

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR

&

THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

MFA.No. 85 of 2009 ()

AGAINST THE ORDER/JUDGMENT IN WCC 32/2004 of W.C.C.,ERNAKULAM
DATED 26-09-2008

APPELLANT(S)/2ND OPPOSITE PARTY:

NATIONAL INSURANCE CO. LTD.,
ALUVA, REP. BY THE MANAGER, KOCHI REGIONAL OFFICE
M.G.ROAD, KOCHI-35.

BY ADV. SRI.E.M.JOSEPH

RESPONDENT(S)/APPLICANTS & FIRST OPPOSITE PARTY

1. CHACKO, AGED 62,
S/O.OUSEPH, PARACKA HOUSE, KALLUPALAM ROAD
ANGAMALY, ERNAKULAM DISTRICT.

2. ROSY, AGED 60,
W/O.CHACKO, PARACKA HOUSE, KALLUPALAM ROAD
ANGAMALY, ERNAKULAM DISTRICT.

3. N.K.CHANDRAN,
NAISSERY HOUSE, KALLUPALAM ROAD, NEAR KOTHAKULANGARA
ANGAMALY.

R1,R2 BY ADV. SRI.V.V.NANDAGOPAL NAMBIAR

R1,R2 BY ADV. SMT.RESHMI JACOB

R3 BY ADV. SRI.R.V.SREEJITH

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 22-07-2015, ALONG WITH MFA 219/2010, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**T.R. RAMACHANDRAN NAIR &
K.P. JYOTHINDRANATH, JJ.**

M.F.A. (WCC)Nos.85/2009 and 219/2010

Dated this the 22nd day of July, 2015

JUDGMENT

Ramachandran Nair, J.

Both these appeals are filed by the insurance companies arrayed as parties before the Workmen's Compensation Commissioners in two cases. M.F.A. No.85/2009 is against the order in WCC No.32/2004 of the Commissioner for Workmen's Compensation, Ernakulam and MFA No.219/2010 is filed against the order in WCC No.26/2007 on the file of the Commissioner for Workmen's Compensation, Palakkad.

2. We heard learned counsel for the appellants Shri Lal George and Shri E.M. Joseph and Shri T.C. Suresh Menon and Shri V.V. Nandagopal Nambiar appearing for the respondents.

3. The substantial question of law raised and argued in these appeals is as to whether the Commissioner for Workmen's Compensation can permit the insurance company to recover the amount

ordered to be paid, indemnifying the insured for the alleged violation of the conditions in the policy by invoking Section 149(4) of the Motor Vehicles Act.

4. In both these appeals, the learned counsel for the insurance companies mainly contend for the position that the driver of the vehicle involved in the accident was not duly licensed and therefore, being a defence under Section 149(2)(a) of the Motor Vehicles Act, 1988, as provided under Section 149(4), the recovery from the insured is permissible.

5. In M.F.A. No.85/2009, the details of the case will show that the claimants are the dependents of one Martin who died in the accident and it was alleged that the accident arose in the course of employment under the first opposite party therein. He was the driver of a lorry bearing Reg. No.KRH 4595 owned by the first opposite party before the Commissioner. While driving the vehicle on 22.5.2004 it met with an accident near Vengachuvadu which resulted in the death of the driver. He was aged 29 years and was earning a sum of Rs.6,000/- per month. The claim was admitted after a preliminary enquiry and the

case was tried by the Commissioner. One applicant, Shri Chacko was examined as A.W.1 and Exts.A1 to A13 have been marked. There was no evidence on the part of the opposite side and A.W.1 was cross examined. A.W.1 is the father of the deceased. The Commissioner finally concluded that the deceased was a workman as defined under the Workmen's Compensation Act and his death was due to an accident arising out of and in the course of his employment under the first opposite party. The eligibility for compensation was accordingly upheld and the insurance company was directed to deposit the amount. The Commissioner also found that the deceased was having a valid driving licence.

