

Divisional Manager Vs. Rakshith B S

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Court : Karnataka

Decided On : Jun-13-2023

Judge : Hanchate Sanjeevkumar

Appeal No. : MFA 5547/2012

Appellant : Divisional Manager

Respondent : Rakshith B S

Judgement :

- 1 - NC:

2023. KHC:20533 MFA No.5547 of 2012 R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE13H DAY OF JUNE, 2023 BEFORE THE HON'BLE MR JUSTICE HANCHATE SANJEEVKUMAR MISCELLANEOUS FIRST APPEAL No.5547 OF2012(MV) BETWEEN:

1. DIVISIONAL MANAGER UNITED INDIA INSURANCE CO. LTD., RUB BUILDING, A.A.CIRCLE, SHIMOGA-577 201. APPELLANT (BY SRI A.N. KRISHNA SWAMY, ADVOCATE) AND:

1. RAKSHITH B.S. S/O SRIDHARA NAIK NOW AGED ABOUT22YEARS R/O BALEHALLI, HOSAGADDE POST, THIRTHAHALLI TALUK SHIMOGA DISTRICT.

2. B.N. NAVEEN S/O NAGAPPA HEGDE AGED ABOUT 33 YEARS DRIVER OF MINI LORRY, R/O BALEHALI, HOSADURGA POST, THIRTHAHALLI TQ, SHIMOGA DISTRICT.

3. G.R. NAGARAJA PAI S/O RAMAKRISHNA PAI, MAJOR, OWNER OF LORRY R/O BIDARAGODU, - 2 - NC:

2023. KHC:20533 MFA No.5547 of 2012 HOSAGADDE POST, THIRTHAHALLI TQ, SHIMOGA DISTRICT. RESPONDENTS (BY SRI PRAKASH HEGDE K., ADVOCATE FOR R3; R1 AND R2 ARE SERVED) THIS MFA IS FILED U/S1731) OF MV ACT AGAINST THE

JUDGMENT

AND AWARD DATED 21.3.2012 PASSED IN MVC NO.650/2010 ON THE FILE OF DISTRICT JUDGE, ADDITIONAL MACT-II, I FAST TRACK COURT, SHIMOGA, AWARDED COMPENSATION OF RS.9,80,900/- WITH INTEREST @ 6% P.A FROM THE DATE OF PETITION TILL PAYMENT. THIS APPEAL COMING ON FOR FURTHER ARGUMENTS THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the Insurance Company challenging the judgment and award dated 21.3.2012 in MVC No.650/2010 on the file of District Judge, Additional MACT-11, I Fast Track Court, Shimoga.

2. The brief facts of the case are as under: The claimant was working as a cleaner-cum-conductor under the 2nd respondent. On 10.4.2009 the claimant as per the directions of the 2nd respondent went to Gulvadi village, Kundapura Taluk and after loading tiles to Swaraj Mazda Mini Lorry No.KA.14 C.7227 and in order to go back to Bidaragodu - 3 - NC:

2023. KHC:20533 MFA No.5547 of 2012 village was traveling in a lorry No.KA.14 C.7227. When they came near Hosagadde village, Thirthahalli Taluk at 9.00 p.m., the driver of the lorry - 1st respondent drove the vehicle rashly and negligently with high speed and in order to give side to the lorry coming from opposite side,

suddenly took the lorry to his left side and hit the road side bridge and as a result of the said accident the claimant sustained grievous injuries. Hence, the claimant filed a claim petition claiming compensation from the respondents.

3. Heard the arguments from both sides and perused the records.

4. Learned Senior Counsel Sri.A.N.Krishna Swamy appearing for the appellant / Insurance Company submitted that, in the present case the claimant was an employee under the employment of respondent No.3 who is owner of the lorry and met with an accident and sustained injuries while proceeding in the lorry as an employee. Therefore, the liability of the appellant / Insurance Company is only as per the Employees Compensation Act is concerned and as per Section 147 of the Motor Vehicles Act. He placed reliance on the - 4 - NC:

2023. KHC:20533 MFA No.5547 of 2012 judgment of Hon'ble Supreme Court in the case of NATIONAL INSURANCE CO. LTD. VS. PREMBAI PATEL AND OTHERS reported in (2005) 6 SCC172 5. Further, it is submitted by learned senior counsel that the claimant is not an employee within the definition of Section 2(n) of the Employees Compensation Act, 1923 (for short the E.C.Act), as the claimant was working in the capacity of a Supervisor. Therefore, so far as the claimant's case is concerned, he is not entitled to compensation under the provisions of the E.C.Act. Therefore, prays to set aside the judgment and award passed by the Tribunal.

