

(2005) 05 AHC CK 0310
In the Allahabad High Court

New India Assurance Company Limited	APPELLANT
Vs	
Smt. Sughra and Others	RESPONDENT

Date of Decision : 03-05-2005

Acts Referred:

Workmens Compensation Act, 1923 — Section 2(1)(n), 4A3

Citation : (2006) 4 ACC 642

Hon'ble Judges : R.P. Yadav, J;Pradeep Kant, J

Bench : Division Bench

Judgement

Pradeep Kant, J.—Heard the learned Counsel for the appellant Mr. M.S. Kotwal and Mr. Deepak Kumar Agarwal for the respondents.

2. Smt. Islama, widow of the deceased Wahid Ali claimed for award of compensation on the death of her husband under the provisions of Workmen's Compensation Act, 1993. Smt. Islama died thereafter.

3. The facts which have given rise to the present appeal are that Wahid Ali (since deceased) was working as a driver on the truck of Praveen Chandra Rastogi bearing registration No. USH 6621 and was 40 years of age at the time of the accident. Since the death had occurred during the course of employment on 26/27.12.1994, when the deceased was carrying the truck with goods loaded thereon, an F.I.R. was lodged on 27.12.1994 at 6.10 in the morning. It was claimed that the deceased was getting a salary of Rs. 2000 per month and that his family consisted of his wife Islama, one son Master Shahid Ali aged about 9 years, two daughters, Km. Shamidun aged about 4 years and Km. Yasmin aged about 2 years and his mother Smt. Sughra, aged about 70 years. The said vehicle was insured with National Insurance Company Limited, which insurance was valid from 3.11.1994 to 2.11.1995. Despite notice for paying compensation being sent, compensation was not paid and, therefore, a claim was filed u/s 3 of the Act claiming compensation to the tune of Rs. 1,02,000 plus interest.

4. The matter was contested by the National Insurance Company Limited (the

present appellant), who filed a written statement. In the written statement, it was pleaded that the claimants have not filed any evidence in support of their claim and, therefore, in the absence of such evidence being filed, it would not be possible to make a reply to the averments made in the application. The plea of defective driving licence and that the claim was barred by limitation was also taken.

5. The owner Praveen Chandra Rastogi filed a written statement on 20.5.2000 and stated that the deceased Wahid Ali was getting the salary of Rs. 1,000 per month and that he was working as driver and was using his vehicle on the date when the accident had taken place. He also stated that the accident had occurred during subsistence of the insurance of the vehicle and that it was fully covered under the insurance policy and, therefore, he stated that if any liability is fastened upon him, the said liability has to be borne by the Insurance Company. Since Smt. Islama died on 22.12.2000, the matter was pursued through heirs.

6. Oral evidence was led in which Smt. Sughra, claimant-respondent No. 1 was examined on behalf of the claimants and Praveen Chandra Rastogi examined himself on behalf of the respondent to the claim. Praveen Chandra Rastogi, who was employer of the deceased Wahid Ali, while in witness box stated that the deceased was getting a salary of Rs. One thousand per month and Rs. 35 per day as Khuraki (diet expenses).

7. The Workmen Compensation Commissioner on considering the evidence on record, found that the age of the deceased was 40 years at the time of death and that the compensation has to be awarded by taking into consideration the salary of Rs. one thousand per month and the amount of Khuraki (Rs. 35 per day) was also to be added towards the wages/salary. The plea of the appellant that the amount of Khuraki i.e. Rs. 35 per day could not be included in the wages was not accepted.

8. The Commissioner, therefore, assessed the compensation to the tune of Rs. 1,84,170 and directed that the claimants would be entitled for the interest as per the provisions of Section 4A, Sub-Clause (3) of the Workmen's Compensation Act, 1923, from the date of the filing of the application at the then prevalent rate of interest. A further direction was issued that out of the amount so awarded, a sum of Rs. 84,170 would be given to Smt. Sughra for looking after the children of the deceased Wahid Ali, which payment shall be made through cheque and the rest of the amount of Rs. one lac would be distributed equally amongst his children and would be placed in FDRs for the period till they attain majority. After they attain majority, the amount was to be given to them by the permission of the Court. This order was passed on 9.10.2003.

9. It appears that the claimants noticed some discrepancy in the operative portion of the award and, therefore, immediately thereafter on 16.10.2003 moved an application for modifying the award with the prayer that the rate of interest has been not been prescribed in the award, nor it has been made clear,

as to who would be entitled to the interest. A prayer was, thus, made that the amount of interest be directed to be paid to Smt. Sughra so that the same may be utilized for the welfare of children. This application admittedly has been decided/disposed of by the Commissioner on 21.10.2003, without issuing any notice to the Insurance Company or to the owner of the vehicle nor they were otherwise given any opportunity to appear and as the appellant did not have any notice of the said application or the proceedings, therefore, the appellant did not appear on the date fixed.