6. In M.F.A. No.219/2010 the facts show that the accident occurred on 9.4.2007. The third respondent is the owner of EX 70 Hydraulic Excavator. According to the applicants before the Commissioner, the deceased was employed as a driver of the insured and while he was removing soil from the canal bund using the excavator of the insured, it all on a sudden tilted upon the deceased causing fatal injuries to him. Therein also, the Commissioner found

that the employer-employee relationship has been proved and the first opposite party is liable to pay compensation and the insurer who has issued the policy, is liable to indemnify the first opposite party.

7. Learned counsel for the insurance companies submitted that even if it is found that the insurance companies are liable to indemnify the insured, the Commissioner ought to have allowed the companies to recover the amount paid by invoking Section 149(4) of the Motor Vehicles Act. Shri Lal George and Shri E.M. Joseph invited our attention to the judgments of the Apex Court and Karnataka High Court. The dictum laid down in two decisions of the Apex Court in **National Insurance Company Ltd. v. Mastan** (2006 (1) KLT 853 - SC) and **Gottumukkala Appala Narasimha Raju and others v. National Insurance Company Ltd. and another** {(2007) 13 SCC 446} was elaborated by the learned counsel for the appellants.

8. Per contra, learned counsel for the applicants submitted that the provision under Section 149(4) of the Motor Vehicles Act has not been made applicable to proceedings under the Workmen's Compensation Act and the dictum laid down by the Apex Court in the

above two decisions will go against the contentions of the insurance companies. It is submitted that the finding regarding validity of licence is a question of fact. The learned counsel for the respondent in M.F.A. No.85/2009 relied upon the additional documents produced in the said appeal on behalf of the respondent/claimant to contend that existence of valid driving licence for the deceased driver stands re-affirmed further.

9. Shri Lal George and Shri E.M. Joseph further relied upon a decision of this Court in **New India Assurance Co. Ltd. v. Venu** (2012 (1) KLT 921) as well as an unreported decision of a Full Bench of this Court in MFA No.261/2009 and connected cases. Shri Lal George also relied upon a decision of the Karnataka High Court in **Oriental Insurance Company Ltd. v. Mohammed Haneef** {1996 (1) TAC 123 (Kant.)} and that of Andhra Pradesh High Court in **New India Assurance Co. Ltd. Mahaboobnagar v. P. Ramulu and another** {2000 (2) TAC 637 (AP)}.

10. As far as the decision of Karnataka High Court in **Mohammed Haneef's case** {1996 (1) TAC 123 (Kant.)} is concerned,

it was contended before the learned Single Judge that the insurance company cannot challenge the quantum by filing an appeal. A reading of paragraph 3 of the judgment will show that even though there was a contention that the insurance company can raise all the grounds, the learned Judge was of the view that the contentions are restricted by the effect of Section 149(2) of the Motor Vehicles Act. It was also a proceeding under the Workmen's Compensation Act. In the subsequent decision of the Andhra Pradesh High Court by a learned Single Judge, the award of the Commissioner fastening liability on the insurance company was set aside on the finding that the accident took place when the vehicle was used for hire, contrary to the terms and conditions of the policy.

11. According to us, in the light of the authoritative pronouncement of law by the Apex Court in **Mastan's case** (2006 (1) KLT 853 - SC = (2006) 2 SCC 641)), there is no scope for accepting the contention that the insurance company will have to be allowed right of recovery under Section 149(4) of the Motor Vehicles Act. The point whether the provisions of Motor Vehicles Act, 1988, especially Chapter

XI will apply to proceedings under Workmen's Compensation Act, 1923 arose for consideration therein. The Apex Court examined the various provisions of the two Acts in that context. Their Lordships, in paragraph 12 referred to Section 143 of the Act, 1988. Going by the said provision, Chapter X has been made applicable to claim for compensation in respect of death or permanent disablement of any person under the Workmen's Compensation Act, 1923. Thereafter, in paragraphs 13 and 14, the following view was taken:

“13. S.143 occurs in Chapter X of the 1988 Act. S.144 contains a *non-obstante* clause stating that the provisions of the said chapter shall have effect notwithstanding anything contained in any other provisions of the said Act or of any other law for the time being in force. Chapter X deals with liability without fault in certain cases. Chapter X, therefore, will have no application in relation to a claim made in terms of Chapter XI of the 1988 Act.

