
(2004) 08 BOM CK 0029
In the Bombay High Court
Case No : First Appeal No. 616 of 1989

Guru Nanak Industries

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 23-08-2004

Acts Referred:

Workmens Compensation Act, 1923 — Section 2, 4

Citation : (2005) 2 ACC 621 : (2005) ACJ 656 : (2005) 1 MhLj 887

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : B.A. Darak, for the Appellant; P.M. Shinde, AGP for respondent No. 1 and U.N. Upadhye, for the Respondent

Judgement

N.V. Dabholkar, J.—Whether, the Insurance Company-respondent No. 2 is liable to reimburse the employer-appellant and if yes, to what extent, being the only issue contested in present appeal, many details of the litigation are not required to be reproduced. The appeal arises from the decision in Application W. C. No. 10 of 1987, decided vide judgment and order dated 7-6-1989 by the learned Commissioner for Workmen's Compensation and Judge, Labour Court, Aurangabad. In the report filed by the Inspector of Factories (Class I). Aurangabad, initially, parents of the deceased Sukhdeo appeared and ultimately the claim was contested by his widow. It is said that, the deceased Sukhdeo was employed with appellant-industry and he died as a result of electrocution on 25-5-1987 at 2.00 p.m. and as such, death is held by the trial Court Judge to be during the course of the employment.

The learned Commissioner awarded compensation of Rs. 57,264.24 and penalty of 50 per cent, which comes to Rs. 28,632.12. The Industry is also charged with interest at the rate of 6 per cent per annum on the compensation amount from 25-6-1987 to the date of payment.

2. For the reasons discussed in paragraph 11 of his judgment, the learned Commissioner has held the insurance company not liable to the compensation

amount in this matter, directly. He has observed that, if at all, the Industry is entitled to get reimbursement of the compensation amount from the insurance company, separately. The learned Judge has, therefore, directed the employer to pay the whole amount.

3. Heard Advocates Shri Darak and Shri Upadhye for the respective parties. Advocate Shri Darak has submitted that, the entire amount is already paid by the employer to the claimants. However, according to him, the employer is entitled to be reimbursed for fullest amount by the insurance company. He has placed reliance upon the policy which is produced along with application at Exhibit C-41. The policy is read in evidence by mutual consent of both the Advocates. Although, the policy, in clause 8 of its terms and conditions, incorporates an arbitration clause, in this appeal filed in the year 1989, both the lawyers have conceded that time to apply for arbitration has lapsed and, therefore, both of them agree to proceed with the appeal, without reference to arbitration.

4. According to advocate Shri Darak, the policy clearly indicates that there is a contract to indemnify the employer towards liability that may be incurred by the employer under the Workmen's Compensation Act, 1923 and subsequent amendment of the said Act, as also Fatal Accidents Act, 1855 and of common law. A premium of Rs. 2501 is charged, by considering estimated total annual earning of 20 employees covered by the policy, to be Rs. 1,02,960/-. Twenty employees engaged as labourers with machinery appear to have been covered by the policy. The policy was in force for the period 10-10-1986 to 9-10-1987. There is no dispute that, the policy was in force as on the date of accident and death i.e. 25-5-1987. Both the lawyers also concede that this policy is not accompanied by list of 20 employees, who can be said to have been covered by this policy. It is because of this lacuna in the policy, the learned Commissioner has held that, the employer has not proved the deceased employee to be covered by the policy and, therefore, the insurance company is not liable. I am afraid, the approach of the learned Commissioner cannot be said to be fully correct. The lacuna of not having any list of the employees, is of such a nature that, both the parties, i.e. insurance company and the insured, are equally guilty. Upon taking a pragmatic approach, in spite of absence of list of employees, several circumstances can be considered. There can be argument that, insurance company cannot deny the liability to indemnify till the time the claim raised is for number of employees less than 20. It may be possible to argue that, even if there are more than 20 employees, having suffered deaths/injuries during the course of single incidence in the factory, liability of the insurance company may not extend towards payment of compensation for number exceeding twenty employees but, it may not be able to refuse payment of compensation to the extent of 20 employees.

