

(2014) 11 KL CK 0181
In the High Court Of Kerala
Case No : M.A.C.A. No. 1585 of 2013

United India Insurance Co. Ltd.

APPELLANT

Vs

Jayaprakash

RESPONDENT

Date of Decision : 18-11-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 167, 95(1)
Workmens Compensation Act, 1923 — Section 10, 4, 8

Citation : (2015) 1 ACC 966 : (2015) ACJ 2110 : (2015) 145 FLR 14 : (2015) 1 ILR 457 : (2014) 4 KHC 905 : (2015) 1 KLJ 6 : (2015) 1 KLT 211 : (2015) 2 LLJ 290 : (2015) 3 LLN 178

Hon'ble Judges : T.R. Ramachandran Nair, J;P.V. Asha, J

Bench : Division Bench

Advocate : P.V. Jyothi Prasad, Standing Counsel, Advocate for the Appellant;
Rajesh Sivaramankutty, Advocate for the Respondent

Judgement

T.R. Ramachandran Nair, J.—The appellant is the third respondent in OP(MV) No. 83/2005 on the file of the Motor Accidents Claims Tribunal, Palakkad. The claimant filed the application claiming compensation to the tune of Rs. 7 Lakhs and the Tribunal awarded Rs. 6,27,500/- with 7.5% interest. The accident occurred on 19/09/2004 at 2.30 p.m. The claimant was working as a cleaner in the lorry bearing Reg. No. KL-9M/9439 and was travelling to Palakkad from Ernakulam. When they reached Aluva, it is alleged, that a Police Officer caused the bus bearing registration No. TN-01 N/6743 which was going in front of the lorry, to be stopped for checking. The bus suddenly stopped without showing any signal and the lorry hit on the rear side of the bus. The claimant sustained serious injuries. He was taken to Karothukuzhy Hospital, Aluva. After obtaining first aid, he was taken to RV Accidents and Trauma Research Institute, Palakkad and was treated till 24/09/2004. Thereafter, he was admitted in the Jubilee Mission Hospital. On 07/10/2004 his left leg was amputated above knee cap.

2. The claimant was aged only 23 years at the time of accident. He had earned a valid driving licence and badge. As the leg has been amputated above knee cap,

he is unable to do any work. Accordingly, the claim was laid.

3. The Insurance Company, the appellant herein contended that the claim is excessive. It was admitted that the vehicle involved, viz. KL-9M/9439 was insured with the appellant company. Before the Tribunal, the owner of the bus, viz. the Managing Director, State Express Transport Corporation Ltd. and its driver and Thiruvalluvar Transport Corporation Ltd., Madras were also impleaded. Thus, the owners and drivers of both the vehicles and the insurance company were parties.

4. As regards the aspect of negligence, the Tribunal found that no negligence can be attributed to the driver of the bus. The Tribunal found that going by Ext. A14 disability certificate, the disability is 40%, but it can be assessed as 100% since being a cleaner, he will not be able to do any work. He was having licence as a driver also.

5. We heard learned counsel for the appellant Company, Shri Jyothi Prasad and Shri Rajesh Sivaramankutty, learned counsel for the claimant.

6. Shri Jyothiprasad, learned Standing Counsel for the appellant contended mainly that the disability assessed is excessive. Even if the leg was amputated, he can do other work and therefore it cannot be reckoned as 100%. He further contended that since the negligence is attributed only to the driver of the lorry, the claimant is entitled for compensation only to the extent allowable under the Workmen's Compensation Act and therefore the award of compensation at Rs. 6,27,500/- cannot be justified.

7. As far as the quantum of compensation is concerned, the claimant/first respondent is admittedly disabled due to amputation of leg. Even though the Insurance Company had taken a contention that he was a gratuitous passenger, the same was not accepted by the Tribunal. The evidence of the first respondent as PW 1 clearly shows that he was working as a cleaner in the lorry. According to him, he was getting a monthly salary of Rs. 3,500/-. Ext. A13 is the driving licence of the claimant. The owner of the lorry was examined as RW 1 who also deposed that the claimant was the cleaner in the lorry for the last three years and his daily wages was Rs. 150/-. It was also deposed by him that after the accident he did not turn up for work. In these circumstances, the Tribunal accepted the case of the claimant that he was working as a cleaner in the lorry. Even though learned Standing Counsel for the appellant submitted that the said aspect has not been properly proved, according to us, in the light of the evidence of PW 1 and RW 1, the Tribunal was right in concluding that the claimant was working as a cleaner, and was not a passenger at all.