14. Applicability of the provisions of the 1988 Act in a proceeding under the 1923 Act is confined to a matter coming within the purview of Chapter X only. It cannot be stretched any further.”

Significantly, it was held that the applicability of the provisions of Act,

1988 in a proceeding under the 1923 Act is confined to a matter coming within the purview of Chapter X only. After referring to the provisions under Section 149, in paragraph 19 it was held that it is not possible to extend the applicability of Section 143 of the Act 1988 to include Chapter XI thereof to a claim under the 1923 Act. In the context of considering the scope of appeal in proceedings under the 1988 Act and the 1923 Act, their Lordships held in paragraph 20 as follows:

“20. Right of appeal is a creature of statute. The scope and ambit of an appeal in terms of S.30 of the 1923 Act and S.173 of the 1988 Act are distinct and different. They arise under different situations. In a case falling under the 1923 Act, negligence on the part of the owner may not be required to be proved. Therein what is required to be proved is that the workman suffered injuries or died in course of employment. The amount of compensation would be determined having regard to the nature of injuries suffered by the worker and other factors as specified in the Act. The findings of fact arrived at by the Commissioner for Workmen's Compensation are final and binding. Subject to the limitations contained in S.30 of the 1923 Act, an appeal would be maintainable before the High

Court; but to put the insurer to further disadvantage would lead to an incongruous situation.”

Their Lordships also observed in paragraph 21 that in the light of the fact that the defences under the 1923 Act and 1988 Act are different, the scope and ambit of the appeal are also different.

12. Shri Lal George relied upon paragraph 22 of the said judgment to contend for the position that in case there is no licence for the driver, it could be a defence under Section 149(2)(a). We herein below extract the said paragraph:

“22. Under the 1988 Act, the driver of the vehicle is liable but he would not be liable in a case arising under the 1923 Act. If the driver of the vehicle has no licence, the insurer would not be liable to indemnify the insured. **In a given situation, the Accident Claims Tribunal, having regard to its rights and liabilities vis-a-vis the third person may direct the insurance company to meet the liabilities of the insurer, permitting it to recover the same from the insured. The 1923 Act does not envisage such a situation.** Role of Reference by incorporation has limited application. A limited right to defend a claim petition arising under one statute cannot be held to be

applicable in a claim petition arising under a different statute unless there exists express provision therefor. S.143 of the 1988 Act makes the provisions of the 1923 Act applicable only in a case arising out of no fault liability, as contained in Chapter X of the 1988 Act. The provisions of S.143, therefore, cannot be said to have any application in relation to a claim petition filed under Chapter XI thereof. A fortiori in a claim arising under Chapter XI, the provisions of the 1923 Act will have no application. A party to a lis, having regard to the different provisions of the two Acts cannot enforce liabilities of the insurer under both the Acts. He has to elect for one.” (emphasis supplied by us)

The observation, evidently that “if the driver of the vehicle has no licence, the insurer would not be liable to indemnify the insured”, has been made in relation to the provisions of 1988 Act and not under the 1923 Act. Significantly, it was held that under the 1988 Act, the insurance company can be permitted to recover from the insured but the 1923 Act does not envisage such a situation. In the context of these cases the said dictum is important and answers the point against the appellants.

