
(2009) 10 GAU CK 0005
In the Gauhati High Court
Case No : Regular First Appeal 4 of 2008

New India Assurance Co. Ltd.

APPELLANT

Vs

Shri Thawmlien and Another

RESPONDENT

Date of Decision : 22-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Motor Vehicles Act, 1988 — Section 12, 147, 147(1)
Workmens Compensation Act, 1923 — Section 10, 11(1), 3, 4, 4A

Citation : (2009) 2 GLD 779 : (2011) 1 GLR 394

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

Bench : Single Bench

Advocate : M. Guite, for the Appellant; S.N. Meitei, Respondent No. 1 and Joel J. Denga, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Musahary, J.—Heard Mr. M. Guite, learned Counsel for the appellant. Also heard Mr. S.N. Meitei, learned Counsel on behalf of respondent No. 1 and Mr. Joel J. Denga, learned Counsel on behalf of respondent No. 2.

2. This appeal is directed against judgment and award dated 19.12.2007 passed by the learned Commissioner, Workmen's Compensation, Aizawl, in W.C. Case No. 6 of 2006 awarding a sum of Rs. 3,92,000/- (Rupees three lakhs ninety two thousand) only, in favour of the claimant and against respondent insurer (respondent No. 1) to be paid within one month and with a further direction to pay a penal interest at the rate of 12 per cent per annum from the date of payment fell due till realisation of the amount.

3. Adverting to the short facts : One Lalramzauva, aged about 15 years, died in a motor accident on 1.4.2006 at Seiling in Aizawl District while travelling in a truck bearing Registration No. MZ-01A-3144 which fell down in a gorge. The deceased's father Sri Thawmlien, through his attorney Vanmawia, filed a petition claiming Rs. 4,00,000/- as compensation pleading that his son was employed as

Handyman at a monthly salary of Rs. 3500/- by one Sri R. Vanlalruata, owner of the truck and he died during the course of his employment. It was registered as W.C. Case No. 6 of 2006. Both the employer as Opposite Party No. 1 and insurer as Opposite Party No. 2 filed written statements and contested the case. The learned Commissioner, on consideration of the evidence and materials on record and after hearing the parties, passed the impugned Judgment and Award as stated above.

4. The pleas taken by the employer before the learned Commissioner are that he employed the deceased workman as Handyman-cum-Mechanic w.e.f. 1.2.2005 and paid Rs. 3500/- p.m. as his salary but subsequently, he decided to terminate him due to his unsatisfactory performance. However, on request of the deceased, he was retained at a reduced monthly salary of Rs. 1000/- only since 1.4.2005 till the date of accident on 1.4.2006. The insurer, besides denying the liability, demanded dismissal of the petition on the grounds that the claim petition was not maintainable, there was no cause of action, the attorney has no locus-standi to file the petition, sufficient Court Fee was not paid, notice u/s 10 of the Workmen's Compensation Act, 1923 (hereinafter referred to as W.C. Act) was not served upon the employer, the insured violated the terms and conditions of the insurance contract for having failed to properly maintain his vehicle, the deceased did not die during the course of employment and he was not paid Rs. 3500/- p.m. as his monthly salary.

Although no issue was framed, the learned Commissioner considered the following points:

- (a) Whether the deceased was a workman within the meaning of the Act;
- (b) Whether the accident arose out of and in the course of deceased's employment;
- (c) Whether the amount of compensation claimed is due, or any part of that amount;
- (d) Whether the Opposite Party is liable to pay such compensation as is due.

The learned Commissioner found and held that the deceased was a workman within the meaning of the workmen's Compensation Act, 1923, inasmuch as he was a Handyman-cum-Mechanic at the time of this death and he died while travelling in the accident truck as a Handyman during and in the course of his employment. On consideration of Income Certificate (Exhibit C-13/D-13) and evidence of the employer, the learned Commissioner came to a conclusion that "the reduction of wages of the deceased was interim and not final and the said interim arrangement was made not due to the fault of the deceased but due to the fact that there has been a momentary decrease in the business of the owner and the employment of the deceased was a continuous one without any change in the terms of the employment and in any case, the other workmen in his workshop were continued to be paid the same amount of salary whether there is

work or not." The learned Commissioner, therefore, accepted the claim of monthly salary/wage of the deceased workman as Rs. 3500/- for the purpose of calculation of the amount of compensation and this is how the award of Rs. 3,92,000/- as compensation was passed in favour of the claimant making the insurer appellant liable to pay within one month from the pronouncement of the judgment and Award failing which a penal interest at the rate of 12 per cent per annum would be accrued on the said awarded amount from the date the payment falls due till the date of realisation of the said amount.

