

(1994) 03 KAR CK 0011

In the Karnataka High Court

Case No : Misc. First Appeal No's. 2236 and 1463 of 1992

United India Insurance Co. Ltd.

APPELLANT

Vs

H.B. Siddappa and another

RESPONDENT

Date of Decision : 09-03-1994

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 149 (2) (a)
Workmens Compensation Act, 1923 — Section 66

Citation : (1994) ACJ 863 : AIR 1994 Kar 338 : (1994) ILR (Kar) 891 : (1994) 4 KarLJ 372

Hon'ble Judges : T.J. Chouta, J;M. Ramakrishna, J

Bench : Division Bench

Advocate : O. Mahesh, for the Appellant; D.R. Nagaraj and M.B. Prabhakar, for the Respondent

Judgement

Ramakrishna, J.—These two Miscellaneous First Appeals arise out of the judgment and award dated 23-6-1992 made by the Motor Accidents Claims Tribunal, Chitradurga, in M.V.C. No. 155 of 1990, awarding compensation of Rs. 1,00,000/- in favour of the claimant H. B. Siddappa. M.F. A. No. 2236 of 1992 is filed by the United India Insurance Company Limited questioning the finding recorded by the Tribunal that the award amount has to be made good by it, whereas the other appeal is for enhancement of the compensation awarded on the ground of inadequacy.

2. We have heard learned counsel on both sides.

3. The main argument advanced by Sri O. Mahesh, learned counsel appearing for the Insurance Company, appellant in M.F.A. No. 2236 of 1992, is that in view of the provisions of sub-sections (1) and (2) of Section 149 of the Motor Vehicles Act, 1988 (the Act for short) read with the conditions imposed in the policy, a copy of which is marked as Ex. D-1 in the Court below, the Tribunal ought to have seen that regard being had to the payment of additional amount of premium of Rs. 36/-, apart from the liability to authorised non-fare paying

passengers as per END IMT 14(b) imposed in the policy, the liability of the insurer was limited to Rs. 10,000/- in respect of the passenger died or injured in the accident involving the vehicle covered by such a policy. But the Tribunal committed a wrong in saddling the insurer with the liability of making good the entire amount of compensation awarded in favour of the claimant.

The other argument of Sri Mahesh is that a Full Bench of this Court in National Insurance Company Ltd., considered the similar question and held that the insurer was . not liable by the force of clause (ii) of the Proviso to Section 95(1) (b) of the Act to pay compensation in respect of death of or bodily injury to any person travelling in a goods vehicle except the owners of the goods travelling in a goods vehicle having engaged it under an agreement with the owner for carrying goods for hire or reward and the goods carried were those as defined in Section 2(7) of the Act, subject to the condition that such liability shall cover only up to the extent of the number of persons permitted to be carried in the goods vehicle under Rule 161 of the Karnataka Motor Vehicle Rules, 1963 and that therefore without following the said ruling in Dundamma's case, the liability fastened on the insurer in the present case by the Tribunal cannot be sustained and the same is liable to be set aside.

4. Sri Nagaraj, learned counsel for the claimant, argued in support of the judgment and award under appeal. He submitted that in view of the additional liability undertaken by the insurer to authorised non-fare paying passengers in terms of the condition imposed in the policy, the insurer was liable to pay the entire amount of compensation awarded in favour of the claimant and that therefore the Tribunal was right in doing so.