13. We also extract hereinbelow paragraph 35 of the concurring

judgment wherein also the categoric view is that Chapter X alone will apply as far as the proceedings under 1923 Act is concerned:

“35. On the language of S.167 of the Motor Vehicles Act, and going by the principle of election of remedies, a claimant opting to proceed under the Workmen's Compensation Act cannot take recourse to or draw inspiration from any of the provisions of the Motor Vehicles Act, 1988 other than what is specifically saved by S.167 of the Act. S.167 of the Act gives a claimant even under the Workmen's Compensation Act, the right to invoke the provisions of Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 deals with what is known as 'no fault' liability in case of an accident. S.140 of the Motor Vehicles Act, 1988 imposes a liability on the owner of the vehicle to pay the compensation fixed therein, even if no fault is established against the driver or owner of the vehicle. Ss.141 and 142 deal with particular claims on the basis of no fault liability and S.143 re-emphasizes what is emphasized by S.167 of the Act that the provisions of Chapter X of the Motor Vehicles Act, 1988, would apply even if the claim is made under the Workmen's Compensation Act. S.144 of the Act gives the provisions of Chapter X of the Motor Vehicles Act, 1988 overriding effect.”

14. The above provision again came up for consideration before

the Apex Court again in **Gottumukkala Appala Narasimha Raju's case** {(2007) 13 SCC 446} and the said view was re-affirmed. The Apex Court in paragraph 25 has held as follows:

“25. The ingredients for maintaining a proceeding under 1988 Act and 1923 Act are different. The purpose for which a contract of insurance is entered into may be different, whereas under 1988 Act, it will bear repetition to state, a contract of insurance would be mandatory; for the purpose of applicability of the 1923 Act, it will be optional and as indicated hereinbefore, in *Harshadbhai Amrut-bhai Modhiya* {(2006) 5 SCC 192}, even contracting out is permissible, as under the 1923 Act, the liability of the insurer is limited to the claim of the workman. The liability under Section 147(2)(b) of the 1988 Act, on the other hand, extends to third party.”

The difference between the provisions under the 1923 Act and 1988 Act and the purpose for which a contract of insurance is entered into, under the two Acts have been delineated therein. In paragraphs 14 and 15 their Lordships examined the question whether Chapter XI will apply to a proceeding under 1923 Act and we extract hereinbelow those paragraphs as well as paragraph 24 wherein also the limited

applicability of the provisions of Act 1988 has been explained, by relying upon **Mastan's case** (supra):

“14. A "workman" within the meaning of the provisions of the 1923 Act would, therefore, be entitled to maintain an application for payment of compensation if, for a personal injury caused to him by accident arising out of or in case of his employment in which the employer shall be liable to pay compensation in accordance with the provisions of the Chapter X. Chapter X of the 1988 Act, thus, is made applicable in relation to a claim which could have also been made under Section 3 of the 1923 Act. But, having regard to the fact that Section 143 of Chapter X makes a special provision, the same shall apply only to cases arising under the said Chapter and not under Chapter XI of the 1988 Act.

15. The 1988 Act provides for mandatory insurance for the matters laid down under Section 147 of the Act and, thus, an Award can be passed against an insurer. An insurer, having regard to sub-section (2) of Section 149 of the Act, would, ordinarily, have limited defence as provided for therein. The defence of an insurer in a proceeding under the 1923 Act would be unlimited and all the defences which are available to the employer would be available to it.”

24.....Only because Sections 143 and 167 of the 1988 Act refer to the provisions of the 1923 Act, the same by itself would not mean that the provisions of the 1988 Act, *proprio vigore* would apply in regard to a proceeding for payment under the 1923 Act. The limited applicability of the provisions of the 1988 Act, in relation to the proceedings under the 1923 Act has been discussed by this Court in the aforementioned judgments. It is, thus, not possible to extend the scope and ambit of the provisions of 1988 Act to the provisions of 1923 Act save and except to the extent noticed hereinbefore.”

15. In the light of the dictum laid down in the above two judgments, we find it difficult to agree with the view taken by the Karnataka High Court in **Mohammed Haneef's case** (supra). The decision of the Andhra Pradesh High Court in **P. Ramulu's case** (supra) was on a question of fact.

