2,00,000 each. He also stated in evidence that the policy in question covers injuries sustained by mahouts due to attack made by the elephant.

7. Section 2(1)(n) of the Workmen's Compensation Act defines the "workman". Sub-clause (ii) therein is relevant, which is extracted below:

2. Definitions.-(1) xxx xxx xxx (n) "workman" means any person who is:

(ii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

Schedule II of the Workmen's Compensation Act contains the "list of persons who, subject to the provisions of Section 2(1)(n), are included in the definition of workmen". Entry (xxii) therein reads thus:

The following persons are workmen within the meaning of Section 2(1)(n) and subject to the provisions of that section, that is to say, any person who is:

xxx xxx xxx (xxii) employed in the training, keeping or working of elephants or wild animals; or

A mahout is certainly a person who comes under the category mentioned in the entry (xxii) of the Schedule II to the Act. The Chambers Dictionary defines mahout as "the keeper and driver of an elephant". Webster's New Dictionary and Thesaurus gives the meaning of mahout as "elephant driver".

8. Section 3(5) of the Act reads thus:

3. Employer's liability for compensation.:

xxx xxx xxx (5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a civil court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any court of law in respect of any injury:

(a) if he has instituted a claim to compensation in respect of the injury before a

Commissioner; or

(b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

Section 22 Act provides for the form of application to be filed before the Commissioner. Section 23 states that the Commissioner shall have all the powers of a civil court under the Code of Civil Procedure, 1908, for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and compelling the production of documents and material objects and the Commissioner shall be deemed to be a civil court for all the purposes of Section 195 and of Chapter XXVI of the Code of Criminal Procedure, 1973. Section 19 provides for reference to Commissioners which reads thus:

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 a workman) 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.

(2) No civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred, under this Act.

9. The scheme of the Act is that the Commissioner has to decide the question as to the liability of any person to pay compensation and no civil court shall have jurisdiction to settle, decide or deal with any question which is required to be settled, decided or dealt with by the Commissioner. Section 3(5) provides that no suit for damages shall be maintainable by a workman if he has instituted a claim for compensation before a Commissioner. The Workmen's Compensation Act is a legislation providing for social security and it is a welfare legislation. The purpose of the Act is to protect the workmen. If two interpretations are possible, that interpretation which is in favour of the workman shall be preferred. The Act makes the employer liable to compensate the workman in the manner indicated in the Act. Schedule I of the Act categorises the injuries; Schedule II provides the list of persons who are included in the definition of workman. Schedule III contains the list of occupational diseases and Schedule IV contains factors for working out the lump sum equivalent of compensation amount in case of permanent disablement and death. A workman who has sustained injuries in the course of his employment is not bound to approach the civil court for recovering compensation. He can file an application u/s 22 of the Act. The Commissioner has jurisdiction to settle the question as to the liability of any person to pay compensation. Section 3(5) would indicate that the workman can opt to file an application u/s 22 of the Act or to file a suit, provided the suit is not barred u/s 19(2) of the Act. If the workman institutes a suit for damages, he is not entitled

to file an application under the Workmen's Compensation Act. If a workman has instituted a claim for compensation before the Commissioner, he is not entitled to institute a suit for damages. This provision provides for the election of the forum by the workman. It does not provide for a defence for the employer to contend that the workman should have resorted to the remedy which he has not resorted to. The option lies with the workman and not with the employer. The expression "the liability of any person" occurring in Section 19 of the Act confers jurisdiction upon the Commissioner to decide the question as to whether the insurer is liable to pay the compensation amount. The question of insurance coverage is not alien to the scope of inquiry before the Commissioner, as is evident from Section 14 of the Act. Section 14 applies in the case of insolvency of the employer or if the employer is a company, in the event of the company having commenced to be wound up. In the contingencies mentioned in Section 14, by a fiction, the workman shall have the rights of the employer. The liability of the insurer does not vanish in any such contingency and the workman is entitled to enforce the right of the employer as against the insurer.

10. In *United India Insurance Co. Ltd. v. Vasudevan* 1989 ACJ 405 the Full Bench held that in proceedings u/s 22 of the Workmen's Compensation Act, the Commissioner is empowered to direct the insurer to pay the compensation as provided for, even in cases where Section 14 of the Act has no application. The Full Bench was dealing with the case of a claim of the dependant of a workman who died as a result of a motor accident and the question which arose was whether the Workmen's Compensation Commissioner can direct the insurer to pay the amount awarded as compensation. The Full Bench held thus:

The scheme thus provides for absolute liability of the employer in case of accidents arising out of and in the course of employment of the workman. Section 19 constitutes the Commissioner as the sole authority to determine this liability of the employer and to enforce that liability incurred under the Act. The civil court's jurisdiction is totally excluded from this liability. Section 19(1) is wide enough to confer jurisdiction on the Commissioner to determine a question arising in any proceeding under the Act as to the liability of "any person" to pay compensation as provided for by the Act. It is not restricted to determination of the liability of the employer alone.... We are clearly of the view that under Workmen's Compensation Act, in proceedings u/s 22 thereof, the Commissioner is empowered to enforce the liability of the employer to pay the compensation to the employee by directing the insurer to discharge the liability in terms of the policy which covers the liability.... In the light of what has been discussed, we hold that in the proceedings u/s 22 of the Workmen's Compensation Act, the Commissioner is empowered to direct the insurer to pay the compensation as provided for even in cases where Section 14 of the Act has no application.

In the light of the principles mentioned above, I am not inclined to accept the contention put forward by the counsel for the appellant that Commissioner has no jurisdiction to direct recovery of the amount of compensation from the insurer.

11. The contention of the appellant that Exh. R2 policy does not cover the claim for compensation by mahout and also that a group insurance policy cannot be availed of by an individual workman in respect of the injury sustained by him, is also without substance. The terms of Exh. R2 policy and Exh. R3 agreement would clearly indicate that the insurer is liable to compensate the insured in respect of the personal injury sustained by the mahout in the course of his employment under the insured as a mahout. Whether it is a group insurance or individual insurance, it does not affect the coverage and the insurer is not entitled to dispute its liability on the ground that it is a group insurance. The purpose of insurance is clear from the agreement. Whether the All Kerala Elephant Owners' Association had approached the insurance company or whether the individual owner of the elephant approached the insurance company for insurance coverage is not at all relevant while fixing the liability of the insurance company as an insurer. The question is, whether insurance company is liable at all, in terms of the policy? Such liability is not dependent on whether it is an individual policy or group policy. The nomenclature of an insurance policy is not always decisive and the rights conferred on the workmen under the Workmen's Compensation Act cannot be taken away by the nomenclature of an insurance policy. In *New India Assurance Co. Ltd. Vs. R. Shridhara and another*, , Karnataka High Court considered a similar question and held thus:

That the insurance company has different types of policies including the one under the provisions of the Workmen's Compensation Act, is not a defence to absolve itself from paying under the miscellaneous group insurance as in the instant case. That will be helping technical defence which this Court will not countenance.

12. I am in agreement with the view taken by Karnataka High Court. For the reasons stated above, I hold that the contention of the appellant that Exh. R2 policy is not sufficient to cover the claim for compensation for the injury sustained by the mahout in the course of his employment, is unsustainable.

In the result, the miscellaneous first appeal is dismissed with costs.