5. Smt. Shobha, learned counsel appearing for the owner of the vehicle, Sri Habib Khan, one of the respondents in these appeals, argued that as per the entry in the policy, Ex. D1, the owner of the vehicle had paid an additional contribution of premium of Rs. 240/- to cover liability for authorised non-fare paying passengers as per END IMT 14 (b) and the insurer had undertaken to pay Rs. 1,00,000/- for the death of, or bodily injury to a passenger travelling in the vehicle and that therefore the Tribunal was right in saddling the insurer with the liability of paying the entire amount of compensation awarded, which the insurer could not escape. In the circumstances, it was not open to it to say that its liability had been limited to Rs. 10,000/- only. The alternate submission of Smt. Shobha is that since the liability of the insurer is restricted to Rs. 50,000/- per accident as can be seen from the policy, at least to that extent the insurer is liable to make good the compensation. In support of her case, she places reliance on the decision of the Supreme Court in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others,

6. On the above contentions, the following two points arise for our consideration :--

(1) Whether the finding recorded by the Tribunal that in view of the policy, Ex. D-

I, the insurer was liable to pay the entire amount of compensation of Rs. 1,00,000/- awarded in favour of the claimant, was justified.

(2) If not, to what extent the insurer is liable for compensation.

7. In support of his claim, the claimant examined three witnesses including himself as P. W. 1 and produced documents Exs. PI to P7. None were examined on behalf of the insurer and the insured; but the policy covering the vehicle in question was produced as Ex. D-I.

8. The claimant Siddappa has stated in the course of his deposition before the Court below that he boarded the lorry bearing registration No. MYN 4467 along with 2 1/2 bags of ground-nuts and 2 bags of sunflower seeds to go to Challakere and that he paid Rs. 25/- to the driver as fare as settled between themselves, as found in the cross-examination, though he never stated so in the examination-in-chief. According to him, the driver of the lorry was driving it at a very high speed, therefore there was the accident resulting in injury to the right hand. No doubt, PW 3 Dr. Ravindra has stated about the treatment given to the injury on the right hand of the claimant which ultimately came to be amputated resulting 80% disability of the limb.

9. To answer the relevant question arising in the case, we have to find out whether there was an agreement between the claimant and the owner of the vehicle to engage the vehicle for carrying his goods up to Challakere. Except the self-interested testimony of the claimant, there is no other independent evidence to corroborate that he paid Rs. 25/-towards fare and luggage charges of his goods and that it was so settled between him and the owners of the lorry. To show that he was proceeding in the lorry along with the goods, there is no independent evidence. Ex. P4 is a copy of the mahazar drawn by the Police at the scene of accident on the very day. In this document, there is no reference to the presence of 2 1/2 of bags of ground-nuts and two bags of sunflower seeds. The best witness who could have spoke to the goods was the. driver of the vehicle, but the claimant never chose to examine him. Therefore, in the absence of the evidence on record, we will have to hold that the claimant has failed to prove that he was travelling in the lorry along with the goods. Keeping this in our mind, we Will have to examine what is the liability of the insurer in a case of this kind.

10. In National Insurance Company Ltd., this Court had the occasion to deal with his question directly. In that decision, Their Lordships considered the scope of Section 95 of the old Act read with Rule 161 of the Karnataka Motor Vehicles Rules, 1963 and also made a comparative study of the two Acts -- one the Act of 1939 and the other the. Act of 1988) with a detailed discussion on the conditions which are generally imposed in a policy and the liability arising thereon. Referring to the similar set of facts, the Full Bench in National Insurance Company Ltd., held as follows in paragraph 31 :--

"Under a motor vehicle insurance Policy issued by an Insurance Company in conformity with Section 95 of the Motor Vehicles Act, 1939, the. Insurance

Company is not liable by the force of Clause (ii) of the Proviso to Section 95(1) (b) of the Act to pay compensation in respect of death of or bodily injury to any person travelling in a vehicle which is not a vehicle constructed or adapted and meant in law for carrying passengers for hire or reward such as a goods vehicle even to the extent of number of passengers/persons permitted to be carried in the vehicle, except in respect of the owners of the goods travelling in a goods vehicle having engaged the vehicle under an agreement with the owner for carrying goods for hire or reward, and the goods carried are those as defined in Section 2(7) of the Act, subject to the condition that such liability shall cover only up to the extent of the number of persons permitted to be carried in the goods vehicle under Rule 161 of the Karnataka Motor Vehicles Rules. 1963."