16. Then, the next decision relied upon is that of a Division Bench of this Court in **Venu's case** (2012 (1) KLT 921). The Bench was of the view that in proceedings under the Workmen's Compensation Act, when a plea is raised with regard to the nature of the licence possessed by the driver and whether it has the effect of

causing the accident, the dictum laid down by the Apex Court in **National Insurance Company Ltd. v. Swaran Singh** (2004 (1) KLT 781) can be considered and it was held that “in each case, the Commissioner has to decide on the issue as to whether the incident is the result of any act or omission attributable to the driver in question whose licence is under challenge.” It was further held that “if the accident is out of circumstances which have no nexus with the driver not possessing the requisite type of licence, the insurer cannot escape the liability.” Shri Lal George and Shri E.M. Joseph submitted that the above view taken by the Bench will support the plea raised by them herein also. But we find from paragraph 5 of the judgment that the Bench did not find it necessary to go into the question whether in a proceeding under the Workmen's Compensation Act the insurer is entitled to raise the defence available under the provisions of Act 1988. Therefore, the contention as noted above alone was examined by the Bench in that case. We cannot accede to the argument that their Lordships went on to lay down the proposition in a larger perspective including the availability of all defences to the insurer as well as the

defences under Section 149(2) of the Act and benefit of recovery from the insured under Section 149(4) of the Act.

17. In fact, a Division Bench of this Court had referred the question of applicability of the provisions under Section 157 of the Motor Vehicles Act, 1988 for consideration before a Full Bench, in MFA No.69/2010 by reference order dated 24.10.2011. Their Lordships have noted the decision of the Apex Court in **Mastan's case** (supra) and then referred the question for consideration by the Full Bench. We had the advantage of going through the decision of the Full Bench rendered on 21.1.2015 in MFA No.261/2009 and connected cases. The Full Bench was of the view that the decision of the Apex Court in **Mallamma (Dead) by Lrs. v. National Insurance Co. Ltd. and others** (2014 (2) KLJ 855) “concludes the issue that in proceedings under the Workmen's Compensation Act, it is open to the claimant to claim the benefit of Section 157 of the Motor Vehicles Act.”

18. Shri E.M. Joseph, therefore, contended that when the Full Bench held that Section 157 could be applied, naturally, the corollary will be that there is no harm in applying the provisions under Section

149 of the Act also to the proceedings under WCC Act. The Full Bench, as noted already, had relied upon the decision of the Apex Court in **Mallamma's case (supra)** in taking the said view.

19. According to us, the pointed question with regard to the difference in the provisions under Workmen's Compensation Act, 1923 and Motor Vehicles Act, 1988 was the issue decided by the Apex Court in **Mastan's case (supra)** and in the later decision in **Gottumukkala Appala Narasimha Raju's case (supra)**. In view of the authoritative pronouncement of law by the Apex Court which is binding on this Court, we will not be justified in adopting a different view on the interpretation of the very same provisions. The provisions of the Motor Vehicles Act, 1988, especially Section 143 make applicable Chapter X alone to certain clauses under the 1923 Act. Therefore, in that regard, by the principle of incorporation by reference the said chapter has been made applicable to the proceedings under the Workmen's Compensation Act, 1923. The question, therefore, whether Chapter XI and specifically Section 149(4) could be applied, is beyond doubt, in that as there is no incorporation by reference, at least the provisions of

the said chapter, by an interpretative process this Court will not be justified in readily adopting a view that Section 149, especially the right of recovery sought by the insurance company under Section 149 (4) of the Motor Vehicles Act, could be applied by the Commissioner for Workmen's Compensation. The nature of the proceedings under the two Acts are different.

20. In that view of the matter, we cannot accede to the request made by the learned counsel for the appellants that the insurance company should be given the right to recover the amount paid as compensation, from the insured.

Accordingly, the appeals are dismissed. The parties will suffer their costs in the appeals.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(K.P. JYOTHINDRANATH,, JUDGE.)

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