8. Learned counsel for the claimant relied upon the decision of a Division Bench of this Court in Jayaprasad Vs. Rejimon Philip, to contend that 100% disability could be accepted in this case also. Therein, in the case of a driver whose leg was amputated, this Court found that in the light of the nature of employment, the disability can be assessed at 100%.

9. As far as the aspect of disability is concerned, we find no reason to interfere with the assessment of the Tribunal that it will be 100%. As a cleaner, he will not be able to do work in a lorry and as a driver also he will not be able to drive a vehicle. The avocation as a cleaner or driver being an impossibility, the functional disability is 100%. Therefore, we find that the compensation assessed after taking his monthly income at Rs. 2,500/- and after choosing the multiplier of 18, does not call for any interference. An amount of Rs. 20,000/- has been awarded as compensation towards pain and suffering; towards compensation for loss of amenities an amount of Rs. 10,000/- has been awarded; Rs. 2,000/- has been awarded towards transportation expenses, an amount of Rs. 1,000/- has been granted towards extra nourishment, an amount of Rs. 4,000/- stands allowed towards bystanders expenses and an amount of Rs. 500/- towards damage to clothing were awarded and none of them is on an excessive scale and do not call for any interference. Ext. A12 series medical bills show that an amount of Rs. 49,888.76 was incurred as medical expenses and the Tribunal awarded a sum of Rs. 50,000/- under the head "medical expenses".

10. The legal question raised is whether the total compensation should be only one under the schedule to the Workmen's Compensation Act since the driver, owner and insurer of the bus have been exonerated as no negligence was found.

11. Learned Standing Counsel for the appellant also relied upon a decision of the Apex Court in United India Insurance Co. Ltd. Vs. Suresh K.K. and Another, in support of the plea that the claimant was a gratuitous passenger. But in the light of the evidence in this case, we cannot agree with the said contention.

12. As far as the legal aspect is concerned, the decision of a Division Bench of this Court in New India Assurance Company Ltd. Vs. Rajula Beebi and Others, has been relied upon by the learned counsel for the appellant apart from the decision in Benz Automobiles" case Benz Automobiles Ltd. Vs. P.D. Thomas and Another, .

13. In Benz Automobiles Ltd. Vs. P.D. Thomas and Another, actually the question involved and considered is different from the one arising herein. A reading of the judgment will show that the claim was only for the compensation under the Workmen's Compensation Act, 1923. The appeal was filed by the owner of a motor cycle driven by the claimant who was a field officer of the appellant company. The contention of the Insurance Company that the policy covers liability only for a "paid driver", was accepted by the Commissioner. The vehicle involved was given by the Company to a Field Officer, who used it in connection with his employment and the accident occurred at that time. This Court accepted the contentions of the owner and the Insurance Company was found liable. The said judgment is of no assistance to consider the issue raised herein.

14. In New India Assurance Company Ltd. Vs. Rajula Beebi and Others, , the claim was laid by the legal representatives of the deceased victim under Section 166 of the Motor Vehicles Act. The challenge was on the quantum. The appeal

was filed by the insurance company before this Court. A contention was raised that the compensation ought to have been awarded in terms of the provisions contained in the Workmen's Compensation Act.

15. A Division Bench of this Court in *Ayisha Beevi Vs. Kalidasan*, considered the question whether the Tribunal is entitled to award compensation in excess of the liability in the case of death of an employee. In paragraph 5 the same has been answered thus and the contention was negatived:

"There is nothing in Section 95(1) or any other provision in the Act which imposes, by express terms or by necessary implication, any limitation on the extent of general damages which can be claimed by such an employee. There is nothing in the general law which imposes any such restriction. Hence it cannot be said that the amount of compensation awardable in the case of death or bodily injury of an employee covered by the Workmen's Compensation Act must be limited to the one payable thereunder."