(Emphasis is supplied)

11. Therefore, in the light of the ruling in National Insurance Company Ltd., regard being had to the evidence on record in the present case, we have to hold that there was no acceptable evidence enabling the Court below to hold that there was an agreement between the claimant and the owner of the vehicle to engage it for carrying the goods- Mere assertion that he had paid Rs. 25/- as fare to the driver does not result in a complete contract. In that view of the matter, it does not answer the provisions of Rule 163 of the Rules.

12. Presuming for the sake of argument that the claimant had paid Rs. 25/- as fare and the insured paid Rs. 26/- as additional contribution of premium, the question is what is the liability of the insurer on such contribution of additional premium. We will presently refer to the copy of the policy, Ex. D-1. The owner of the vehicle did not choose to produce the original policy at the time of enquiry as he remained ex parte. Therefore-, we will have to fall back upon what is available in the copy of the policy. The first entry under basic premium to cover liability to public risk shows Rs. 240/- which is typed as against Add: for L.L. to authorised non-fare paying passengers as per END IMT 14(b) and below it mentioned Rs. 36/- as against limit per passenger per accident. Smt. Shoba, learned counsel for the insured, however, argued that the Court should construe payment of Rs. 240/- as the additional premium. It is not possible to do so because that amount has been paid towards basic premium and therefore it is not possible to construe it in the manner in which she wanted to do. Clause 14(b) of the policy at page-2 under which Rs. 240/- is stated to have been paid reads :

"IMT 14(b) Legal liability to authorised Non-fare paying passengers who are not employees of the injured :

In-consideration of the payment of an additional premium as stated in the schedule and notwithstanding anything to the contrary contained in Schedule-II it is hereby understood and agreed that the company will indemnify the insured against his legal liability other than liability under statute (except Fatal accident Act 1856) in respect of death or bodily injury to any person not being an employee of the insured nor carried by him or reward provided the person is,

(a) the owner or the representative of the owner of the goods.

xxx xxx xxx xxx

13. The Full Bench in Dundamma's case in paragraph-23 referring to the relevant provision in the Tariff, the insurance policy and the contents of the insurance policy in that case extracted relevant portions of the documents. At page 2085 it extracted the provision in the policy relating to Legal liability for accidents to Non-fare Paying Passengers who are employees of the insured, but not "workmen" under the Workmen's Compensation Act and any other Non-fare Paying Passengers wherein additional premium to be paid to indemnify the insured in respect of the above liability arising out of the goods carrying vehicles is mentioned as follows :--

Rs.10,000/- any one 15 per cent of the passenger liability to the pub-
Rs.50,000/- any one lic risks only accept premium. Rs.20,000/- any one 171/2%
of the liabi- passenger lity to the public Rs.1,00,000/-any ac- risks only
premium. cident

14. At page 2086, Clause I.M.T. 14(b) is extracted. We have also extracted the said clause in page-10 of this judgment.

15. On consideration of the contents of the tariff and the conditions incorporated in the policy extracted above, the Full Bench held National Insurance Company Ltd., as follows :-

"The contents of the tariff and the conditions in the policy extracted above clearly indicate that the insurance company covers risk in respect of every goods vehicle with the clear understanding that the risk in respect of passengers in a goods vehicle is not covered under the policy. If the conditions incorporated in the policy are inconsistent with the provisions of the Act, certainly the latter prevails, but if the conditions are in conformity with the provisions of the Act they must prevail. For instance, if in an Insurance Policy issued in respect of a stage carriage or a contract carriage, a condition is incorporated in the policy to the effect that it would not be liable to pay compensation in respect of death or bodily injury to passengers such a condition would be a nullity and the Legislature has also incorporated an express provision to that effect in Section 66 of the Act. But the condition incorporated in the policy in respect of a goods vehicle to the effect that the Insurance Company is not liable to pay any compensation in respect of passengers carried in a vehicle other than the driver and the employees covered by Section 95 of the Act, is strictly in conformity with the provisions of the Act and is binding on the concerned."

