Karnataka High Court Oriental Insurance Co. Ltd. vs Vasantha Pitambar And Anr. on 10 October, 1996 Equivalent citations: I (1997) ACC 613, ILR 1997 KAR 497 Author: M Chinnappa Bench: M Chinnappa JUDGMENT M.P. Chinnappa, J. 1. The Insurance Company has preferred this appeal against the Judgment dated 20.3.91 passed by the Commissioner for Workman's Compensation, Belgaum Dist., in case No. SCA: SR -48/89 questioning its liability to pay the compensation of Rs. 68,327/-awarded in favour of the 2nd respondent herein. 2. The brief facts of the case are that the 2nd respondent was an employee of the 1st respondent and he was employed as a driver to drive truck bearing No. MCH 4860 or a monthly salary of Rs. 800/-with bata of Rs. 20/- per day. On 31.3.89 with a view to change the oil and also to apply grease he had taken the truck to Sadhu Garage, Belgaum. While he was removing the tyre, the lorry fell on him and he sustained fractures resulting in disability. Therefore, he claimed compensation in a sum of Rs. 75,000/-. 3. The Commissioner after holding enquiry held that the claimant was an employee of the 1st respondent & during the course of his employment he sustained injuries and he also held that the claimant has proved his disability to the extent of 70% and taking his salary at Rs. 800/- awarded a compensation in a sum as stated above and held the insurance company liable to pay the compensation. 4. The insurance company has preferred this appeal. 5. Heard the Learned Counsel appearing for the respective parties. 6. At the very outset, the Learned Counsel for the respondent raised two preliminary objections, viz. that in view of Section 30(1) of the Workmen's Compensation Act, the insurance company is not entitled to prefer this appeal and more so, without depositing the amount awarded by the Commissioner. 7. Before proceeding to consider the other point raised by the appellant, it is necessary to find out as to whether the appeal is maintainable. 8. According to Section 30(1) of the Act, it is incumbent on the appellant to deposit the amount awarded by the Commissioner for Workmen's Compensation and in support of it, the Learned Counsel for the respondent placed reliance on a decision reported in UNITED INDIA INSURANCE CO. v. KASHIMSAB wherein the Division Bench of this Court has held that appeal by insurer unaccompanied by Certificate for deposit of amount awarded, not maintainable. The Learned Counsel for the appellant however submitted that there is absolutely no quarrel as far as the principles laid down by this Court, but this decision came to be rendered by this Court on 4th June 1993 in M.F.A.No. 2274 of 1992 MFA 2274/92 : DD 4-6-93. But this appeal was filed on 20.3.91. Therefore, the decision is not applicable to this case. He also submitted that as on that date, when the insurance company filed the appeal, it was not incumbent on the insurance company to deposit the amount. The respondent further also placed reliance on a decision rendered by the Division Bench of this Court in MFA.1202/ 92 dated 27.10.92 wherein this Court has held that the appeal is liable to be dismissed without going into the merits of the case on the ground that there is no compliance of provisos (1) and (3) to Section 30(1) of the Workmen's Compensation Act. This decision also as stated earlier came to be rendered by this Court subsequent to filing of this appeal. 9. When this appeal was filed, the Division Bench of this Court admitted it

and stayed the enforcement of the award against the appellant. This is only because the appellant has stated in the appeal memo specifically mentioning which reads: "No certificate by the Commissioner as contemplated by the third proviso to Section 30(1) of the Workmen's Compensation Act is produced herewith as this appeal is not filed by the employer." A mere reading of Section 30(1) makes it dear that only when the employer files an appeal, the requirement of Section 30(1) of the Act has to be followed. Similar view is also taken by the Orissa High Court in a decision reported in S.D. SHARMA v. RAMESH MAHAKUD AND ANR . Further in it is held by Their Lordships that if the appeal is admitted, it has to be disposed of on merits. As stated earlier, this appeal has been admitted by the Division Bench. In view of the note made in the appeal memo & also the fact that the insurance company was not obliged under law to deposit the amount as contemplated under Section 30(1) of the Act, as it is pertaining to the employer. But subsequently the law has been changed in view of the decisions referred to above. Therefore, when once this appeal came to be admitted by the Division Bench of this Court, it is not now open the respondent to contend that the appeal is liable to be dismissed for non-compliance of provisos to Section 30(1) of the Workmen's Compensation Act. The High Court of Madhya Pradesh by its Judgment in NATIONAL INSURANCE CO. LTD. v. SAIFUDDIN AND ORS 1992 ACJ 736. held that the insurance company is not an employer and the condition of deposit before filing an appeal does not apply. This Judgment was rendered by following the decision reported in NORTHERN INDIA INSU. CO. v. COMMR. FOR WORKMEN'S COMPENSATION 1973 ACJ 428. Therefore, when the appeal came to be filed, the legal position was that the insurance co. which files an appeal need not deposit the amount. Therefore, viewed from any angle the first objection raised by the respondent is unsustainable and accordingly rejected. 10. The Learned Counsel for the respondent further argued that the insurance company has no locus standi to file this appeal in view of the provisions contained in Section 95(2) except what is provided under Section 110-C(2)(a))ii). He submitted that the insurance company cannot question the manner in which the accident occurred or the quantum of compensation awarded, etc. The Learned Counsel for the appellant however, contended that the employer remained exparte. He has not contested the case. Under those circumstances, the insurance company can take all grounds available to the employer also before the Tribunal and the insurance company also can prefer appeal against the Judgment and Award passed irrespective of the restrictions contained under Section 110-C of the Act. In support of his argument, he placed reliance on a decision reported in ORIENTAL FIRE & GENL. INS. CO. LTD. v. RAJRANI SURENDRA KUMAR SHARMA AND ORS 1990 ACJ 60. wherein the Division Bench of the Bombay High Court has held: "If the person against whom the claim is made has failed to contest the claim the insurer gets a right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made. Section 110-C (2-A) provides that in such a case if the insurer is not a party the Court may, for reasons to be recorded by it in writing, direct that the insurer who may be made liable in respect of such a claim shall be impleaded