6. Further, learned senior counsel submitted that the Tribunal erred in taking 100% functional disability, whereas, the Doctor has stated only 30% functional disability and that much ought to have been taken under the E.C.Act, since it is stated in Schedule I of the E.C.Act as to how much percentage of loss of earning capacity is stated, that much only is to be taken into consideration, but not more than that. Therefore, prays to modify / set aside the judgment and award passed by the Tribunal.-. 5 - NC:

2023. KHC:20533 MFA No.5547 of 2012 7. On the other hand, learned counsel for the respondents / claimants justified the judgment and award passed by the Tribunal and prays to dismiss the appeal.

8. Undisputedly, the claimant had sustained injuries while travelling in the lorry bearing No.KA.14 C-7227. The disputed fact is whether the claimant was traveling in the lorry as a loader or supervisor. The learned counsel referring to the complaint and other documents of the police records submitted that the claimant had travelled as a supervisor in the lorry, not as a loader. But in the claim petition it is stated as loader just to make a claim against the Insurance Company. Therefore, submitted that the supervisor is not a workman within the definition of Section 2(n) of the E.C.Act. Considering this aspect, even in the complaint it is stated that the claimant was travelling as a supervisor, but upon considering the nature of work of the claimant is concerned, basically he was working as a loader. In the complaint, it is stated that after loading tiles to the lorry and while coming back to Bidaragodu village, the accident was occurred. Therefore, just because the nomenclature is different, the nature of work is to be - 6 - NC:

2023. KHC:20533 MFA No.5547 of 2012 considered as to in what capacity the claimant was working. Therefore, to decide the fact either as a workman or Supervisor, the nature of work is to be considered. In the present case, after loading the tiles in the lorry, the claimant was travelling along with the goods in the lorry. Therefore, the claimant is proved to be a loader/workman/employee. Coming to Section 2(n) of the E.C.Act, the claimant is entitled to compensation as per law.

9. Section 147 of the Motor Vehicles Act stipulates requirements of policies and limits of liability. Therefore, the risk of employee/workman is compulsorily covered under the insurance policy as per the requirement of policy and limits of liability, for which separate premium need not be paid. Therefore, the risk of the employee/workman is compulsorily covered as per Section 147 of the Motor Vehicles Act subject to the provisions of the Employees Compensation Act. Therefore, in this regard, the claimant's case is considered under Section 147 of the Motor Vehicles Act.

10. The claimant is not a third party. The claimant was travelling as a loader in the lorry and sustained injury in the - 7 - NC:

2023. KHC:20533 MFA No.5547 of 2012 accident. The Tribunal has assessed and considered the case of the claimant and determined compensation as per the

provisions of the Motor Vehicles Act. The Tribunal has committed error in not following Section 147 of Motor Vehicles Act while determining the compensation to be payable by the appellant / Insurance Company. In this regard, it is worthwhile to refer to the judgment of the Hon'ble Supreme Court in the case of Prembai Patel stated supra. Paragraph Nos.13, 14, 15 16 reads as follows:

"13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147 (1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award, However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and terms of the policy.

14. The aforesaid interpretation of the relevant provisions applicable to the case in hand - 8 - NC:

2023. KHC:20533 MFA No.5547 of 2012 is in consonance with the view expressed by a Constitution Bench in New India Assurance Co. Ltd. v. C.M. Jaya where, while interpreting the provisions of Section 95(2) of the Motor Vehicles Act, 1939, the Court held as under in para 10 of the Report: (SCC p.

285) "The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to rewriting the statute or the

contract of insurance which is not permissible."