(Emphases is supplied)

16. However, regard being had to the provisions of Section 149(2)(a), the statement contained in the above paragraph-extracted, is distinguishable as follows :--

Section 149 of the Act deals with duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. Sub-section (2) thereof provides :

"(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :-

(1) a condition excluding the use of the vehicle -

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or.....

XXX XXX XXX XXX

17. Therefore, it is clear that Section 149 of the New Act provides that the insurer may take the risk of the liability to make good the compensation in respect of death of or bodily injury to a passenger carrying in a goods vehicle as non-fare paying passenger as contended for the claimant in the instant case. It is true that this is an improvement over the provisions of Section 95(2) of the old Act. In that view of the matter, the insurer may undertake the responsibility for indemnifying the insured for the death of or bodily injury to a passenger as non-fare paying passenger as found in the instant case. But the question that remains for consideration is what is the condition incorporated in the policy in the given case.

18. The learned counsel for the insurer drew our attention to condition-3 below heading "Limitation as to use" on front page of the policy. It reads :

"LIMITATIONS AS TO USE :

Use only under a public Carrier's permit within the meaning of the Motor Vehicles Act, 1939.

The Police does not cover :

(1) xxxx

(2) xxxx

(3) Use for carrying passengers in the vehicle except employees (other than driver) not exceeding six in numbers coming under the purview of the Workmen's Compensation Act, 1923."

19. In this view of the matter if the policy issued by the insurer provides a clear prohibition for carrying the passengers in the vehicle except employees (other than driver) not exceeding six in numbers coming under the purview of the Workmen's compensation Act, 1923, the insurer shall not be liable to take the responsibility for payment of compensation for the death of or bodily injury to a passenger carried by the vehicle contrary to the condition of the policy.

20. In order to construe the policy in the manner in which Smt. Shobha wanted to construe, the two clauses -- one payment of Rs. 36/- stated to be additional contribution for liability to authorised non-fare paying passengers as per END IMT 14 (b) relied upon by her and the other prohibiting the vehicle for carrying passenger under the head "Limitations as to use" must be considered together with a view to confer benefit on the passenger injured and not the insured. It is true that Section 149(2)(a) is held to provide that the insurer may undertake risk of indemnifying the insured in the event of a passenger dying or injuring in the accident involving his goods vehicle in case the insurer offers to accept the contract in a way which is beneficial as is done in this case by accepting additional premium of Rs. 36/- for liability to authorised non-fare paying passengers as per END IMT 14 (b), but at the same condition-3 under "Limitations as to use" heading comes in the way of the insurer undertaking the liability to indemnify. Therefore, the Court will have to consider as to what is the understanding between the two parties. When the insured with the eyes open accepts the policy with a condition like condition-3 that he shall not carry passengers in the goods vehicle and yet he carries passengers relying on Clause 14 (b) which authorises non-fare paying passengers to travel in such a vehicle on payment of additional premium, in the event of an accident to the vehicle causing death or bodily injury to a passenger in it, whether the insurer is liable for indemnifying the insured in such a case is the question to be considered.

21. Undoubtedly, if a specific condition imposed in the policy is not contrary to the provisions of the Act, such a condition must prevail. There is no mandatory provision in the Act against the condition-3 of the policy. Therefore, condition-3 being in conformity with the provisions of the Act, it must prevail. However, in the instant case, we will have to take lenient view to confer certain benefits upon the claimant-injured since the insurer admits that a sum of Rs. 36/- has been paid by way of additional premium. Therefore, now the question is what is the extent of liability that can be imposed against the insurer.

