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Oriental Insurance Co. Ltd. Vs Kuttan Nair

None

Court: High Court Of Kerala

Date of Decision: Jan. 9, 2007

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 23#Criminal Procedure Code, 1973 (CrPC) â€" Section 19, 195#Employees Compensation Act, 1923 â€" Section 14, 19, 2, 22, 3

Citation: (2007) 2 ACC 463 : (2007) 112 FLR 1176

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

Bench: Single Bench

Judgement

K.T. Sankaran, J.
In this appeal filed by the Oriental Insurance Co. Ltd., the 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, the first

respondent.

2. The first respondent herein, applicant before the Commissioner, was working as a Mahout of the elephant by name ""Dhananjaya"" owned by the

second respondent 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 in

patient in the Medical College Hospital, Kozhikode from 28.3.1998 to 25.4.1998. He had to undergo a surgery, as he sustained fracture of his

right femur. The Assistant Professor of Surgeon, Medical College Hospital, Kozhikode certified that the applicant sustained disablement and it was

assessed at 30%. A sum of Rs. 2 lakh 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 the Commissioner. The Commissioner found, on evidence, that the applicant is entitled

to compensation of Rs. 45,494.40.

3. The Insurance Company was arraigned as one of the opposite parties on the ground that Ext. R2 Insurance policy available to cover the

accident. The Insurance Company contended In the written statement that since no policy was Issued indemnifying the employer under the

Workmen''s Compensation Act, the Insurance Company is not liable to pay compensation. The Commissioner found that Ext. 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. Learned Counsel for the appellant contended that the Commissioner has no jurisdiction to fix the liability on the Insurance Company. Ext. 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 the 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

Ext. R2 policy the sum assured is mentioned, which indicates that Ext. R2 is not a policy which can be availed of by the workman in respect of the

accident. The Counsel also contended that the insured has not approached the insurer and, therefore, the Mahout is not entitled to file an

application before the Commissioner. He contends that the remedy, if any, of the Mahout is to approach the Civil Court.

5. Learned Counsel for the first respondent-applicant contended that there is no difference between Ext. R2 policy was 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 (1) KLT 366 .

6. Ext. R2 policy shows that the 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 ""purpose for which used"", it is recorded as ""temple and timber"". The total sum assured is Rs. 4 lakh. 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"". Ext. R3 is the agreement on the basis of which the policy was issued. The agreement was executed between All Kerala Elephant

Owners'' Association and the 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, paragraph 7 covers ""third party liability"" and there is ""Mahout cover"" as

well. The Assistant Divisional Manager of the Company, who was examined as RW1, 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 are insured for a sum of Rs. 2 lakh 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 ''workman''. Sub-clause (ii) therein is relevant, which is extracted below:

2. Definitions--(1) ....

(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--....

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

A Mahout is certainly a person who comes under the category mentioned in Entry (xxii) of Schedule II of 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....

(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 of the 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 Chap. 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 lump sum equivalent of compensation amount in case of permanent disablement and death. A workman who

has sustained injuries in the course of 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 Company Ltd. v. Vasudevan (supra) 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 dependent 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 the 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 the 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 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 the

Commissioner has no jurisdiction to direct recovery of the amount of compensation from the insurer.

11. The contention of the appellant that Ext. 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 Ext. R2

policy and Ext. 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 approached the Insurance Company or whether the individual owner

of the elephant approached the Insurance Company for insurance coverage is not at all relevant in 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

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. v. R.

Shridhara and Anr. (supra) the 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 the Karnataka High Court. For the reasons stated above, I hold that the contention of the appellant

that Ext. 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.

13. In the result, the Miscellaneous First Appeal is dismissed with costs.