16. A later Division Bench in *New India Assurance Co. Ltd. Vs. Pennamma Kurien and Others*, , considered a similar question. Section 110AA of the old Motor Vehicles Act came up for consideration. In paragraph 5 it was noted that the said provision is the same as Section 167 of the new Act. In paragraph 6 it was held as follows:

"6. Section 110AA, even by a reading, conveys the message that one cannot have multiple or double advantage with the same cause of action. If a person has obtained a relief through the remedy provided in one of two Statutes, he is debarred from availing himself of the remedy provided in the other Statute. There can be no doubt on that proposition."

Another question which came up for consideration before the Bench in that case was whether, if a person has been non-suited under one Act on any ground, whether he is debarred from filing an application under the other Act. The question was answered in paragraph 8 by stating that "in other words, if death or bodily injury to a person does not give rise to a claim under any one of the Acts, there would be no bar in making a claim under the other Act even if he had made an unsuccessful move under the other Act earlier. Dismissal of an application under one of the Acts would tantamount to a finding that no legal claim arose under that Act".

17. Another Division Bench in *In Re: Commissioner for Workmen's Compensation*, , while considering Section 167 of the Motor Vehicles Act, 1988 held that for the same cause of action, a person cannot institute and proceed two applications simultaneously, one before the Motor Accidents Claims Tribunal under the Motor Vehicles Act for compensation as a third party and other before the Commissioner for Workmen's Compensation, as a workman under the Workmen's Compensation Act. It was held as follows:

"A claimant who becomes entitled to claim compensation under both the Motor

Vehicles Act, 1988 and the Workmen's Compensation Act, because of a motor vehicle accident has the choice of proceeding under either of the Acts before the forum concerned. By confining the claim to the authority or the Tribunal under either of the Acts, the Legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. The emphasis in the Section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation."

18. Recently the Apex Court has considered an identical question in *Oriental Insurance Company Ltd. Vs. Dyamavva and Others*, . That was a case where a person employed in Mormugao Port Trust had succumbed to his injuries while travelling as a pillion rider in a motor cycle when a tipper lorry hit the same. The Port Trust deposited an amount of Rs. 3,26,140/- before the Workmen's Compensation Commissioner and after notice was received by the widow the amount was disbursed. A claim was raised under Section 166 of the Motor Vehicles Act independently of the same before the Motor Accidents Claims Tribunal which passed an award in her favour. Rs. 11,44,440/- was awarded and the Tribunal ordered a deduction of Rs. 3,26,140/- which was disbursed by the Workmen's Compensation Commissioner and directed to release the balance amount of Rs. 8,18,300/-. The Insurance Company filed an appeal before the High Court of Karnataka. The High Court rejected the appeal. The Company approached the Apex Court challenging the same. The Apex Court, after referring to the provisions under Section 167 of the Motor Vehicles Act, considered the question whether the claimant had opted to move the Workmen's Compensation Commissioner. It was found in paragraph 11 that actually the claimant had not moved the Workmen's Compensation Commissioner, but it was the Port Trust which initiated proceedings before the Workmen's Compensation Commissioner. Therein, the question considered was whether the acceptance of compensation will amount to exercise of option. In paragraphs 12 and 13, the Apex Court has held as follows:

"12. The issue to be determined by us is, whether the acceptance of the aforesaid compensation would amount to the claimants having exercised their option, to seek compensation under the Workmen's Compensation Act, 1923. The procedure under Section 8 aforesaid (as noticed above) is initiated at the behest of the employer "suo motif, and as such, in our view cannot be considered as an exercise of option by the dependants/claimants to seek compensation under the provisions of the Workmen's Compensation Act, 1923. The position would have been otherwise, if the dependants had raised a claim for compensation under Section 10 of the Workmen's Compensation Act, 1923. In the said eventuality, certainly compensation would be paid to the dependants at the instance (and option) of the claimants. In other words, if the claimants had moved an application under Section 10 of the Workmen's Compensation Act, 1923, they would have been deemed to have exercised their option to seek

compensation under the provisions of the Workmen's Compensation Act. Suffice it to state that no such application was ever filed by the respondents-claimants herein under Section 10 aforesaid. In the above view of the matter, it can be stated that the respondents-claimants having never exercised their option to seek compensation under Section 10 of the Workmen's Compensation Act, 1923, could not be deemed to be precluded from seeking compensation under Section 166 of the Motor Vehicles Act, 1988.