The Bench also referred to earlier decisions rendered in *New India Assurance Co. Ltd. v. Shanti Bai and Amrit Lal Sood v. Kaushalya Devi Thapar* and observed that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the insurance company is neither unlimited nor higher than the statutory liability fixed under Section 95 (2) of the Motor Vehicles Act, 1939. It was further observed that it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, - 9 - NC:

2023. KHC:20533 MFA No.5547 of 2012 the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability.

15. Though the aforesaid decision has been rendered on Section 95(2) of the Motor Vehicles Act, 1939 but the principle underlying therein will be fully applicable here also. It is thus clear that in case the owner of the vehicle wants the liability of the insurance company in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) should not be restricted to that under the Workmen's Act but should be more or unlimited, he must take such a policy by making payment of extra premium and the policy should also contain a clause to that effect. However, where the policy mentions "a policy for Act Liability" or "Act Liability", the liability of the insurance company qua the employees as aforesaid would not be unlimited but would be limited to that arising under the Workmen's Act.

16. The High Court, in the impugned judgment, has held that if the legal representatives of the deceased employee approach the Motor Accidents Claims Tribunal for payment of compensation to them by moving a petition under Section 166 of the Act, the liability of the insurance company is not limited to the extent provided under the Workmen's Act and on its basis directed the appellant Insurance Company to pay the entire amount of compensation to the claimants. As shown above, the insurance policy taken by the owner contained a clause that it was policy for "Act Liability" only. This being the nature of policy the liability of the - 10 - NC:

2023. KHC:20533 MFA No.5547 of 2012 appellant would be restricted to that arising under the Workmen's Act. The judgment of the High Court, therefore, needs to be modified accordingly.

11. In the present case, admittedly the Insurance Policy is "Act Policy/liability only policy". Therefore, when the Insurance Policy is an Act Policy/liability only policy, the risk is covered as per the statute as enshrined under Section 147 of the Motor Vehicles Act. Therefore, the liability of the appellant/Insurance Company is limited and not unlimited. The liability of the insurance company whether limited or unlimited is according to the nature of insurance policy executed between the insurer and the insured. The owner may get higher coverage of risk by paying extra premium, but that is the contractual liability. But in the present case, there is a finding on the part of the owner that the owner has not paid extra premium so as to make the liability of the insurance company as unlimited. Therefore, under these circumstances upon the factual matrix involved in the present case that the insurance policy is Act Policy / liability only policy, the risk of the claimant being employee is covered only as per the Statute prescribed under Section 147 of the Motor Vehicles Act. Therefore, the - 11 - NC:

2023. KHC:20533 MFA No.5547 of 2012 liability of the Insurance Company is limited as per Section 147 of the Motor Vehicles Act. Therefore, in this regard the judgment and award passed by the Tribunal is liable to be modified.

12. In the present case, the claimant had suffered injuries. As per the medical evidence on record, the claimant had sustained injury to urethra and fracture of pelvis and there is also cut injury towards the left thigh and he is unable to squat, sit cross legged, cannot lift weight and has trouble in walking. CW1-Doctor in his evidence has stated that the claimant had suffered pelvic fracture and there is urethral injury. CW2-Doctor has given disability certificate to the effect that the claimant has suffered 100% disability. Even though the doctor-CW1 has stated 30% disability in respect of right lower limb, doctor-CW2 has stated that the claimant had suffered 100% disability in respect of difficulty in passing the urine and there is deficiency of penis in respect of erectile dys-function and there is deficiency of intercourse in future and also there is no possibility of getting children

in future. Therefore, when such being the case, the claimant had suffered severe injuries and disability as above discussed as per the doctors and other - 12 - NC:

2023. KHC:20533 MFA No.5547 of 2012 medical evidence on record, certainly the claimant had suffered 100% functional disability affected his loss of earning capacity. Even though the doctor-CW1 had stated that the claimant had suffered 30% disability in respect of the right lower limb, but the claimant had suffered pelvic fracture and also there is urethral injury and suffered erectile dys-function, which certainly causes 100% functional disability which affected the loss of earning capacity. These injuries are permanent in nature causing permanent physical disability. The injuries suffered by the claimant cannot be considered as permanent-partial disability, but the injuries are causing permanent total disability. Therefore, in this regard the Tribunal is correct in holding that the claimant has suffered 100% loss of earning capacity permanently as it is a case of permanent total disablement.