It also could have been argued, and this argument was resorted to, to some extent, by learned Counsel for the insurance company, that, the employees, who were not on the muster roll of the industry on the date of issuance of the policy, may not be covered. In fact, even this argument may not be sufficient to

exonerate the insurance company. Hypothetically considering the employer to be law abiding, who has employed only 20 employees and has obtained a policy covering 20 employees, if couple of employees resign/retire, the employer may employ fresh employees. In the absence of condition or restriction in the terms and conditions of the policy that only particularly named employees will be covered by the policy or, the employees, who were in the employment on the date of issuance of the policy, will only be covered, the insurance company will not be in a position to deny the liability to reimburse the employer till the time the claim does not exceed the number of employees as incorporated in the policy, in the cases wherein the list of employees with specific names is not part and parcel of the policy and the insurance contract. In the matter at hands, admittedly, there is not such list of twenty named employees, nor Advocate Shri Upadhye has been able to point out a condition that, the employees recruited after issuance of the policy, who suffered injuries/deaths during the policy period; are not to be covered. The insurance company, therefore, cannot deny the liability in toto.

5. Advocate Shri Upadhye also urged that, by taking into consideration the details narrated by the employer, the deceased Sukhdeo does not come within the purview of definition of workman as given in Section 2(n) of the Workmen's Compensation Act, 1923. Shri Upadhye has led emphasis on the clause, "other than a person whose employment is of casual nature and who is employed otherwise than for the purpose of employer's trade or business." Shri Upadhye pointed out that, as per the contentions raised by the appellant, the deceased Sukhdeo was employed only on 21-5-1987; he was employed only for 4 1/2 days (till death on 25-5-1987 afternoon) and employer himself has said that the deceased was a casual employee. Merely because Sukhdeo died on 25-5-1987, it cannot be said that, initial contract for employment was only for 4-1/2 days. Even if it is accepted that, he was employed from 21-5-1987, it cannot be said that employment was only for 4 1/2 days of that, it was casual. Eventually, the employment came to an end after 4 1/2 days because of death.

Presuming it for the sake of argument that, the deceased was a casual or temporary worker, I am afraid that, clause relied upon by Advocate Shri Upadhye does not take him beyond the purview of "workman" as defined by Section 2(n) of the Workmen's Compensation Act, 1923. For a casual employee, the employment being for casual purpose is not sufficient, but it should be for the purpose otherwise than for the employer's trade or business. In the matter at hands, admittedly, the deceased met with an accident, while he was working in the industry and this second ingredient, within the clause relied upon by Advocate Shri Upadhye, therefore, was not attracted. The submission of Advocate Shri Upadhye that, the deceased was not a workman as defined by the Act, therefore, cannot be accepted.

6. Advocate Shri Darak has not disputed the position that, primarily, the employer is liable and if the employer does not make the payment within one

month and, therefore, some penalty and interest is required to be paid, the insurance company would not be liable to reimburse the employer to that extent. But Advocate Shri Darak insisted that, initial compensation amount of Rs. 57,264.24 ought to be reimbursed by the insurance company. When it is held that, in the light of ambiguity that has remained in the policy because of list of employees covered not being part and parcel of insurance contract, the insurance company cannot be allowed to refuse its liability to the extent of number of employees indicated in the policy and the finding of the Commissioner that, the insurance company is not at all liable must be set aside. Learned Commissioner has calculated compensation payable, by taking into account the wages of the deceased to be Rs. 22/- per day as per the Minimum Wages Act. Advocate Shri Upadhye for the insurance company pointed out that the employer is said to have paid the deceased at the rate of Rs. 12/- per day. Shri Upadhye, therefore, prayed that the insurance company, if at all; may be saddled with the responsibility of payment of compensation, by taking the wages of the deceased to be Rs. 12 per day. This submission of Advocate Shri Upadhye has some substance. However, the liability of the insurance company ought to be viewed from different angle. While charging premium of Rs. 2501/-, the insurance company has taken estimated salary of twenty employees to be Rs. 1,02,960.20 as their annual earnings. This works out annual wages of each individual to be Rs. 5148/-, Rs. 429/- p.m. and Rs. 14.30 per day. When the insurance company has charged the premium, by taking the salary of the employees at that rate, it is felt that, the insurance company should indemnify the insured employer, by considering the salary at that rate. Taking the monthly wages to be Rs. 429/-, as required by Section 4 as applicable on the date of accident, 40 per cent works out to Rs. 171.60 ps. As per the 4th Schedule, the factor applicable is 216.91, when we consider that the deceased was aged 25 years at the time of accident. Responsibility to be shared by the insurance company, therefore, calculates to Rs. $171.60 \times 216.91 = 37,221.75/-$.

7. In the light of facts and circumstances of the matter, it is felt that, the insurance company should reimburse the employer to the extent of Rs. 37,221.75 ps. and industry should shoulder the rest of the liability itself.

8. The appeal, therefore, is partly allowed. It is directed that respondent No. 2 insurance company should reimburse the employer-appellant to the extent of Rs. 37,221.75 ps., and rest of the liability shall be that of the employer. No orders as to costs.