(2019) 10 SIK CK 0001

In the Sikkim High Court

Case No : Appeal (C) No. 01 Of 2019

Manager, United India Insurance Co. Ltd — APPELLANT

Vs

Kakali Sarkar Guha And Ors — RESPONDENT

Date of Decision : 04-10-2019

Acts Referred:

Employees Compensation Act, 1923 — Section 3, 4, 4(1), 4(4), 4A, 4(1B), 4A(2), 4A(3), 4A(3)(a), 4A(3)(b), 5, 18, 30
Motor Vehicles Act, 1988 — Section 147

Citation : (2019) 10 SIK CK 0001

Hon'ble Judges : Bhaskar Raj Pradhan, J

Bench : Single Bench

Advocate : Pema Ongchu Bhutia, Ranjan Chettri, Khem Raj Sapkota, Leonard Gurung

Final Decision : Disposed Of

Judgement

Bhaskar Raj Pradhan, J

1. Two short questions arise for consideration in the present case. The first question raised is whether the Appellant-the Insurance Company can be

held liable for the payment of compensation to the Respondent No.1-(the Claimant) for the accident that occurred at Mazitar when the insurance

policy provides that the location of risk was Gangtok, East Sikkim? The second question is whether the learned Commissioner could have directed the

Appellant-Insurance Company to pay the claim amount in view of Section 3 of the Employees Compensation Act, 1923?

Facts in brief

2. On 18.06.2015 a First Information Report (FIR) No. 35/2015 was lodged at the Jorethang Police Station stating that the same morning at 00:30

hours the hired vehicle fell down from pressure shaft to power house at Mazitar and the operator (Ranjan Guha) got injured. It was further stated that

they brought the operator to the Jorethang Hospital where the Doctor informed them that the operator was already dead.

3. A claim petition under the provisions of the Employees Compensation Act, 1923 (the Act) was filed on 28.09.2015 by the Claimant The words

â??Appellantâ? is replaced with the word â??Claimantâ? vide order of this Court dated 23.10.2019 in Appeal (C) No.01 of 2019. i.e. the wife of the

deceased operator. It stated that the deceased was employed as an operator/ driver of transit mixer (heavy vehicle) bearing No. WB29-7322 which on

18.06.2015 while being driven by the deceased fell down from the pressure shaft to power house at Mazitar, Jorethang, South Sikkim and the

deceased succumbed to his injuries. Copies of the FIR as well as the death certificate were also annexed. It was asserted that the deceased was

recruited as a driver on 25.05.2015 by Respondent No.3 (the Employer) and the said Company had deputed him with the Respondent No.2. It was

asserted that the deceased workman expired in the course of employment.

A copy of the appointment letter was also annexed. The Claimant* asserted that on her inquiry it was found that the Employer had insured their

liability under the Act with the Appellant and therefore the Appellant was also made a party. The Claimant asserted that the deceased was 36 years

at the time of his death and a copy of the driving license reflecting the date of birth of the deceased was also annexed. The Claimant further claimed

that the deceased was drawing a monthly salary of Rs.13,765/- only as evidence by the appointment letter dated 25.05.2015. The Claimant claimed

compensation on the above facts without quantifying the amount.

4. Only the Appellant i.e. the insurance company filed a written objection to the claim filed by the Claimant. The Appellant contested its liability. The

Appellant stated that the Employer i.e. the insured had not issued the mandatory notice as per clause 6 of the insurance policy and notified the

Appellant about the event. The Appellant admitted that the Employer had taken an insurance policy for the employees. It was asserted that the liability

of the insurer is to indemnify the Employer for the compensation paid and it was not the responsibility of the Insurance Company to pay the

compensation awarded at the first instance. The Appellant admitted that the

Employer had taken the insurance policy for the employees engaged at

Hydro Power Project Plant at Haridwar Infrastructure Limited, Dikchu Project, but the location of risk was Gangtok. It was stated that the accident

occurred at Mazitar, Jorethang and therefore, it was not covered by the policy. The claim for compensation against the Employer was not disputed by

the Appellant.

5. The Respondent No.2 filed a reply to the written objection filed by the Appellant. It was asserted that the deceased was recruited by Employer and

his monthly salary was also being paid by the Employer which was insured by the Appellant. It was asserted that therefore, the Appellant was liable to

pay compensation.