13. Even though the injury sustained is non-scheduled injury, but as per the principles of law laid down by the Hon'ble Apex Court in the catena of decisions, in PRATAP NARAIN SINGH DEO Vs. SRINIVAS SABATA AND ANOTHER reported in (1976) 1 SCC289 the Hon'ble Supreme Court has observed at paragraph No.5 as follows: - 13 - NC:

2023. KHC:20533 MFA No.5547 of 2012 5. The expression "total disablement" has been defined in Section 2(1)(l) of the Act as follows: (1) "total disablement" means such disablement whether of a temporary or permanent nature, as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement. It has not been disputed before us that the injury was of such a nature as to cause permanent disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows: The injured workman in this case is carpenter by profession. By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only. This is obviously a reasonable and correct finding. Counsel for

the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4 1/2" below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established.-. 14 - NC:

2023. KHC:20533 MFA No.5547 of 2012 14. Raj Kumar Vs. Ajay Kumar and Another¹, wherein it is stated at para Nos.12, 13 and 19, reads as under:

12. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give 'ready to use' disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and 1 reported in (2011) 1 SCC343- 15 - NC:

2023. KHC:20533 MFA No.5547 of 2012 refer the claimant to such Medical Board for assessment of the disability.

13. We may now summarise the principles discussed above : (i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity. (ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning

capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability). (iii) The doctor who treated an injured- claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety. (iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.-. 16 - NC:

2023. KHC:20533 MFA No.5547 of 2012 19. The evidence showed that at the time of the accident, the appellant was aged around 25 years and was eking his livelihood as a cheese vendor. He claimed that he was earning a sum of Rs.3000/- per month. The Tribunal held that as there was no acceptable evidence of income of the appellant, it should be assessed at Rs.900/- per month as the minimum wage was Rs.891 per month. It would be very difficult to expect a roadside vendor to have accounts or other documents regarding income. As the accident occurred in the year 1991, the Tribunal ought to have assumed the income as at least Rs.1500/- per month (at the rate of Rs.50/- per day) or Rs.18,000/- per annum, even in the absence of specific documentary evidence regarding income.

15. In the case of NARENDRA SINGH VS. NISHANT SHARMA AND ANOTHER reported in (2015) 14 SCC353 in Para 12, it is held as under:

12. In para 12 of the said judgment in Ajay Kumar case 5, this Court had further opined that the Tribunal has to decide if there is any permanent disability so that further loss of income can be calculated and if so, to what extent. If there is no permanent disablement, then future loss of income - 17 - NC:

2023. KHC:20533 MFA No.5547 of 2012 shall not be calculated. Therefore, the Tribunal has to decide: (i) Whether the disablement is permanent or temporary?. (ii) If the disablement is permanent, whether it is permanent total disablement or permanent partial disablement?. (iii) If the disablement percentage is expressed

with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person?.

16. Therefore, the Tribunal is correct in holding that the claimant has suffered 100% as permanent total disability affecting the loss of earning capacity to the extent of 100%. But as stated above, the appellant's liability is only to the extent of the provisions of Employees Compensation Act. As per Section 147 of the Motor Vehicles Act, the quantum of compensation to be determined so far as the liability is concerned is followed.

17. According to the claimant, accident occurred on 10.4.2009. Therefore, as per Section 4 of the Employees Compensation Act, monthly wage is to be taken at Rs.4,000/-.. 18 - NC:

2023. KHC:20533 MFA No.5547 of 2012 As the claimant was aged 20 years, the relevant factor is 224.00. Hence, the loss of earning capacity due to disability is re-assessed $(4,000 \times 60/100 \times$

$224) = 5,37,600/-$.

18. Therefore, the appellant is liable to pay only the compensation of Rs.5,37,600/- . The remaining amount as determined by the Tribunal shall be payable by respondent No.3 / owner of the lorry. Therefore, the appeal filed by the Insurance Company is liable to be allowed-in-part modifying the judgment and award passed by the Tribunal.

19. Hence, I pass the following:

ORDER

i) The appeal is allowed in part. ii) The Judgment and Award dated 21.3.2012 in MVC No.650/2010 on the file of District Judge & Additional MACT-11, I Fast Track Court, Shimoga, is modified. iii) The appellant/Insurance Company shall pay compensation of Rs.5,37,600/- and the remaining - 19 - NC:

2023. KHC:20533 MFA No.5547 of 2012 balance amount of compensation shall be payable by respondent No.3/owner of the lorry. iv) The amount in deposit shall be transferred to the Tribunal along with T.C.R. v) Draw award accordingly. Sd/-
JUDGE AP List No.:

1. SI No.: 4

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