as a party. The insurer so impleaded thereupon gets the right to contest the claim on all grounds available to the person against whom the claim is made. In case where the insurer is already a party there is no question of the Court recording any reasons in writing and directing the insurer to be made a party. The insurer is already a party. Therefore by virtue of the provisions of Section 110-C (2-A) once the insurer is a party, whether pursuant to a notice of the Court or otherwise, and the person against whom the claim is made, does not inter alia, contest the claim, the insurer gets a right to contest this claim on all grounds available to the person against whom the claim is made. By virtue of Section 110-C (2-A), therefore, in the present case the insurer is entitled to contest the claim made by the claimants on all grounds available to the person or persons against whom the claim is made. In other words since the claim has proceeded exparte against opponent Nos. 1 to 3 the insurance company is entitled to challenge the award on all grounds available to opponent Nos. 1 to 3 in the present appeal." As stated earlier, the employer remained absent. The vehicle in question was insured. Therefore, though the claim was lodged before the Commissioner of Workmen's Compensation under the Workmen's Compensation Act, still the insurance company is entitled to take the defence as provided under Section 110-C of the M.V. Act. 11. Therefore, it is dear that the insurance co. is entitled to take all the defence that the employer was entitled to when the employer was placed exparte and it is also entitled to prefer appeal on all grounds. As such, I have not been persuaded to accept the preliminary objections raised by the Learned Counsel for the respondent. Accordingly, I hold that they are unsustainable. From the above discussion it is dear that when the employer is placed exparte, the insurance company is entitled to defend the case and also permitted to prefer an appeal raising all the grounds which are normally available to the employer owner of the vehicle. Therefore, I have not been persuaded to accept the preliminary objections raised by the respondent & accordingly rejected. 12. The Learned Counsel for the respondent further argued unless the appellant establishes substantial question of law in this appeal to be decided by this Court, the appeal is liable to be dismissed in limine. In support of his argument, he placed reliance on a decision reported in NEW INDIA ASSURANCE CO. LTD. v. RAJA NAIKA wherein it is held that no appeal by insurer under Section 30(1)(c) of the W.C. Act could lie on grounds other than under Section 149(2) of MV Act subject to further condition such grounds involve substantial questions of law. Similar view is expressed by this Court in ORIENTIAL INSURANCE CO. v. VERONICA OBRIN that as the award has since been made on the basis of claim made under the WC Act, according to the option exercised by claimant/s as provided for in Section 110A of the MV Act, the appeal therefrom by an insurer on grounds other than those on which he could have defended the claim under Section 96(2) of the MV Act becomes not maintainable. 13. The Learned Counsel for the appellant however argued that if the substantial question of law is involved, the appeal is maintainable. In this connection, he has also drawn by attention to the decision rendered by this Court which has described what is substantial question of law involved. Following the Judgment of the Supreme Court in a case re-