6. The Employer also filed a reply to the written objection filed by the Appellant but did not contest the claim. The Employer asserted that the

deceased was recruited and his salary paid by the Employer. It was asserted that the Employer was insured by the Appellant and hence it was the

Appellant who was liable to pay the compensation to the Claimant. The Employer did not dispute that the Claimant was entitled to compensation.

7. On 04.12.2015 the learned Commissioner directed the office to make assessment of the compensation based on the papers available. On

23.11.2015 the office calculated the compensation payable as Rs.7,78,560/- taking the average salary per month as Rs.8000/-, the completed years of

age of the deceased as 36 years and the relevant factor as 194.64. On 05.02.2016 the learned Commissioner held that the amount of compensation

has been worked out by the office at Rs.7,78,560/- and the Appellant was directed to deposit the said amount in the Court of the learned

Commissioner. The amount of compensation has not been made an issue.

8. On 25.10.2018 the parties were heard and on 17.11.2018 the impugned judgment was passed by the learned Commissioner.

9. There is no material to show that the Appellant had complied with the order dated 05.02.2016 passed by the learned Commissioner for deposit of

the compensation amount during the proceedings. However, there is an application dated 18.01.2019 on record filed by the Appellant seeking to

deposit the compensation amount as per Section 30 of the Employees Compensation Act, 1923 for preferring the present appeal along with a cheque

bearing No.014508 dated 07.01.2019 for the said amount of compensation. The memo of appeal filed by the Appellant also asserts the said facts.

10. The Appellant is aggrieved by the order dated 17.11.2018 passed by the learned Commissioner by which it was directed to pay an amount of

Rs.7,78,560/- (Rupees Seven Lakhs Seventy Eight Thousand Five Hundred Sixty) to the Claimant within a month. The Appellant has not contested the

amount of compensation awarded. However, the Appellant prays that this Court â??re-computeâ? the compensation awarded. The Appellant is

aggrieved by the fact that it was directed to pay compensation in the first instance and that the award was passed although under the insurance policy

the accident, which admittedly occurred at Mazitar, was not covered.

Answers to the two substantial questions of law

11. The first substantial question of law raised by the Appellant is directly relating to the merit of the insurance policy the privity of contract of which

was between the Appellant and the Employer. It is not in dispute that the liability of the Employer under the Act was insured by the Appellant. What

the Appellant contends is that the policy was limited to a specific area i.e. Gangtok only and therefore, when admittedly the accident occurred at

Mazitar the same was not covered. The insurance policy provided that the policy shall not cover liability of the insured if the â??accidentâ? occurred

at any other place other than the place or places of employment specified in the schedule, unless the employee was at such other place whilst on duty

for the purpose of the business and on the direction of the insured or any of the officials authorised to exercise control and supervision over the

employee. The record before the learned Commissioner reveals that the deceased was an employee of the Employer. The joining letter issued by the

Employer to the deceased reflects that the effective date of joining was 25.05.2015 (The date â??25.05.2016â? is replaced with the date

â??25.05.2015â? vide order of this Court dated 23.10.2019 in Appeal (C) No.01 of 2019). The Claimant has categorically stated in the claim petition

that the deceased workman expired in the course of employment due to accident of the transit mixer of which the deceased was a driver. The

Appellant filed a reply thereto. However, all it stated was as per the insurance policy the location of risk was Gangtok and the accident occurred at

Mazitar. It was not disputed that the deceased died as a result of an accident in the course of his employment. The Employer did not contest the claim made by the Claimant but contested the written objection filed by the Appellant. In the said written objection the Employer clearly stated that the

deceased who is the husband of the Claimant was inducted by the Employer to work for Respondent No.2 and he expired during the course of

employment while driving a transit mixer hired by the Respondent No.2. The FIR which was lodged immediately after the accident before the

Jorethang Police Station on 18.06.2015 also records that the accident occurred when the hired vehicle fell down from pressure shaft to power house

at Mazitar and the deceased got injured. The death certificate produced by the Claimant reflects that the deceased died on 18.06.2015 itself. The facts

before the learned Commissioner thus clearly reflected that the accident occurred out of and in the course of his employment and the deceased was at

Mazitar whilst on duty for the purpose of business and on directions of the Employer i.e. the insured. The first question therefore, is answered in the

affirmative. The Appellant was liable to indemnify the Employer.