5. In this appeal, the insurer appellant has raised serious objection to acceptance of the deceased claimant's monthly salary/wage as Rs. 3500/- and calculating the compensation award on the basis of the same and also raised objection to the question of interest at the rate of 12 per cent per annum. The employer/respondent No. 2 has filed written objection to the memo of appeal with cross objection to the decree under Order XLI Rule 22 of the Civil Procedure Code, 1908, denying his liability to pay penalty for the delay in the payment of interest amount.

6. For disposal of this appeal, this Court formulated the following substantial questions of law:

(i) Whether the oral evidence rendered by the employer in regard to the income of the deceased workman can be treated as the evidence for awarding the compensation;

(ii) Whether the learned Commissioner violated the provisions of Section 5 of the Workmen's Compensation Act, 1923, while calculating the wages of the deceased workman;

(iii) Whether the learned Commissioner violated the provisions of Section 4 of W.C. Act, 1923, while assessing the amount of compensation payable to the applicant/respondent No. 1.

(iv) Whether or not the policy of insurance in the instant case, can be issued to meet the statutory requirements of the Motor Vehicle Act, 1988, and if so, whether it will cover and indemnify the employer/owner of the vehicle in respect of the interest on the awarded amount.

7. Mr. Guite, learned Counsel for the appellant, first of all, submits that the learned Commissioner calculated the compensation in gross violation of the provisions u/s 5(a) of W.C Act inasmuch as he has erroneously accepted the monthly wage/salary of the deceased as Rs. 3500/- discarding the oral evidence of the employer that the deceased was paid Rs. 1000/- only w.e.f 1.4.2005 till his death on 1.4.2006. Secondly, Mr. Guite submits that in death case, the amount of compensation should be an amount equal to 50 per cent of the monthly wages of the deceased workmen multiplied by the relevant factor. He urges that 50 per cent of the monthly salary of the deceased would be Rs. 500/- and the age of the deceased workman being 19 plus, the relevant multiplier

would be 224 and thus, the amount of compensation awardable is Rs. 1,12,000/- only and not Rs. 3,92,000/-. The amount of compensation as awarded by the learned Commissioner is violative of provision u/s 4 of W.C. Act and as such, the impugned judgment and Award is liable to be set aside. Thirdly, Mr. Guite submits that the penal interest at the rate of 12 per cent per annum against the appellant is unauthorised and illegal inasmuch as the insurance in respect of workman is a contractual liability and is not a statutory liability. The insurer appellant does not assume any liability to indemnify the insured employer as regards the interest. The question of imposing liability on the insurer appellant to pay interest does not legally arise. According to Mr. Guite, the liability of the insurer appellant is in respect of principal award alone and the insured employer would be liable to pay the interest to the extent it is payable. The terms and conditions of the policy of the W.C. Act clearly show that the insurance company did not assume any liability regarding any interest. He refers to the relevant portion of the terms and conditions which reads-"....This insurance does not cover any interest and/or penalty which may be imposed on a insured on account of failure to comply with the said Workmen Compensation Act, 1923, as amended...."

In support of his submissions, Mr. Guite, places the decisions rendered by the Apex Court in P.J. Narayan Vs. Union of India (UOI) and Others, , New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and Another, and also decision of this Court in National Insurance Co. Ltd. Vs. Kanai Dasgupta and Others,

8. Mr. Joel J. Denga, learned Counsel for the employer, respondent No. 2, submits that the nature and extent of liability in the insurance policy issued by the appellant company is governed by the provisions u/s 147 of Motor Vehicle Act, 1988, and as the policy was issued squarely to meet the said mandatory/statutory requirements, the law would not permit the learned Commissioner to reduce the liability of the appellant insurance company towards compensation including the interest to a third party arising out of a motor accident as specified in Section 147 of M.V. Act, 1988. He also submits that as per the scheme of the said Act, the statutory liability is imposed on the insurer to insure the owner of the vehicle against all liabilities arising under the W.C. Act for which statutory coverage is required u/s 147 of the said Act including the payment of interest on the awarded amount. As the accident occurred by the use of a motor vehicle in respect of whereof the contract of the insurance would be governed by the provisions of the M.V. Act, 1988, the appellant insurance company is bound to pay the entire compensation amount with interest and the learned Commissioner erred in fixing the liability for the interest with the employer/respondent No. 2.

