

(2016) 01 BOM CK 0243
In the Bombay High Court
Case No : First Appeal No. 836 of 2015.

Amita and Others

APPELLANT

Vs

The New India Assurance Co and another

RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Employees Compensation Act, 1923 — Section 3(1)(b), 4A(3)

Citation : (2016) 3 ACC 757 : (2016) 3 AIRBomR 119 : (2016) 5 ALLMR 7 :
(2016) 3 BCR 833 : (2016) 150 FLR 880 : (2016) 4 MhLJ 198 : (2016) 4 SCT
148 : (2016) 4 TAC 573

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

Advocate : A.J. Pathak, Advocate, for the Appellant; Anita Singh, Advocate and
Amit Khare, Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.S. Chandurkar, J. (Oral) - By this appeal filed under Section 30 of the Employees Compensation Act, 1923 (for short, the said Act) the appellants-original claimants have challenged judgment dated 22/01/2015 passed by the learned Commissioner under Employees Compensation Act by which the application preferred by them under Section 22 of the said Act has been dismissed.

2. The appellants are the dependents of one Prakash who was employed as a driver with the respondent No. 2. On 31/05/2011 when said Prakash was driving a car, the same met with an accident resulting in said car turning turtle resulting in death of said Prakash. According to the appellants, the accident occurred during the course of and out of employment with respondent No. 2. Said Prakash was getting salary of Rs. 5500/- per month and was aged about 24 years when the accident took place. Hence claim for compensation came to be filed.

3. The respondent No. 1-Insurance Company took the stand that the accident occurred on account of a voluntary act of the driver who was driving the vehicle

in a rash and negligent manner. The owner of the vehicle also filed reply and took the stand that though the deceased was employed as a driver, his services had been terminated on 07/02/2011. On 31/05/2011, said Prakash took away the car and drove the same in a drunken condition resulting in the accident. Hence the liability was denied.

The learned Commissioner, after considering the evidence on record came to the conclusion that the car in question was being driven by Prakash in his capacity as driver at high speed and it dashed a two wheeler. It thereafter did not stop and tried to speed away after which it dashed the road divider. The deceased was under influence of alcohol when the accident took place. It held that there was no connection of the accident with the employment and on that basis it rejected the claim for compensation.

4. The appeal was admitted by framing the following substantial question of law :

" Whether the learned Commissioner was justified in ignoring the provisions of Section 3(1)(b) of the Employees Compensation Act, 1923 while rejecting the claim for compensation ? "

Shri A.J. Pathak, learned counsel for the appellants submitted that the learned Commissioner was not justified in rejecting the claim for compensation. He submitted that in view of provisions of Section 3(1)(b)(i) of the said Act, when death occurred during the course of employment, the claimants would be entitled for compensation despite the fact that the deceased was under the influence of liquor. He submitted that the learned Commissioner having found that the accident occurred when the deceased was driving the car in the capacity as driver, the claim for compensation could not have been rejected. He placed reliance upon the judgment of learned Single Judge of the Himachal Pradesh High Court in United India Insurance Co. Ltd. v. Seema Devi and ors. 2006 ACJ 1357. It was therefore submitted that the appellants were entitled for compensation.

Ms. Anita Singh, learned counsel for the respondent No. 1 submitted that the Insurance Company was not liable to pay any compensation as no premium had been paid for a paid driver. The policy in question was a standard private car package policy. As the accident occurred when the driver was under influence of liquor, the Insurance company was not liable.

Shri Amit Khare, learned counsel for the respondent No. 2 relied upon the provisions of Section 2(dd) of the said Act and submitted that as the deceased had met with an accident under influence of liquor, the owner of the vehicle could not be held liable. The act in question was not one committed during the course of employment and therefore it was submitted that the claim had been rightly rejected. He referred to the report at Exhibit- 45 to indicate that the deceased was under influence of liquor and it was not the intention of the legislature to award compensation when an accident occurred in such situation.

