
(1991) 02 OHC CK 0007

In the Orissa High Court

National Insurance Company

APPELLANT

Vs

Sudarsan Bhuyan and Another

RESPONDENT

Date of Decision : 20-02-1991

Acts Referred:

Employees Compensation Act, 1923 — Section 30

Citation : (1991) 2 ACC 687

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Judgement

S.C. Mohapatra, J.—This is an appeal u/s 30 of the Workmen's Compensation Act, 1923 (hereinafter referred to as "the Act") filed by the insurer.

Respondent No. 1 is the younger brother of deceased and respondent No. 2 is the owner of a truck bearing registration No. ORU 4771 in respect of which appellant has covered risk under terms of policy. Deceased Trilochan was a helper in the truck employed by the owner on 21.1.1989 while deceased was moving in the truck in course of and arising out of his employment as helper, the truck faced with an accident resulting in fatal injuries on the deceased to which he succumbed on 22.1.1989.

2. Respondent No. 1 filed an application for compensation of Rs. 90,000/- under the Act asserting in his application that deceased was aged 20 years and was receiving Rs. 1,000/- as his monthly wages. It was further asserted that being the minor brother applicant is a dependent and is entitled to the compensation. Deceased presented the application himself and in a separate petition authorised his lawyer to act on his behalf in the proceeding.

3. On receipt of notice owner appeared and filed his written statements. He admitted the accident, fatal injury on deceased in course of and arising out of employment. He asserted that deceased was getting monthly wages of Rs. 800/- and insurer is to pay the same. Recording in the order sheet that insurer has not taken any steps P.Ws. 1 and 2 were examined. P.W. 1 is brother of the claimant

and P.W.2 is the claimant himself. Owner cross-examined the witnesses but on material question there was no effective cross-examination. When the proceeding was posted for taking evidence, insurer filed its written statement denying its liability and challenging the dependency of claimant. On its prayer P.Ws. 1 and 2 were recalled for further evidence. In cross-examination insurer challenged age of the claimant and the wages paid to deceased at the time of his death.

4. Commissioner on appreciation of evidence accepted fatal injury of deceased on account of accident and found that in course of and arising out of employment by the owner of the truck deceased met with the accident. Determining monthly wages of the deceased at Rs. 800/-. Commissioner directed insurer to pay the compensation which is grievance of the appellants.

5. Under the Act, employer is liable to pay the compensation. There is no provision under the Act to direct the insurer to pay the compensation. However, by judicial decision, it has been held consistently that Commissioner can give a direction for recovery of compensation amount from the insurer. See *Bibhuti Bhusan Mukherjee Vs. Smt. Dinamani Dei and Others*, : *Subasini Panda and Others Vs. State of Orissa and Others*, and *Oriental Fire and General Insurance Company Limited Vs. Matias Burla and Another and Katrina Majhi and Another*, .

6. Compensation to another for death of a person is not a right by itself. Person causing death is not liable for the same. In order to get compensation person claiming is required to prove that on account of wrongful act of the person causing death, he is entitled to compensation. It comes within the law of torts and normally claim is to be made in a Civil Court including merits. Death coming within the scope of Fatal Accidents Act would also be considered by the civil courts. In respect of such deaths by Motor Vehicles, to give early relief provision will make in the Motor Vehicles Act creating Special Tribunal to adjudicate and award compensation. Principles for adjudication are the same as are to be followed by the civil court except that strict rule of Evidence Act are not applicable and the award is not a decree. Special provision for realisation of the awarded amount was made in that Act. Law of torts envisage wrongful act or omission. Negligence is a wrongful act or omission. To avoid this, statutory right was given to workman to get compensation even if there is no negligence and contribution of the workman to the fatal. Vary does not deprive him of compensation. All persons were not entitled to compensation under the Act. Only the dependants as defined in the Act are entitled. Therefore, Commissioner of the Act gets jurisdiction to award compensation only to dependants as defined under the Act. Fatal accident caused by motor vehicle to a workman comes within the scope of consideration of the Commissioner if the preconditions under the Act are satisfied. They are (i) Accident (ii) Fatal injury (iii) In course of and arising out of employment and (iv) person claiming is a dependent as defined under the Act. Employer is to be directed to pay. In some cases, principal employer is also directed to pay the compensation award. As has been earlier

stated, other persons covering the risk or liable under other laws are normally not to be given a direction. However, insurers of motor vehicles have been made liable on account of decision of courts.

7. If claim would have made under a forum created under the Motor Vehicles Act, insurer's right to contest would have been limited to the grounds available under Sections 95 and 96 of that Act unless the owner would have remained *ex parte* or would have colluded with the claimant. Scope of a insurer to contest on merit has been provided u/s 110-C(2) of that Act. There is no provision under the Workmens' Compensation Act, like 110-C(2) of the Motor Vehicles Act to limit the scope of challenge by an insurer. Accordingly, when notice is issued to be insurer by the Commissioner in respect of a claim before him insurer can contest such claim on all available grounds.

8. In this case, claim having been made on the grounds that claimant is minor brother of the deceased workman which was not specifically admitted by the owner or the insurer it was duty of the Commissioner to give a finding in respect of such contest. Absence of finding of a material question relating to jurisdiction of the Commissioner vitiates the order and non-consideration of such a question gives rise to a question of law.

9. In a benevolent statute where there is deficiency which has not been considered by the fact finding authority, claimant should get an opportunity to explain to the Commissioner to satisfy the Commissioner that he is dependant as defined under the Act. In case I enter into merits to decide the question, on the materials available, either party may be prejudiced. Accordingly, in this case, I am inclined to hold that ends of justice would be best served, in case, the award is set aside and the matter is remitted back to the Commissioner for fresh decision making it clear that there being finding of fact that the deceased workman was receiving salary of Rs. 800/- per month and the accident took place in course of and arising out of the employment, there would be no further enquiry in this respect and thus findings stand confirmed. After giving opportunity to the parties, to adduce evidence, Commissioner shall give a clear finding about the dependency of the claimant and his entitlement to compensation on that basis. In this respect better evidence on the age of deceased may also be allowed to be brought on record by the parties.

10. In the result, appeal is allowed. Order of the Commissioner is set aside and the matter is remitted back for fresh disposal in accordance with the observation made above. All parties shall appear before the Commissioner on 11.3.1991 on which day the Commissioner shall fix a date of hearing for giving opportunity to the parties to adduce evidence. In the circumstances, of the case, there shall be no order as to costs of this appeal.