ported in CHUNICAL V. MEHTA & SONS LTD v. CENTURY SPINNING & MFG. CO. LTD it is held: " Whether there was disability caused and to what extent is also a question of fact. The Commissioner has recorded his finding that there is disability and it is to the extent of seventy-five, percent. Hence, there is no question of law much less a substantial question of law involved in this point." Following the above Judgment, it is held that what is substantial question of law is not defined under the Workmen's Compensation Act. Similar expression however is used in the C.P.C. vide Section 100. The Learned Counsel for the respondent contended that there is no question of law involved in this case as far as the fixation of quantum of compensation by the Commissioner for Workmen's Compensation is concerned. Therefore, the appeal is liable to be dismissed. 14. Per contra, the Learned Counsel for the appellant however argued that the injury said to have been sustained by the claimant was not during the course of employment or arising out of the employment. Therefore, the finding of the Tribunal awarding compensation in favour of the claimant is an important question of law to be decided by this Court. On that count he submitted that the appeal is pending. In view of this argument, it is now necessary to go into the question of the facts available on record to find out as to whether there is a substantial question of law to be decided by this Court. 15. According to the respondent/claimant he was a driver working under the owner of the lorry. He had taken the lorry to garage for the purpose of applying grease and also to oil the same. He has further stated that he had put the jockey to remove the tyre. At that time it slipped and fell on him, thereby he sustained injuries. 16. The Learned Counsel for the appellant has vehemently argued that having taken the lorry to the garage, it was the duty of the garage owner or the employees there to remove the tyre and oil and grease it and the claimant should not have ventured to do the work as it was not his work. He also contended that he was not the driver of the lorry. Therefore, the incident did not occur during the course of his employment or arising out of his employment. 17. Per contra, the Learned Counsel for the respondent has strenuously argued that this is a purely a question of fact which was decided by the Commissioner on the basis of the evidence let in by the parties. Therefore, this Court cannot interfere with the findings of the Commissioner. The question whether it arose out of and in the Court of employment is a substantial question of law and this has to be decided by the Appellate Court depending on the contentions raised by the parties therein. It is incumbent on the claimant to establish that the injuries sustained by him arose both out of & in the course of the employment to come within the Workmen's Compensation Act. Therefore, it is now necessary to find out as to whether the Commissioner has correctly come to the conclusion that the injuries sustained by the claimant arose out of and in the course of his employment. However, the Learned Counsel for the respondent has drawn my attention to the decision reported in MACKINNON MACKENZIE AND CO. PRIVATE LTD., v. IBRAHIM MAHOMMAD ISSAK wherein Their Lordships have held: “The words”in the course of the employment" mean “in the course of the work which the workman is employed to do and which is incidental to it”. The words “arising out of employment” are understood to mean that “during

the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered". There must be casual relationship between the accident and the employment. If the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act." 18. In this case, the claimant has specifically contended that he was working as a driver under the owner of the lorry and in that connection he had taken the lorry to the garage for changing the oil & applying grease. While he was trying to remove the tyre after he lifted the vehicle the jacky slipped and the vehicle fell on him. The owner has not filed any objection but the insurance company contended that he was not the driver of the respondent. This argument cannot be accepted in view of the suggestion put in the course of his cross-examination as to whether he surrendered the driving licence, etc. and that suggestion was only to show that he is not able to work as a driver. In support of his contention that he was working as a driver, he has produced Ex. P-8 the driving licence. In the absence of any denial by the employer, it can be inferred that the claimant was working under the respondent as his driver. Being a driver, it was his duty and responsibility to maintain the lorry in good and road worthy condition. Greasing and applying oil is undoubtedly essential for smooth running of the lorry. For that purpose only he had taken the lorry to the garage. He put the lorry on to jockey to remove the tyre as the cleaner was not present on that day. He has stated in his evidence that it is the duty of the lorry cleaner. It is common knowledge that the tyres are replaced by both the cleaner and the driver of the vehicle. So he has ventured to help the garage people to remove the tyre instead of whiling away his time in the garage, it is not the job which the drivers do not do. It is neither suggested to him in the cross-examination nor it can be inferred that he had exposed himself to one added peril by his own independent act. Therefore, it has to be held that during the course of the employment injury has resulted from some risk incidental to the duties as the driver. The risk incidental to the duties cannot be in straight jacket formula, but depending on facts of each case. Such being the case, it is now necessary to refer to the medical evidence rendered by the parties in this case. 19. The Learned Counsel for the appellant has further argued that the medical evidence discloses that he sustained only 40% of the disability but the Tribunal has fixed the disability at 70% and thus the amount awarded in favour of the claimant is exorbitant. This question cannot be gone into by this Court in view of the decision rendered by the Hon'ble Supreme Court wherein it is held that the disability caused and to what extent is a question of fact which cannot be gone into by the Appellate Court. 20. The Appellant's Counsel further argued that the doctor is not examined to prove the injuries sustained by him. The doctor who was examined is the doctor who subsequently examined him to prove his disability. Therefore, he submitted that the injury itself is not proved. This argument cannot be accepted in view of the fact that the appellant has produced the certificate issued by the doctor and also the x-ray reports. In support of it,

the doctor who has been examined has spoken to about the disability suffered by the appellant. What is required in Workman's Compensation Act is to prove the disability suffered by him as contemplated under Section 4(1) of the Act. The evidence of this doctor fully satisfies the requirement of the Act. 21. The Learned Counsel for the appellant has vehemently argued that in this case the employer was placed exparte: Under the circumstances, the insurance company may be given an opportunity to lead evidence in this case by remitting the matter to the Commissioner for Workmen's Compensation. This contention is without any force in view of the fact that the insurance company has taken all the defence which is available to the employer in view of the fact that he was placed exparte. On that ground only the insurance company has preferred this appeal which I have already discussed above. Further, the appellant has not made but any ground to remand the matter which would otherwise improve the case of the appellant. Hence I do not find any merit to remand the matter to the Commissioner. Accordingly, this contention also is rejected. 22. For the foregoing reasons, I do not find any reason to interfere with the order passed by the Commissioner which is impugned in this appeal. Accordingly, this appeal is dismissed. No order as to costs.