5. Heard the respective counsel and perused the documents filed on record. The learned Commissioner in paragraph 6 of the impugned judgment has recorded a finding that Prakash was at the time of the accident driving the car in the capacity of a driver. In paragraph 10 of the judgment a further finding has been recorded that while performing his duties he had consumed liquor after which the vehicle met with an accident. These findings recorded by the learned Commissioner are based on appreciation of evidence available on record. The same do not warrant any interference. In fact the appellants have proceeded on the basis that the accident took place when the driver of said vehicle was under influence of liquor. The question therefore is whether provisions of Section 3(1)(b) of the said Act can be relied upon for defeating the claim for compensation.

Under provisions of Section 3(1)(b) of the said Act, an employer is not liable to pay compensation in respect of an injury caused by an accident which is directly attributable to the employee having been at the time of the accident under influence of drink or drug. However, aforesaid provision excludes the contingency of either death or permanent total disablement being influenced as a result of such accident. The intention therefore appears to exclude the liability of an employer when an accident results in injury on account of the employee at the time of the accident being under influence of drink or drug. The exclusion of the consequence of death or permanent total disablement appears to have been made with a view to safeguard the interests of dependents in such contingencies.

6. In *United India Insurance Company Ltd. (supra)*, a learned Single Judge of the Himachal Pradesh High Court considered the aspect of a fake license with the driver and its effect on the claim for compensation under the said Act. In paragraph 21 of said judgment it has been observed thus :

"21. However, the legislature in proviso to section 3(1) of W.C. Act has exempted the employer in certain cases. The most important factor to be noted is that this exemption is not applicable in the case of death or permanent total disablement, but only in cases of injury. In cases of injury, if the employer proves that workman was under the influence of drink or drugs or that he had wilfully disobeyed any express order or specific rule with regard to securing the safety of the workman or the workman has wilfully removed or disregarded any safety guard or other devices which he knew were provided for the purpose of securing the safety of a workman, then the employer can avoid his liability. However, even in such cases the employer is liable to pay compensation in case death or permanent disablement results from the injury. The intention of the legislature is thus very clear. In cases of death or permanent total disablement even if the employee has wilfully disregarded the safety aspects then also the employer would be liable."

From the aforesaid it is therefore clear that in cases of injury, if the employer proves that the workman was under the influence of drink or drug then the employer can avoid his liability. However, even in such cases, the employer is liable to pay compensation where death or permanent disablement results from

the injury. The intention behind aforesaid provision indicates that in case of injuries, the employee in question is made to suffer by denying the benefit of compensation while in the case of death or permanent disablement, care has been taken to see that the claim for compensation is not defeated on said count and the defendants do not suffer.

7. The learned Judge of the trial Court while rejecting the claim for compensation failed to take into consideration the provisions of Section 3(1) (b) of the said Act. Considering the observations in *United India Insurance Company Ltd. (supra)* which I am inclined to follow, the rejection of the claim for compensation does not appear to be justified in the present facts.

8. The application for compensation filed by the appellants indicates that the date of birth of the deceased was 08/02/1987 and considering his age, the relevant factor was 216-91. The claimants however have restricted their claim for compensation for an amount of Rs. 5 lakhs only. In that view of the matter, the appellants would be entitled only for an amount of Rs. 5 lakhs towards compensation. In terms of provisions of Section 4-A(3) of the said Act the employer would be liable to pay the amount of compensation with simple interest @12% per annum from 30/06/2011 as the accident in question occurred on 31/05/2011.

The question of payment of penalty would not arise in view of the fact that the employer had denied the liability to pay compensation. As held in *State of Maharashtra v. Arti Ashok Kapshikar* 2007(6) Mh.L.J. 108, on denial of liability to pay compensation, the claim would have to be adjudicated and hence question of levying penalty would not arise.

9. In view of aforesaid discussion the substantial question of law is answered by holding that the learned Commissioner was not justified in ignoring the provisions of Section 3(1)(b) of the said Act while rejecting the claim for compensation.

10. Accordingly, the following order is passed :

(i) The judgment dated 22/01/2015 in W.C.A. Case No. C-74/2011 is set aside.

(ii) It is held that the appellants are entitled for compensation of an amount of Rs. 5 lakhs with 12% simple interest thereon payable from 30/06/2011. The respondents are held jointly and severally liable to pay the amount of compensation.

(iii) First appeal is allowed in aforesaid terms with no order as to costs.