

(1999) 12 OHC CK 0001
In the Orissa High Court
Case No : M.A. No. 650 of 1998

New India Assurance Co. Ltd.

APPELLANT

Vs

Kartika Jena and Others

RESPONDENT

Date of Decision : 23-12-1999

Acts Referred:

Employees Compensation Act, 1923 — Section 30, 4
Motor Vehicles Act, 1988 — Section 147, 149, 170

Citation : (2000) 2 ACC 487 : (2000) ACJ 1421 : (2000) 89 CLT 608

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : S.S. Rao, B.K. Mohanty and D.K. Sahoo, for the Appellant; B. Mohanty, for the Respondent

Judgement

P.K. Misra, J.—The insurer has filed this appeal u/s 30 of the Workmen's Compensation Act (in short, "the Act").

2. Claimant-respondent No. 1 had filed W.C. Case No. 405-J of 1994 claiming compensation on the ground that his son died in a motor accident arising out of and in course of employment as a coolie in a truck bearing registration No. ORU 9323. The accident had occurred on 18.7.1994. Thereafter, the deceased had been shifted to S.C.B. Medical College & Hospital, Cuttack, but succumbed to the injuries on 21.7.1994. The father of the deceased in his claim application claimed that he was depending upon his son.

The owner of the truck while admitting about the engagement of the deceased as a coolie as well as about the accident and the consequential death, claimed that the liability if any, should be met by the insurance company. The insurer filed written statement generally denying the allegations made in the claim application.

3. The Commissioner for Workmen's Compensation, Cuttack (in short, "the Commissioner"), on consideration of the materials on record found that the deceased was a workman under present respondent No. 2 and had died because

of the injuries sustained in an accident arising out of and in course of employment. The monthly wages of the deceased were calculated at Rs. 1,000 and the age was found to be 18 years. The Commissioner applied the provisions contained in Section 4(1)(a) of the Workmen's Compensation Act as amended in the year 1995 and by calculating fifty per cent of the monthly wages as the multiplicand and applying the multiplier of 226.38 directed that a sum of Rs. 1,13,190 should be paid by the insurance company to claimant-respondent No. 1. He also directed for the payment of Rs. 1,000 as funeral expenses, as envisaged in Subsection (4) of Section 4 of the Act, as amended in the year 1995. In addition to the aforesaid amount, the Commissioner has imposed a sum of Rs. 500 as cost and fine of Rs. 500 and thus awarded a total sum of Rs. 1,15,190.

4. In this appeal, the main contention of the appellant is to the effect that since the accident had occurred on 18.7.1994 and the death had occurred on 21.7.1994, the Commissioner should have applied the provisions of Section 4(1) (a) as existed before amendment by Act 30 of 1995. In other words, it is contended that the amended provision is not applicable to cases where the cause of action arose prior to the amended Act came into force.

5. The learned counsel appearing for claimant-respondent No. 1 submitted that the Act being a beneficial legislation, the amended provisions should be applied to all pending cases irrespective of the date of accident and, therefore, the award of the Commissioner should not be interfered with. It is also submitted that the insurance company in an appeal u/s 30 of the Act is entitled to raise grounds as envisaged in Sections 147 and 149 of the Motor Vehicles Act and cannot challenge the award on other grounds unless such insurance company had been permitted to contest the case on merit in accordance with the provisions contained in Section 170 of the Motor Vehicles Act.

6. in view of the latter contention of the counsel for claimant-respondent, before considering the appeal on merit, the scope of an appeal u/s 30 of the Act at the instance of the insurance company is to be ascertained. The learned counsel for the claimant-respondent pleaded that the right of an insurance company to avoid the liability flows from the provisions contained in Sections 147 and 149 of the Motor Vehicles Act. It is submitted that even though there is no specific provision in the Workmen's Compensation Act regarding the liability of the insurance company, the principle available under the provisions of Sections 147 and 149 of the Motor Vehicles Act should be made applicable to all proceedings including the proceedings under the Workmen's Compensation Act. The learned counsel has relied upon the decision of the Karnataka High Court in United India Insurance Company Limited, Bangalore Vs. Venkataraju and Another, , wherein it was held that in an appeal u/s 30 of the Workmen's Compensation Act, the insurer of a motor vehicle can raise contentions basing on provisions contained in Sections 147 and 149 of the Motor Vehicles Act and cannot challenge the decision of the Commissioner for Workmen's Compensation on other grounds. Such contention