13. Even though the aforesaid determination, concludes the issue in hand, ambiguity if at all, can also be resolved in the present case, on the basis of the admitted factual position. The first act at the behest of the respondents-claimants for seeking compensation on account of the death of Yalgurdappa B. Goudar, was by way of filing a claim petition under Section 166 of the Motor Vehicles Act, 1988 on 30/05/2003. The aforesaid claim petition was the first claim for compensation raised at the hands of the respondents-claimants. If the question raised by the appellant has to be determined with reference to Section 167 of the Motor Vehicles Act, 1988, the same is liable to be determined on the basis of the aforesaid claim application filed by the respondents-claimants on 30/05/2003. The compensation deposited by the Port Trust with the Workmen's Compensation Commissioner for payment to the respondents-claimants was much later, on 04/11/2003. The aforesaid deposit, as already noticed above, was not at the behest of the respondents-claimants, but was based on a unilateral "suo motu" determination of the employer (the Port Trust) under Section 8 of the Workmen's Compensation Act, 1923. The first participation of Dyamavva Yalgurdappa, in the proceedings initiated by the Port Trust under the Workmen's Compensation Act, 1923, was on 20/04/2004. Having been summoned by the Workmen's Commissioner, she got her statement recorded before the Commissioner on 20/04/2004. But well before that date, she (as well as the other claimants) had already filed a claim petition under Section 166 of the Motor Vehicles Act, 1988, on 30/05/2003. Filing of the aforesaid claim application under Section 166 aforesaid, in our view constitutes her (as well as, that of the other dependants of the deceased) option, to seek compensation under the Motor Vehicles Act, 1988. The instant conclusion would yet again answer the question raised by the appellant herein, under Section 167 of the Motor Vehicles Act, 1988, in the same manner, as has already been determined above."

The determination of compensation by the Tribunal and the judgment of the High Court were confirmed. It was held that the deduction made by the Tribunal will give full effect to Section 167 of the Motor Vehicles Act.

19. The above judgment is a complete answer to the contentions raised by the learned Standing Counsel for the appellant. In fact, the Division Bench, while deciding New India Assurance Company Ltd. Vs. Rajula Beebi and Others, did not consider the provisions under Section 167 of the Motor Vehicles Act. We find from the full text of the above judgment that one of the aspects pointed out before the Bench was that additional premium was paid only to cover the risk of

the employees under the said Act. Therein, the victim was a person accompanying the goods in a trailer attached to a tractor. The claim was laid by the legal representatives of the deceased victim under Section 166 of the Motor Vehicles Act. This question was answered by the Division Bench in paragraph 14 of the judgment thus:

"14. The claim was laid by the legal representatives of the deceased-victim under section 166 of the Motor Vehicles Act. The Tribunal has computed compensation as provided under the Motor Vehicles Act. Therefore there is considerable force in the contention raised by the appellant in this regard. Going by the provisions contained in Section 4 of the Workmen's Compensation Act and the age, relevant factor etc. as indicated in Schedule 4 of the Act, the Compensation payable under the Workmen's Compensation Act would come to only Rs. 2,63,940/- with 12% interest thereon in addition to Rs. 2500/- towards funeral expenses."

Finally, the Insurance Company was directed to pay the entire amount of compensation and they were allowed to recover the amount in excess of its liability under the Workmen's Compensation Act, from the owner and driver of the offending vehicle. The like question raised herein was not the issue considered therein. We understand that it is only on the particular facts of the said case, the said view was taken in paragraph 14 quoted above. It cannot be said that the Bench was of the view that compensation can be awarded only as payable under the Workmen's Compensation Act. Therefore, the said decision is distinguishable on the particular facts of the case.

There is also no contention herein that the liability under the policy is limited. Therefore, the application for compensation filed before the Tribunal is perfectly maintainable. If that be so, it cannot be said that the Tribunal is hedged with any restriction to award compensation than that is provided in the Schedule to the Workmen's Compensation Act. In the light of the effect of Section 167 of the Motor Vehicles Act and the fact that there was no claim before the Workmen's Compensation Commissioner, the claim cannot be restricted as regards the quantum of compensation to what is provided in the Schedule to the Workmen's Compensation Act.

The appeal is accordingly dismissed. No costs.