

(2008) 03 GUJ CK 0035
In the Gujarat High Court
Case No : First Appeal No. 1085 of 2007

New India Assurance Co. Ltd.

APPELLANT

Vs

Pababhai Mayabhai Harijan and Others

RESPONDENT

Date of Decision : 18-03-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 147
Workmens Compensation Act, 1923 — Section 17, 30

Citation : (2009) ACJ 245 : (2008) 118 FLR 293 : (2008) 2 GLR 1091

Hon'ble Judges : H.B. Antani, J

Bench : Single Bench

Advocate : K.V. Gadhia, for the Appellant; Balram D. Jain, for the Respondent

Judgement

H.B. Antani, J.—This appeal, preferred u/s 30 of the Workmen's Compensation Act, 1923, is directed against the judgment and award passed by the Workman Compensation Commissioner, Gandhidham, Kutch in W.C.F. No. 11 of 2006 dated 02.01.07 by which the learned Commissioner has awarded an amount of Rs. 2,24,000/- to the distraught heirs and legal representatives of deceased Dhaniben Pababhai. The learned Commissioner has further awarded interest at 12% from 09.06.98 till the date of payment, Rs. 1,12,000/- being 50% penalty, Rs. 1000/- towards obsequial expenses, and Rs. 5000/- towards costs.

2. Being aggrieved by the aforesaid award passed by the learned Commissioner, the Insurance Company, The New India Assurance Company Limited has preferred the present appeal mainly on the grounds that the Insurance policy produced in the matter makes it abundantly clear that it covers risk of only 40 workers; since the Commissioner has already discussed in the order that 66 persons had filed claim petitions from which only 17 applications were allowed and the rest of the applications were dismissed, the present application would definitely exceed the limit of 40 workmen as provided under the policy, and, therefore, the claimants are not entitled to compensation as prayed for in the claim petition. Learned advocate further submitted that on perusal of the policy it

becomes clear that the Insurance Company is not liable to pay interest and/or penalty imposed on the insured on account of his/their failure to comply with the requirements as laid down under the Act, and, therefore, the award of interest and penalty by the Commissioner on the Insurance Company requires to be quashed and set aside. Mr. Ghadia submitted that as the insurer has specifically excluded any liability for interest or penalty and confined its liability to indemnify the employer only against the amount of compensation ordered to be paid under Workmen's Compensation Act, the appellant cannot be fastened with liability to pay penalty and/or interest. Save and except the above two submissions, no other submissions are canvassed by the learned advocate for the appellant-Insurance Company. Thus, the learned advocate submitted that considering the entire gamut of evidence adduced before the learned Commissioner, the appellant has made out a case for interference in the appeal and the appeal requires to be allowed, and the order passed by the learned Commissioner requires to be quashed and set aside. Learned advocate for the appellant has also placed reliance on the judgment in the case of Devki Fabrics Ltd. v. Raiben w/o Mafatlal Gangaram Patel and Anr. reported in 2006 III CLR 487.

3. As against the aforesaid submissions, Mr. Balram Jain, the learned Counsel representing the claimants submitted that the Commissioner has not committed any error in awarding compensation to the claimants. Learned Commissioner has, after taking into consideration the policy issued by the appellant, awarded the said compensation and no interference is called for in the appeal preferred by the present appellant. He further submitted that the learned Commissioner has also considered the evidence adduced by both the sides and arrived at the finding that the original claimants are required to be paid Rs. 2,24,000/- as they were dependents on deceased Dhaniben who died during the course of employment with the respondents No. 1 and 2. Thus, the learned advocate submitted that no case for interference is made out and the appeal deserves to be dismissed.