of the counsel for the claimant-respondent though prima facie attractive cannot be accepted in view of the specific decision of this court in National Insurance Co. Ltd. Vs. Sudarsan Bhuyan and Another, . It has been observed that there being no provision under the Workmen's Compensation Act like Section 110-C (2-A) of the Motor Vehicles Act (which corresponds to Section 170 of the Motor Vehicles Act, 1988), the insurer when noticed by the Commissioner can contest the claim on all available grounds. In the absence of any other decision of a larger Bench of this court or of the Apex Court, I am bound by the aforesaid decision of this court. Such preliminary objection raised by the counsel for claimant-respondent No. 1 cannot be accepted.

7. Coming to the main question relating to extent of liability, there cannot be any doubt that the contention of the appellant has to prevail. The learned counsel for the claimant-respondent has relied upon the decision of Karnataka High Court, already noticed, in support of the contention that the Workmen's Compensation Act being a beneficial legislation, the provisions of the amended Act should be applied retrospectively to all pending cases. In the Karnataka case, the question was with reference to the income of the workman. The relevant provisions of Section 4 before amendment by Act 30 of 1995 with effect from 15.9.1995, were as follows:

(4) Amount of compensation.-(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:

(a) where death an amount equal to results from forty per cent of the injury monthly wages of the deceased workman multiplied by the relevant factor; or an amount of twenty thousand rupees, whichever is more; XXX XXX XXX
Explanation-I. Xxx xxx

Explanation-II.-Where the monthly wages of a workman exceed one thousand rupees, his monthly wages for the purposes of Clause (a) and Clause (b) shall be deemed to be one thousand rupees only.

This provision was amended by Act 30 of 1995 and in Section 4(1) (a) "fifty per cent" was incorporated in place of "forty per cent". Similarly in Explanation-II, the expression "two thousand rupees", was inserted in place of "one thousand rupees". Since the incorporation of the deeming provision was considered to be a matter of procedure, it was observed in the Kar-nataka case that the amended provision would be applicable to all matters pending on the date of amendment. The question in the present case is not as to whether the deeming provision should be applicable or not.

Prior to the amendment forty per cent of the income was considered to be the amount to which the factor as envisaged in the Schedule was to be applied for the purpose of assessing compensation. Under the amended provision as incorporated in the year 1995, it is laid down that "fifty per cent" of the income shall be considered to be the amount to which the relevant factor is to be applied. In other words, the change does not relate to procedural aspect. In the

absence of any specific provision or clear intention to the contrary, the amendment relating to the substantive provision cannot be considered to be retrospective. While assessing compensation, the Commissioner should have assessed the compensation by fixing the amount at "forty per cent" of the income to which the relevant factor is to be applied, and not at "fifty per cent". This position is now clear in view of the decision of the Calcutta High Court in *New India Assurance Co. Ltd. Vs. Ullashini Bhowmick and Others*, . In such view of the matter, the compensation has to be assessed by applying the multiplier of 226.38 to the amount of Rs. 400 (i.e., forty per cent of the monthly wages of Rs. 1,000). On such calculation, the amount comes to Rs. 90,552 (i.e., Rs. 400 x 226.38).

8. The next question is relating to imposition of penalty and cost. So far as the cost is concerned, it has been rightly imposed by the Commissioner for the default of the insurance company. However, so far as the penalty is concerned, it could not have been assessed in the very same proceeding, as has been observed by this court in the decision in *Sharma S.D. Vs. Ramesh Mahakud and Another*, . Accordingly the penalty imposed is waived.

9. So far as funeral expenses was concerned, there was no such provision before the amendment and for the first, time it was contemplated by the introduction of Subsection (4) to Section 4 by Act 30 of 1995. As such the sum of rupees one thousand directed to be paid towards funeral expense is also to be deducted.

10. For the aforesaid reasons, the appeal is allowed in part to the extent indicated above. There will be no order as to costs.