In order to establish his above submissions, Mr. Denga, would rely upon the decisions rendered by the Apex Court in Ved Prakash Garg Vs. Premi Devi and others, and also a decision of Delhi High Court in New India Assurance Co. Ltd. v. Smt. Momina Khatun and Ors. in FAO No. 268/2004.

9. Mr. S.N. Meitei, learned Counsel for the claimant/respondent No. 1, would focus his submission on the monthly salary/wage of the deceased workman and correct calculation of compensation amount on the basis thereof. There is no justification in fixing the monthly wage of the deceased workman at Rs. 1000/- for it does not conform to the provisions made under the Minimum Wages Act, 1948 (hereinafter referred to as the M.W. Act only). He would refer to Government notification dated 15.5.2002 fixing the minimum rates of wages for the skilled, semi-skilled and unskilled workers mentioned in the scheduled employment in the Government Departments, semi-Government Departments, private undertakings, etc.. The minimum rates of wages for semi-skilled and unskilled supervisory which includes helper in a truck, has been fixed at Rs. 94/- per day. The said notification provides that the workers other than the clerks, peons, etc., working in the office, will enjoy the same paid holidays in addition to Sunday benefit as enjoyed by the workers provided they work continuously for 6 days in a week. The employer may fix any norm he thinks fit specifying the quantity of work which must be turned out by the workman during the day, but, if the workman does not turn out the work in conformity with such norm, the employer cannot pay him anything less than the minimum wage. If the norm fixed by the employer is reasonable and the workman does not turn out work according to such norm, disciplinary action may be taken against the workman and in a given case, he may even be liable to be thrown out of employment. But he cannot be paid less than the minimum wage unless, of course, the minimum wage fixed by the notification under M.W. Act, is given in relation with the quantity of work to be turned out by the workman. This submission, according to Mr. Meitei, is backed by a decision of the Apex Court in Sanjit Roy Vs. State of Rajasthan, and Ram Kumar Misra Vs. State of Bihar and Others, . Further Mr. Meitei, submits that even otherwise too, the evidence on record clearly indicates that the payment of Rs. 1000/- p.m. was an interim arrangement and initially the deceased was employed as Handyman-cum-Mechanic at a monthly salary of Rs. 3500/- ,and his salary was reduced to Rs. 1000/- p.m. as because there was a decrease in the volume of work in the workshop even though there was no break/discontinuation of service at any point of time by the deceased workman. The employer was intending to increase the wage of the deceased workman as soon as the work would increase in the workshop. Therefore, under the circumstances, the salary of the deceased workman cannot be accepted as Rs. 1000/- p.m. as it violates Section 12 of the M.V. Act, which provides : ".... payment of minimum rate of wages (1) where in respect of any scheduled employment, the notification u/s 5 is in force, the employer shall pay to every employment engaged in the scheduled employment under him wages at a rate less than the minimum rate of wages fixed by such notification for that class of employees in that employment without any deduction except as may be authorised within such time and to such conditions as may be prescribed...." Hence, according to Mr. Meitei, the deceased will have to be considered as drawing Rs. 3500/- p.m. from the date of his appointment till his death without any reduction and as such, there is no perversity in the impugned conclusion of the learned Commissioner that the

deceased was earning Rs. 3500/- p.m. as wages.

10. It may be noted here that the aforesaid Government notification on the minimum rate of wages was not brought on record or proved before the learned Commissioner and as such, a serious objection has been raised by the learned Counsel for the appellant on the acceptability of the same for the purpose of calculating the minimum wage of the deceased workman. In my considered view, the said objection is sustainable inasmuch as the learned counsel for the employer has produced only a photocopy of the notification without producing copy of any gazette notification for acceptance of the same by this Court as a public document upon which the Court can take judicial notice and act upon for extending proper relief. For this reason, I would refrain from making any consideration in regard to entitlement to rate of the minimum wage by the deceased workman. At the same time, I would bear in mind the settled position that a workman cannot be paid less than the minimum wage under M.W. Act.