4. Learned advocate for the claimants further submitted that the appellant Insurance Company is liable to pay interest to the claimants. In support of this submission, Mr. Jain relied on the following decisions of the Honourable Supreme Court:

1. New India Assurance Co. Ltd. Vs. Shiv Singh and Another,
2. Maghar Singh Vs. Jashwant Singh,
3. L.R. Ferro Alloys Ltd. Vs. Mahavir Mahto and Another,
4. National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another,

5. Heard learned advocate Mr. K.V. Gadhia and Mr. Balram Jain for respondents No. 1 and 2 in detail and at length. None appears for respondents No. 3, though served. I have also perused the judgment rendered by the learned Commissioner and the reasons assigned by the learned Commissioner in awarding

compensation of Rs. 2,24,000/- to the claimants, with penalty, interest and costs. The learned Commissioner has in great detail discussed about the contention which was raised by the appellant Insurance Company that out of 66 workmen, only applications of 17 workmen were allowed and the rest of the applications were dismissed, and since the applications preferred by the present claimants are not according to the policy which prescribes maximum limit of 40, the same cannot be considered. The learned Commissioner has infact discussed the aspect with regard to the dismissal of 49 applications and came to the conclusion that the Insurance Company has not adduced necessary evidence in respect thereof and, therefore, the contention raised by the Insurance Company cannot be accepted. There is no reason to interfere with this finding arrived at by the learned Commissioner and since only 17 applications were allowed, the present application preferred by the legal heirs of deceased Dhaniben, in my considered view, requires to be allowed as per the Insurance Policy, a copy of which is produced along with the appeal for my perusal. The learned Commissioner has considered the evidence on record of the case, the age and income of the deceased and the loss which is likely to be suffered by the claimants while awarding compensation of Rs. 2,24,000/- for death of the deceased workman as a result of the cyclonic storm.

6. The second contention on behalf of the appellant Insurance Company is that it is not liable to pay penalty and interest.

7. In view of the settled legal position that the Insurance Company is not liable to pay penalty, Mr. Jain has not seriously pressed this contention. However, with regard to interest, Mr. Jain submitted that the Insurance Company is liable to pay interest to the claimants in view of the decisions of the Honourable Supreme Court in the case of New India Assurance Co. Ltd. Vs. Shiv Singh and Another, Maghar Singh Vs. Jashwant Singh, , L.R. Ferro Alloys Ltd. Vs. Mahavir Mahto and Another, , and, National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, . Mr. Jain submitted that in view of the ratio laid down by the Honourable Supreme Court, the Insurance Company cannot wriggle out from the liability to pay interest.

8. I have carefully considered the judgments cited by learned advocate Mr. Jain. However, before dealing with the same, it would be beneficial to consider the ratio laid down by the Honourable Supreme Court in the case of New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and Another, The said case arose out of a Workmen's Compensation Policy and the question before the Apex Court was exactly similar to the one in the present case which the Apex Court has recorded in paragraph 2 as under:

2. Whether interest is payable by an insurer while indemnifying the insured the amount of compensation awarded against him under Workmen's Compensation Act, 1923 (for short "the Act") is the question involved in this appeal....

9. After considering the scheme of Workmen's Compensation Act and the

Insurance Act, the Apex Court held as under in paragraphs 14,15,16, 18, 19 and 21:

14. 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, the 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. Section 17 of the Act does not provide for any restriction in the matter of contracting out by the employer vis-a-vis the insurer.

15. The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance Act, an insured is bound to pay premium which is to be calculated in the manner provided for therein. With a view to minimize his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute. Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in law.

16. In Ved Prakash Garg Vs. Premi Devi and others, this Court undoubtedly held that in terms of the contract of insurance entered into by and between the employer and the insurer under the provisions of the Motor Vehicles Act, 1988, which would also apply in a given case to the claim under the provisions of Workmen's Compensation Act, the insurer would also be liable for payment of interest stating:

xxx xxx xxx xxx xxx xxx xxx xxx

18. We are, in this case, not concerned with a case where accident has occurred by use of a motor vehicle in respect whereof the contract of insurance would be governed by the provisions of the Motor Vehicles Act, 1988.