12. The next question however, raises the issue of the scope of the Act. The Workmenâ??s Compensation Act, 1923 was amended by the

Workmenâ??s Compensation (Amendment) Act, 2009 and consequently it is now known as the â??Employeeâ??s Compensation Act, 1923â?.

Under Section 3 of the Act it is the Employer who is liable to pay compensation in accordance with the provisions of Chapter II of the Act if personal

injury is caused to an employee by accident arising out of and in the course of his employment. In re: P.J. Narayan v. Union of India & Ors. (2006) 5

SCC 200 the Supreme Court held that the statutory liability under the Workmenâ??s Compensation Act, 1923 is on the Employer and insurance is a

matter of contract between the insurance company and the insured. In re: New India Assurance Co. Ltd. v. Harshadbhai Amrutbhai Modhiya (2006)

5 SCC 192 the Supreme Court had occasion to examine an appeal by the insurance company from the dismissal of his appeal under Section 30 of the

Workmenâ??s Compensation Act, 1923 against the order of the learned Commissioner directing it to pay the amount of compensation. Before the

Supreme Court the Appellant contended that in terms of the insurance contract it was not liable to pay any interest on the awarded sum. The Supreme

Court held that by reason of the provisions of the Act, an Employer is not statutorily liable to enter into a contract of insurance. Where, however, a contract of insurance is entered into by and between the Employer and the Insurer, insurer shall be liable to indemnify the Employer. The insurer,

however, unlike under the provisions of the Motor Vehicles Act does not have a statutory liability. The Act does not contain a provision like Section

147 of the Motor Vehicles Act. The Supreme Court held that unlike the scheme of the Motor Vehicles Act, the Workmenâ??s Compensation Act,

1923 does not confer a right on the Claimant for compensation under that Act to claim the payment of compensation in its entirely from the insurer

himself. The entitlement of the Claimant under the Workmenâ??s Compensation Act, 1923 is to claim the compensation from the Employer. As

between the Employer and the Insurer, the rights and obligations would depend upon the terms of the insurance contract.

13. The insurance policy taken by the Employer covers its liability under the Act. It is apparent that the liability of the Appellant as the insurer (as it is

not contested that the Appellant had insured the liability of the Employer under the Act) is to indemnify the Employer for the compensation payable by

it. The insurance policy issued by the Appellant in favour of the Employer specified that the policy covers the Employerâ??s liability under the Act

and the limit of indemnity was the amount of liability incurred by the Employer. It is not the responsibility of the Appellant to pay the compensation

awarded at the first instance. The statutory liability under the Act is upon the Employer to pay the compensation and the insurance company has a

duty to indemnify the Employer if the employerâ??s liability under the Act has been insured by it. The second question is answered (The word

â??answerâ?? is replaced with the word â??answeredâ?? vide order of this Court dated 23.10.2019 in Appeal (C) No.01 of 2019.) accordingly.

14. The impugned order dated 17.11.2018 passed by the learned Commissioner of the Act is thus modified. The Employer is held liable to pay the

compensation and is directed to pay the compensation in accordance with Chapter II of the Act. The payment shall be made on or before 30.10.2019

The date â??30.09.2019â? is replaced with the date â??30.10.2019â? vide order of this Court dated 23.10.2019 in Appeal (C) No.01 of 2019.

However, the Employer shall be entitled to get reimbursement of such payment from the Appellant in accordance with law and under the insurance

policy.

15. Having answered the two substantial questions raised it is incumbent upon this Court to ensure that the Claimant is paid the compensation as is

statutorily provided. The learned Counsel for the Employer submitted that although apparently the calculation of the compensation amount is erroneous

in view of the fact that no cross appeal has been preferred by the Claimant and the scope of Section 30 of the Act is limited to the questions of law

formulated enhancement of the compensation is impermissible. Section 3 of the Act mandates that the Employer is liable to pay compensation in

accordingly with the provisions of Chapter II of the Act. Chapter II consists of Section 3 to Section 18 (both sections included). Section 3, 4, 4A and 5

of the Act are relevant for the purpose of determining payments due and payable by the Employer. The learned Commissioner was duty bound to

calculate the amount of compensation in accordance with the provisions of Chapter II of the Act. The learned Commissioner did not do so although

there was no contest that the Claimant was to be awarded compensation. In fact the record reflects that it was only the office of the learned

Commissioner which calculated the compensation amount. Section 30 of the Act provides for appeals against the orders of the learned Commissioner

on the questions of law involved and formulated. The powers of the Appellate Court are coextensive with that of the learned Commissioner. The