11. To my mind, under the M.W. Act, there is no bar to payment of wage of workman more than the minimum wage fixed by the Government notification under the said Act. As per the evidence of the employer himself, he initially paid Rs. 3500/- p.m. w.e.f. 1.2.2005 to the deceased workman who he engaged as a Handyman-cum-Mechanic which falls under the semi-skilled category of the said Act. If it is accepted that as per the Government notification, a semi-skilled workman is entitled to a minimum wage of Rs. 94/- per day, the deceased workman would have earned $(94 \times 30) = \text{Rs. } 2820/-$ p.m. There would have been a difference of $(3500-2820) = \text{Rs. } 680/-$. This means the employer was paying little more than the minimum wage. His further evidence is that the deceased workman's work was not found satisfactory and as such, he reduced the wage to Rs. 1000/- which is far less than the minimum wage with a difference $(\text{Rs. } 2820-1000) = \text{Rs. } 1820/-$. Is an amount of Rs. 1000/- p.m. enough to meet the bare minimum needs for subsistence of a workman? The employer must be knowing that it was not justified and hence, in his evidence, termed the said reduction in wage as an "interim arrangement." He stated in his evidence that he reduced the wage as because there is a decrease in the volume of works in his workshop. The evidence is self-contradictory and inconsistent. If it is accepted that there was a decrease of work in the workshop, the allegation of the employer about unsatisfactory works of the deceased workman would fall flat. Then he would have no ground to reduce the wage by way of "interim arrangement" or otherwise. There was no denial of the fact that the employer was initially paying Rs. 3500/-p.m. to the deceased workman knowing fully well that he had no experience. The same could be found in the cross-examination by the claimant. The relevant portion is quoted below:

...it is a fact that I did not ask about the experience of the deceased Lalranzauva as I knew at the time of his employment that he will be only learning the work. I have other experienced worker/mechanic from Guwahati.

Despite the knowledge that he will be only learning work in my workshop, I

initially pay him Rs. 3500/-

12. Besides it should not escape notice of the Court that the employer made no attempt to prove his claim that the service of the deceased workman was unsatisfactory and for that reason, he reduced the wage of the deceased workman from Rs. 3500/- to Rs. 1000/- p.m. Burden is cast on the employer to prove the said claim/allegation by adducing evidence of some co-workers. This was not done although, according to his own evidence, the employer had other workers engaged in the workshop and he could have examined at least one of them to establish his case.

13. In regard to the claim for "decrease" in the volume of work necessitating reduction in wage of the deceased workman, the employer preferred not to adduce any evidence by examining any staff of his establishment. The employer also preferred not to produce the payment register to satisfy the learned Commissioner that he has been paying the deceased worker at the reduced rate of Rs. 1000/- p.m. from 1.4.2005. There is a total failure on the part of the employer in discharging his burden of proof. This being the position, the Court cannot take a view or to hold that the workman concerned was paid at the rate of Rs. 1000/- p.m. from 1.4.2005 till his death, more particularly, on the face of a clear evidence of the employer himself that he did issue Exhibit C-13/D-3 admitting payment of wage at the rate of Rs. 3500/- p.m. to the deceased workman. The Court, under such circumstances, has to accept and hold that the deceased workman was paid at the rate of Rs. 3500/- p.m. from 1.2.2005 till his death on 1.4.2006 and the calculation of compensation must be done accordingly. The learned Commissioner has exactly and rightly done so and awarded the compensation which calls for no modification/alteration at all.

14. As regards the liability to pay the interest and penalty, different views were taken by different High Courts of the country. In Ved Prakash Garg's case (supra), the Apex Court examined a very important question as to whether the phrase "liability arising under the W.C. Act", as employed in the proviso to Sub-section (1) of Section 147 of the Motor Vehicle Act, 1988, and as found under proviso to Clause (i) of Sub-section (1) of Section 11 of the Insurance Policy would cover only the principal amount of compensation as computed by the workmen's Commissioner or whether it can also include interest and penalty as imposed on the insured employer under contingencies contemplated by Section 4A(3)(a) and (b) of the Workmen's Compensation Act. After a detailed examination of provisions under the M.V. Act, particularly, Section 147 and the scheme under Sections 3 and 4-A of the Workmen's Compensation Act, it was held therein that the insurance company would be liable to make good not only the principal amount of compensation payable by insured employer but also interest thereon if ordered by the Commissioner to be paid by the insured employer. It was further held that they would not be liable to pay the penalty imposed u/s 4-A(3)(b). One may like to read from paragraph 19 which is quoted below:

19. As a result of the aforesaid decision, it must be held that the question posed for our consideration must be answered partly in the affirmative and partly in the negative. In other words, the Insurance Company will be liable to meet the claim for compensation alongwith the interest as imposed on the insured employer by the Workmen's Commissioner under the Compensation Act on the conjoined operation of Section 3 and 4-A Sub-section (3)(a) of the Compensation Act. So far as additional amount of compensation by way of penalty imposed on the employer by the Workmen's Commissioner u/s 4-A(3)(b) is concerned, however, the Insurance Company would not remain liable to reimburse the said claim and it would be the liability of the insured employer alone.

15. In another case of L.R. Ferro Alloys Ltd. Vs. Mahavir Mahto and Another, while reaffirming the decision in Garg's case (supra), the Apex Court held that the insurance company is liable to reimburse only the compensation with interest thereon, if any, and not the penalty imposed on insured employer for default of payment of amount within one month. From the aforesaid judgments, it is to be noted that payment of interest and penalty are two distinct liabilities under the Act.

16. In P.J. Narayan's case (supra), it is held that there is no liability on the insurance company for payment of interest on the amount of compensation. The statutory liability under the Workmen's Compensation Act, 1923, is, rather on the employer as because insurance is a matter of contract between the insurance company and the insured and it is always open to the insurance company to refuse to insure. It was, therefore, further held that in absence of any statute, the insurance company cannot be forced by Courts to take liabilities which they do not want to own. The aforesaid law has been affirmed by the Apex Court in a judgment rendered by a two-Judge Bench in Harshad Bhai's case (supra). Hon"ble Mr. Justice S.B. Sinha held that employer can, vis-a-vis the insurer, contract out any matter not statutorily mandatory, such as, payment of interest or penalty. Concurring with the same, Hon"ble Mr. Justice P.K. Balasubramanyam, observed in Paragraph-24 as follows:

24...It is not brought to our notice that there is no other law enacted which stands in the way of an insurance company and the insured entertaining into a contract confining the obligation of the insurance company to indemnify to a particular head or to a particular amount when it relates to a claim for compensation to a third party arising under the Workmen's Compensation Act. In this situation, the obligation of the insurance company clearly stands limited and the relevant proviso providing for exclusion of liability for interest or penalty has to be given effect to. Unlike the scheme of the Motor Vehicles Act, the Workmen's Compensation Act does not confer a right on the claimant for compensation under that Act to claim the payment of compensation in its entirety from the insurer himself. The entitlement of the claimant under the Workmen's Compensation Act 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. Construing the contract involved here it is clear that 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 the Workmen's Compensation Act. The High Court, was, therefore, not correct in holding that the insurance company is also liable to pay the interest on the amount of compensation awarded by the Commissioner. The workman has to recover it from the employer.

In the present case, there is nothing on record or at least brought to my notice that there is an agreement/contract executed or signed between the appellant insurance company and the insured employer making the former (insurer) liable to pay/bear the interest on compensation amount awarded by the Commissioner and on default, to pay the said interest to pay/bear the penalty for the latter (insured). I am afraid, in absence of such agreement between the insurer and the insured containing such terms and conditions, the learned Commissioner or for that matter, this Court, would be in a position to pass an order directing the appellant insurer to pay the interest and the penalty for the insured employer. I, therefore, hold that there is no infirmity in the judgment and award passed by the learned Commissioner in directing the owner of the vehicle (employer) i.e. Respondent No. 2, to pay the interest on the awarded compensation amount and the penalty for default in payment of the said awarded amount.

17. The substantial questions of law, thus, stand answered. The discussions, made as above, in the light of the decisions and law laid down by the Apex Court, lead me to hold that this appeal is lacking in merit and thus liable to be dismissed. Accordingly, the appeal stands dismissed. The appellant shall pay an amount of Rs. 3,000/- (Rupees Three Thousand) only as cost to the respondent claimant.

18. LCRs be remitted forthwith.