19. As indicated hereinbefore, a contract of insurance is governed by the provisions of the Insurance Act. Unless the said contract is governed by the provisions of a statute, the parties are free to enter into a contract as for their own volition. The Act does not contain a provision like Section 147 of Motor Vehicles Act. Where a statute does not provide for a compulsory insurance or the extent thereof, it will bear repetition to state, the parties are free to choose their own terms of contract. In that view of the matter, contracting out, so far as reimbursement of amount of interest is concerned, in our opinion, is not prohibited by a statute.

xxx xxx xxx xxx xxx xxx xxx xxx

21. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. The appellant is not liable for the interest. However, we make it clear that the employer shall be liable

to pay the amount of interest to the claimant. In the facts and circumstances of the case, there shall be no order as to costs.

10. In the light of the aforesaid ratio laid down by the Apex Court, advertent to the judgments cited by Mr. Jain before me, out of the four judgments, two judgments, viz. New India Assurance Co. Ltd. Vs. Shiv Singh and Another, and National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, pertain to accident occurred by use of a motor vehicle in respect of which the contract of insurance would be governed by the provisions of the Motor Vehicles Act, 1988. The terms and conditions of the insurance policy under Motor Vehicles Act and the coverage of risk in such cases are altogether different from Workmen's Compensation Policy. Therefore, the ratio laid down by the Apex Court in the aforesaid two judgments have no bearing in the present case which pertains to Workmen's Compensation Policy, more particularly in view of paragraph 19 of the judgment of the Apex Court in the case of New India Assurance Co. Ltd. v. Harshadbhai Amrutbhai Modhiya.

11. There is also no dispute with the ratio laid down by the Honourable Supreme Court in the case of Maghar Singh Vs. Jashwant Singh, . The said litigation was between two private individuals, a farm labour and his employer, and the Apex Court held that the employer is liable to pay interest. In the present case, the question involved is whether the Insurance Company would be liable to pay interest or not. Therefore, the ratio laid down in the said judgment is of no avail to the learned advocate.

12. As regards the judgment in the case of L.R. Ferro Alloys Ltd. Vs. Mahavir Mahto and Another, the Apex Court held that the claim for compensation along with interest will have to be made good jointly by the insurance company with the insured employer. In the said case, perhaps, the terms of the contract of insurance did not exclude payment of interest. However, in the present case, the insurer has specifically excluded any liability for interest or penalty under the Workmen's Compensation Act and confined its liability to indemnify the employer only against the amount of compensation ordered to be paid under Workmen's Compensation Act. In view of the specific exclusion, this judgment is also of no avail to the learned advocate.

13. In the instant case, the policy specifically provides that the Insurance Company is not liable to pay interest and/or penalty imposed on the insured on account of his/their failure to comply with the requirements as laid down under the Act. Therefore, in the light of the ratio laid down by the Apex Court in the case of New India Assurance CO. LTD. v. Harshadbhai Amrutbhai Modhiya [supra], the appellant Insurance Company cannot be fastened with the liability to pay penalty and interest.

14. In view of the above discussions, the appeal is partly allowed. The award of compensation of Rs. 2,24,000/- in favour of the claimants is hereby allowed. However, the award of interest at 12% from 09.06.98 till the date of payment

and Rs. 1,12,000/- being 50% penalty, qua the appellant, is hereby quashed and set aside. However, as held by the Apex Court in paragraph 21 of the judgment in the case of New India Assurance CO. LTD. v. Harshadbhai Amrutbhai Modhiya [supra], though the learned Commissioner has passed the award only against the Insurance Company and has not passed any award against the respondents No. 2 and 3 herein and the same is not challenged by the claimants, considering the fact that the Act is a social welfare legislation, it is held that the employer shall be liable to pay the amount of interest to the claimants. The rest of the award of Rs. 1000/- towards obsequial expenses and Rs. 5000/- towards costs is not disturbed. The award passed by the learned Commissioner is modified to the extent indicated hereinabove.

15. Out of the amount deposited by the appellant Insurance Company, the learned Commissioner is directed to forthwith refund interest and penalty to the appellant by accounts payee cheque. The balance amount is directed to be disbursed to the original claimants by accounts payee cheque on proper verification.

16. The appeal is partly allowed. No order as to costs.