Appellate Court is the â??court of errorâ? and its normal function is to correct the decision of the Court from whose decision the appeal lies. The

Claimant has not preferred any appeal against the quantum of compensation awarded by the learned Commissioner although the computation is

apparently erroneous. The Appellant i.e. the insurer as well as the Employer are not aggrieved by the quantum of compensation but both agree that

compensation is payable. The Appellant states that it is the Employer who is liable. The Employer on the other hand states that it is the Appellant who

is liable. When a claim for compensation is made by the Claimant entitled to do so under the Act it is the statutory duty of the learned Commissioner to

quantify the said amount in accordance with Chapter II of the Act. This statutory duty binds the learned Commissioner to arrive at the quantum of

compensation irrespective of the fact as to whether any plea in that behalf was raised by the Claimant or not. There is also no restriction under the

Act that compensation should be awarded only up to the amount claimed by the Claimant and when the evidence is brought on record and the learned

Commissioner comes to the conclusion that the Claimant is entitled to more compensation than claimed even then the learned Commissioner may pass

such award as statutorily provided for. It must be kept in mind that the Act is beneficial and welfare legislation and therefore the statutory duty under

Section 3 of the Act to quantify the compensation correctly and award it, is salutary for the purpose. This Court is therefore, of the view that although

the Claimant has not preferred any cross appeal against the award of the learned Commissioner and the learned Commissioner has not determined

compensation correctly it is the duty of the Appellate Court to ensure that the award of the learned Commissioner is modified and the Claimant is

awarded the compensation and all such amounts as are due and payable under Chapter II of the Act. After all the existence of Courts of justice is to

ensure that justice is done and inherent in every Court is the power to undo the wrong and do the right.

16. The learned Commissioner has calculated the compensation amount as Rs.7,78,560/- only taking the average salary per month as Rs.8000/-, the

completed years of age of the deceased as 36 years and the relevant factor as 194.64. The Claimant had claimed that the deceased was drawing a

salary of Rs.13,765/- only. In support thereof the appointment letter dated 25.05.2015 was also annexed. As per the letter the deceased gross salary

was Rs.13,765/- per month. The Employer did not contest this. In the Employerâ??s written objection to the reply filed by the Appellant it stated that

the Employer was paying the monthly salary to the deceased. The learned Commissioner has held that the Claimant have proved that the deceased

was drawing a monthly salary of Rs.13,765/-. However, the learned Commissioner directed payment of compensation of Rs.7,78,560/- only. As per

note sheet dated 23.11.2015 the office of the learned Commissioner seems to have arrived at the figure taking the average salary per month as

Rs.8,000/-only although, it had been proved that the deceased was drawing a salary of Rs.13,765/-. It is apparent that the learned Commissioner came

to this conclusion on the basis of notification issued by the Central Government under Section 4(1B) of the Act which specified that for the purpose of

sub-section (1) of the Section 4 of the Act the monthly wages in relation to an employee would be Rs.8000/-. A similar situation arose before the

Supreme Court in re: Jaya Biswal & Ors. v. Branch Manager, Iffco Tokio General Insurance Company Limited & Anr. (2016) 11 SCC 201. In the said case the learned Commissioner had taken Rs.8000/- as the limited wage to calculate the compensation. Since neither of the parties produced any

document on record to prove the exact amount of wages being earned by the deceased the wage of the deceased was accepted as Rs.4000/- per

month + daily bhatta of Rs.6000/- per month, which amounts to a total of Rs.10,000/- at the time of the accident. In the present case it has been

proved that the monthly wages of the deceased was Rs.13,765/-. The learned Commissioner was thus required to calculate the Employerâ??s

liability for Compensation in the following manner:

Rs.13,765 (monthly wages) x 50% x 194.64 (the relevant factor) = Rs.13,39,609.8/-.

17. The Employer was also liable to pay the expenditure for the funeral of the deceased to the eldest surviving dependent i.e. the Claimant herein.

Section 4 (4) of the Act provides that if the injury of the employee results in his death, the Employer shall, in addition to the compensation under sub-

Section (1), deposit with the Commissioner a sum of not less than Rs.5000/- for payment of the same to the eldest surviving dependent of the

employee towards the expenditure of the funeral of such employee or where the employee did not have a dependent or was not living with his

dependent at the time of his death to the person who actually incurred such expenditure. In re: Jaya Biswal (supra) the deceased was also a driver.

