(2005) 07 SHI CK 0024

In the High Court Of Himachal Pradesh

Case No : F.A.O. (WCA) No''s. 73 and 150 of 1997

New India Assurance Co. Ltd. — APPELLANT

Vs

Maya Devi and Others — RESPONDENT

Date of Decision : 08-07-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 7
Workmens Compensation Act, 1923 — Section 22, 30, 4A, 4A(3)

Citation : (2005) 4 ACC 566 : (2006) ACJ 2580

Hon'ble Judges : Surjit Singh, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; Devyani Sharma and Romesh Verma, for the Respondent

Judgement

Surjit Singh, J.—Both the present appeals have been filed against the order dated 30.12.1996 of Workmen''s Compensation Commissioner (SDM), Solan District whereby on a petition filed by Maya Devi and others, dependants of late Prem Lal, a sum of Rs. 2,19,950 has been awarded on account of compensation and the money has been ordered to be paid with interest at the rate of 12 per cent per annum from the date of the compensation amount fell due to the date of the decision (the date of the order of Commissioner). Order of payment of penalty at the rate of 10 per cent, the amount of which has been worked out at Rs. 21,995 has also been passed. One appeal has been filed by the insurance company, i.e., F.A.O. (WCA) No. 73 of 1997 and the other by the insured and its number is F.A.O. (WCA) No. 150 of 1997.

2. Facts relevant for the disposal of the two appeals may be noticed. Late Prem Lal, aged about 23 years was employed with R.R. Thakur, the appellant in F.A.O. (WCA) No. 150 of 1997 to drive his truck No. HP-07 2517. This appellant had insured himself with appellant in the other appeal, namely, New India Assurance Co. Ltd., for his indemnification for the payment of the compensation to his employees engaged in connection with the operation of the truck in the event of

any of his employee dying or sustaining any injuries in the accident of the said truck. The truck met with an accident on 15.4.1996. Said Prem Lal, the driver, died in that accident. No compensation was paid to the dependants of said Prem Lal, driver within one month''s time prescribed u/s 4-A of Workmen''s Compensation Act for the payment of the compensation. The insured, i.e., the owner of the truck intimated the insurer about the occurrence of accident on 11.6.1996. When no compensation was paid either by the insured or his insurer, even after the intimation of the fact of the accident by the insured to the insurer the dependants of said Prem Lal, i.e., his mother and a minor sister and a minor brother, filed a petition, u/s 22 of Workmen''s Compensation Act, before the Workmen''s Compensation Commissioner (SDM), Solan. This petition was filed on 19.7.1996. In the petition, it was alleged that the deceased used to be paid Rs. 3,000 a month as salary and in addition to that he was paid daily allowance at the rate of Rs. 80 by his employer, i.e., appellant in F.A.O. (WCA) No. 150 of 1997. Notices were issued to the insured and the insurer, who were impleaded as respondents in the said petition. Insured did not appear and was, therefore, ordered to be proceeded against ex pane. Insurer filed the reply, contesting the claim petition. Various technical objections were raised, which are of no relevance for deciding these appeals, because the decision of the Commissioner qua those objections had not been assailed in either of the two appeals. On merits, the insurance company took the plea that income of the deceased was only Rs. 1,500 a month and nothing was paid to him on account of daily allowance.

3. The Commissioner framed issues and afforded opportunity to claimants as also the insurer to adduce evidence. Claimants examined two witnesses, one doctor who conducted the post-mortem of the body of deceased Prem Lal and the other was the mother of the deceased, one of the claimants. The insurer produced a copy of the prescribed form, on which the intimation was given to it by the insured, as also the affidavit of the insured, per which the income of the deceased was only Rs. 1,500 per month on account of his salary as an employee of the insured. Thereafter, the Workmen''s Compensation Commissioner heard the arguments and posted the case for final order. After the hearing of the arguments, but before the pronouncement of the final order, insured made an application under Order 9, Rule 7 of the CPC for setting aside the order of exparte proceedings. The Commissioner dismissed the application vide order dated 7.12.1996 with the observation that final arguments having already been heard in the claim petition and the matter listed for final order, the said application was not competent.

4. Finally vide order dated 30.12.1996, the Commissioner decided the application and awarded the compensation with interest and also ordered the payment of penalty as aforesaid.