22. In Dundamma's case, the Full Bench referred to the additional premium payable and the extent of liability of the insurer thereon. In the instant case, the policy states that for payment of Rs. 36/- being additional premium, the maximum liability of the insurer is Rs. 10,000/- per passenger and Rs. 50,000/- per accident i.e., for any number of passengers in one accident. Therefore, we hold that the liability that can be imposed against the insurer in this case is Rs. 10,000/- in respect of one passenger who is injured. The Tribunal ought to have seen that having regard to the condition imposed in the policy, the insurer was

liable to pay only Rs. 10,000/- to the claimant Siddappa being the only passenger injured in the accident and not more than that.

23. In *National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others*, the Supreme Court regard being had to the provisions of Section 95(2)(b) Of the Motor Vehicles Act, 1939, held that though it was not obligatory on the part of the owner of the vehicle to get it comprehensively insured, yet it may be so done with the agreement entered into between the owner of the vehicle and the insurance company by paying separate premium. However, comprehensive insurance of the vehicle and payment of higher premium do not mean that the limit of the liability with regard to third party risk becomes unlimited or higher than the statutory liability fixed under sub-section (2) of Section 95 of the Act. This principle laid down in *Jugal Kishore's* case will not come to the aid of the insured.

24. In view of the foregoing, M.F.A. No. 2236 of 1992 is allowed and the finding of the tribunal that the insurer was liable to make good the entire amount of compensation of Rs. 1,00,000/- awarded in favour of the claimant is set aside. We hold that the appellant-insurance company is liable to pay only Rs. 10,000/- out of the award amount and the remaining award amount has to be paid by the owner of the vehicle MYN 4467. The rest of the judgment and award are maintained.

25. Sri O. Mahesh, learned counsel for the insurer, submits that at the time of filing M.F.A. No. 2236 of 1992, the insurer deposited Rs. 25,000/- and that, in view of the order now made that the insurer is liable to pay only Rs. 10,000/- with proportionate interests and costs thereon, the balance amount out of the amount of Rs. 25,000/- in deposit may be ordered to be refunded to the insurer. Accordingly, we direct the Office to calculate the amount payable by the insurer by virtue of this order and pay the same to the claimant immediately out of the amount of Rs. 25,000/- in deposit and the balance, if any, out of Rs. 25,000/- in deposit may be refunded to the insurer.

26. Coming to the other appeal M.F.A. No. 1463 of 1993 filed by the claimant for enhancement of compensation, Sri Magaraj, learned counsel for the appellant, strenuously argued that the appellant having sustained an injury to the right hand which ultimately came to be amputated up to the shoulder level resulting in 100% disability, the amount of Rs.60,480/- awarded in this behalf by the Tribunal was on the lower side and the same required to be enhanced having regard to the age of the claimant being 28 years and his 100% disability to work as agriculturalist or cooli in agricultural lands. However, this has been opposed both by the insured and the insurer.

27. We have carefully considered the evidence on record and the discussion made by the Tribunal thereon. The contention of the claimant that he was a sub-contractor has been disbelieved by the Tribunal and we also find nothing on record to believe that he was a sub-contractor. On the other hand, there is

enough material to show that he was working as an agricultural cooli and he did not possess any land. That being so, the approach of the Tribunal to the evidence on record and its conclusion thereon that the reasonable income of an agricultural cooli being Rs. 480/-per month, the income of the appellant came to Rs. 360/ - per month having regard to 80% disability and Rs. 4,230/- per year and that, by applying the multiplier of 14 regard being had to the age of the claimant, the award of compensation payable towards disability was Rs. 60,480/- cannot be said to be incorrect or erroneous. In the absence of any evidence to show that he was earning more and that he was unable to do any work after the loss of the right hand, it is not possible to accept the contention of Sri Nagaraj that this is a fit case for enhancement of the compensation awarded, particularly in the face of the fact that in the other appeal, the liability of the insurer is limited to Rs. 10,000/- and the owner of the vehicle is made to pay the balance amount of the compensation awarded. In the circumstances, we do not think that this is a fit case for enhancement of compensation awarded.

In the result and for the reasons stated above, M.F.A. No. 1463 of 1993 is dismissed.

28. Order accordingly.