The Supreme Court awarded Rs.25,000/- (Rupees Twenty Five Thousand) as funeral expenses for the death of the driver which occurred in the year

2011. The deceased in the present case died in the year 2015. Therefore, it would be appropriate to award an amount of Rs.26,000/- as funeral

expenses to the Claimant.

18. Section 4A of the Act provides that compensation under Section 4 shall be paid as soon as it falls due. The Supreme Court in re: Pratap Narain

Singh Deo v. Srinivas Sabata & Anr. (1976) 1 SCC 289 and Saberabibi Yakubbhai Shaikh v. National Insurance Company (2014) 2 SCC 298 has held

that compensation has to be paid from the date of the accident.

19. Section 4A (2) of the Act provides that in cases where the Employer does not accept the liability for compensation to the extent claimed, he shall

be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may be without prejudice to the right of the employee to make any further claim. In the present case the

Employer in spite of knowledge that its employee i.e. the deceased had succumbed to his injuries in an accident arising out of and in the course of his

employment it failed to pay compensation as soon as the accident occurred (i.e. when it fell due) or even after knowledge taking a stand that since the

liability was insured it was for the Appellant i.e. the insurer who was to pay the compensation. No amount was deposited by the Employer. The

Appellant also did not deposit any amount until the impugned judgment was passed by the learned Commissioner. The Employer was therefore in

default in paying the compensation due under the Act within one month from the date of the accident i.e. 18.07.2015. Therefore, in terms of Section

4A (3) of the Act the Commissioner was required to direct that the Employer shall, in addition to the amount of the arrears pay simple interest thereon

@ 12% per annum or at such higher rate not exceeding the maximum of lending rates of any schedule bank as may be specified by the Central

Government in the official gazette, on the amount due. The learned Commissioner has failed to do so.

20. The Employer was given an opportunity to show cause as to why penalty should not be imposed in terms of the proviso to Rule 4 A (3) of the Act

and the learned Counsel for the Employer was heard on this aspect. The learned Commissioner was required to consider and direct if mandated that

the Employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding 50% of such amount by way of

penalty. The learned Commissioner failed to either opine or direct the payment of penalty. The Employer has categorically admitted to the fact that the

deceased was its employee and he had succumbed to his injuries in an accident arising out of and in the course of his employment. Having done so

there was no justification for not paying the compensation when it fell due. In the circumstances, this Court is also of the opinion that the Employer is

liable to pay a further sum as penalty. As the accident had occurred in the year 2015 and till this day the Respondent No.1 has not been paid a single

rupee as compensation this Court is of the opinion that penalty of 50% of the amount should be adequate penalty to be imposed. Therefore, the total

amount of compensation would be as under:

Compensation (under Section 4(1) = (A) Rs.13,765 x 50% x Rs.194.64 =13,39,609.8/-.

Funeral expenses (under Section 4(4) = (B) Rs.26,000/-.

Total = (A) 13,39,609.8 + (B) 26,000 = Rs.13,65,609.8/-

(C) Interest of 12% per annum [under Section 4A (3) (a)] on Rs. 13,65,609.8/- on and from 18.07.2015 (one month from the date it fell due) till date

of actual payment (30.10.2019) =Rs.7,01,362.22/-

(D) Penalty of 50% [under Section 4A (3) (b) of the arrears and interest thereon calculated on the sum total of the arrears (A+B) and the interest on

it (C) to be calculated till the date of actual payment (30.10.2019) = Rs. 10,33,486.01/-

Grand total payable on 30.10.2019 = Rs. 31,00,458.03/-.

21. The Employer shall deposit the total amount payable to the Claimant on or before 30.10.2019 with the learned Commissioner. On such deposit, the

learned Commissioner shall disburse the same to the Claimant. The grand total payable is calculated as on 30.10.2019. If the Employer chooses to pay

the amount on any date before 30.10.2019 suitable reduction in the calculation may be adjusted to the satisfaction of the learned Commissioner. The

amount of Rs. 7,78,560/- deposited by the Appellant before the learned Commissioner may be used by the Appellant to satisfy its contractual liability

and indemnify the Employer of its liability as insured by the Appellant. The appeal is disposed of accordingly.

22. A copy of this judgment shall be sent forthwith to the Court of the learned Commissioner, Employeeâ??s Compensation Act, 1923.