5. The insurer in its appeal has challenged the quantum of compensation. It is alleged that as per intimation received by the insurer from the insured, the

deceased was being paid only a sum of Rs. 1,500 by the insured on account of daily wages and that the finding of the Commissioner that the wages of the deceased were to the tune of Rs. 2,000 a month is contrary to the evidence on record. The insured in his appeal has challenged the order of penalty and also the order directing the payment of interest on the compensation amount by him. He has also challenged the order dated 7.12.1996 whereby his application under Order 9, Rule 7 of the CPC was dismissed.

6. I have heard the learned Counsel for both the appellants as also the learned Counsel for the claimants, impleaded as respondents, in both the appeals.

7. The grievance of the insured is only with respect to the order of Commissioner regarding payment of interest and also the payment of penalty by him. As regards the order for the payment of interest by the insured, as passed by the Commissioner, the law is clear on the point. The Hon''ble Supreme Court in L.R. Ferro Alloys Ltd. Vs. Mahavir Mahto and Another, , has authoritatively ruled that the claim for compensation along with interest has to be made good jointly by insurance company with the insured employer. Therefore, the order of the Commissioner that the interest on the compensation amount is to be paid by the insured is not sustainable.

8. As regards the challenge to the order regarding payment of penalty, I feel that the order is bad on account of the Commissioner having not afforded any opportunity, leave alone a reasonable opportunity, to the insured, i.e., the employer of the deceased, to show cause against the proposed order for the payment of penalty, as per requirement of proviso to Clause (b) of Sub-section (3) of Section 4-A of the Workmen''s Compensation Act, 1923. It is true that the employer was proceeded exparte but that was only in respect of the petition for award of compensation. In respect of the proposed order for payment of penalty, a fresh notice was required to be issued to the employer, especially when he was ex parte in the proceedings for award of compensation, in view of the aforesaid provision of law. The opportunity having not been granted to the employer to show cause against the proposed order for payment of penalty, the order of the Commissioner to that extent can also not be sustained.

9. So far as the appeal filed by the insurance company is concerned, counsel representing the claimants has urged that the appeal is not competent in view of the provision of Section 30 of the Workmen''s Compensation Act, 1923, inasmuch as no substantial question of law has been raised. In reply to this submission of the learned Counsel for the claimants, Mr. K.D. Sood appearing for the insurance company (the appellant in Appeal No. 73 of 1997) has urged that the order of the Commissioner is not based on any evidence and that the testimony of the mother of the deceased about the income is in fact no evidence inasmuch as she did not have nor was she supposed to have any personal knowledge about what the deceased was paid by his employer. He urged that either the employer should have been examined by the claimants or the record maintained by the employer with regard to the payment of salary to his employees engaged in

connection with the operation of the truck should have been got produced before the Commissioner.

10. I do agree with the contention of the learned Counsel for insurance company that the testimony of the mother of the deceased with regard to the income of the deceased cannot be used as legal evidence. Despite the acceptance of this contention, I am not inclined to interfere with the finding of the Commissioner as regard to the amount of income of deceased arrived at by the Commissioner. The Commissioner has held that the income of the deceased was Rs. 3,000 a month. It is true that the insured intimated to the insurance company that the wages of the deceased were to the tune of Rs. 1,500 a month, but it is not clear from the form or the affidavit, which the insured submitted to the insurer, whether the wages were inclusive of the daily allowance. It is a matter of common knowledge that the drivers and conductors employed on trucks are paid a considerable amount of money on account of daily allowance in addition to salary to enable them to meet their daily expenses, in connection with their stay and food, etc., because most of the time they are supposed to remain away from their homes in connection with their job. Normally a driver is paid Rs. 50 per day as the daily allowance. Now if this amount of daily allowance is added to the figure of wages intimated by the insured to the insurer, the income of the insured comes to Rs. 3,000 a month. Consequently, the finding of the Commissioner that income of the deceased was Rs. 3,000 a month is upheld.

11. As a result of the above discussed position, appeal filed by the employer, namely, Ratti Ram Thakur is accepted. The appeal filed by the insurance company, i.e., New India Assurance Co. Ltd. is dismissed. The order of the Workmen''s Compensation Commissioner, Solan is modified in the following terms in view of the acceptance of appeal of the employer.

The amount of compensation together with interest awarded by the Commissioner shall be payable by the insurer to the claimants. The interest on the amount of Rs. 1,64,962 shall be payable from the date when compensation fell due to the claimants to the date of deposit of the aforesaid amount of money with the Commissioner and the interest on the remaining amount of Rs. 54,989 shall be payable from the date the aforesaid amount of money fell due to the date of deposit of said amount of money with the Commissioner. The rate of interest will be the same as mentioned in the order of the Commissioner.