10. The Commissioner, while dealing with the aforesaid application, observed that so far as the rate of interest is concerned, that has been awarded in accordance with statutory provisions of Section 4A, Sub-clause (3), which says interest has to be awarded at the rate of 12% and, therefore, he clarified the award by saying that interest is being awarded @ 12% p.a. from the date of filing of the application till the date it is actually paid. The Commissioner directed the said amount to be paid to Smt. Sughra, as prayed by the claimants themselves.

11. Mr. M.S. Kotwal, learned Counsel for the appellant, while challenging the impugned order, has raised following three questions:

(i) Wages would not include the amount of Khuraki (diet expenses) per day i.e. Rs. 35 per day and, therefore, the compensation awarded is excessive. According to him, the compensation should have been calculated by taking the wages as Rs. 1,000 per month;

(ii) The order dated 21.10.2003, which modifies the terms of the original award passed on 9.10.1993, having been passed without affording any opportunity to the appellant and without issuing any notice to the appellant, is void and nullity and in any case deserves to be set aside and the appellant cannot be directed to comply with the same; and

(iii) There being no contract between the Insurance Company and the owner of the truck for paying interest awarded on any amount of compensation, the liability of payment of interest could not have been fastened upon the Insurance Company, irrespective of the quantum of compensation, which otherwise would have determined.

For determining as to whether "wages" would include the diet expenses, which were being given to the deceased per day i.e. Rs. 35 or not, reference has to be made to the definition of wages given in Section 2(1)(m) of the Act. "Wages", in the said section has been defined as under-

(m) "wages" includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by any nature of his employment.

12. The definition of the wages as given in the aforesaid section, says that wages would include any privilege or benefit which is capable of being estimated in terms of money, other than a travelling allowance or the value of any traveling concession or a contribution paid by the employer of a workman towards pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by any nature of his employment, which means that the definition is illustrative and not exhaustive.

13. In a case where a term has been defined with the inclusion clause, it means that all other terms of like nature would fall within the definition and the wages would include all such privilege or benefit mentioned therein, which can be estimated in terms of money. It, thus, would mean that definition of "wages" given under the Act cannot be restricted to the privilege or benefit which has been mentioned therein but this provision would bring in its ambit all other benefits and privileges, which otherwise would fall within the definition of "wages", if they are capable of being estimated in terms of money.

14. The amount of diet allowance/diet expenses would fall in the definition of wages, firstly because there is no restriction given as such in the definition of wages under the Act and secondly because it would amount to the benefit or privilege to the employee for having food per day, capable of being estimated in terms of money, therefore, also it would stand included in the definition of wages.

15. In the case of *Oriental Insurance Co. Ltd. v. Shyamsundar Rohldas and Ors.* II (2000) ACC 599 : 2000 3 TAC 290 (Orissa), similar question arose with respect to daily allowance paid towards diet. The learned Single Judge of the High Court, after taking into consideration, the definition of wages given in the Act and also following the judgment of the Supreme Court in the case of *Divisional Manager, Oriental Insurance Company Ltd. v. Girdwal Transport Corporation and Ors.* 1994 LAB I.C. 2655, held that daily allowance of Rs. 25 towards food was to be considered as part of the wages. In the case of *Luizina Cyril Vaz v. Caltex(India) Limited*, reported in 1973 27 FLR 321, the Bombay High Court held that the word wages or remuneration or earning would include all that a workman gets as incidental to his employment and that Food Allowance, Overseas Allowance, Devaluation Supplement and overtime wages paid to a seaman, who is workman as defined in Section 2(1)(n) of the Workmen's Compensation Act, 1923, in addition to his basic wages, are privileges or benefits which are capable of being estimated in money and are, therefore, wages within the meaning of Section 2(1)(m) of the Act. In the instant case also, the amount of daily allowance given for the purpose of food or which may be termed as diet expenses per day is a privilege and benefit which can be estimated in terms of money and, therefore, it would be included in the definition of "wages" as per the definition of wages given in the Act. The next question is regarding the authority of the Workmen's Compensation Commissioner to modify the award without issuing notice and without giving any opportunity to the Insurance Company. The learned Counsel for the claimant-respondents has

fairly admitted that the Commissioner ought to have issued notice and given opportunity to the appellant before passing any order on a subsequent date but he has submitted that the subsequent order dated 21.10.2003 does not change the terms of the original award at all passed on 9.10.2003 and, thus, no prejudice having been caused to the appellant, there would be little justification for the Court to interfere with the said order. Reliance is being placed on the case of *United India Insurance Co. Ltd. v. Workmen's Compensation Commissioner/ Regional Assistant Labour Commissioner and Others* 1996 (2) T.A.C. 43 (Allahabad), in support of his submission that the Commissioner was fully empowered to modify the order even in the absence of any specific provision with a view to dispense justice between the parties. Elaborating the aforesaid argument, he has submitted that under the original award interest has already been awarded and the award specifically says that the same has been awarded in terms of Section 4A, Sub-clause (3), which itself means that the interest has to be paid at the minimum rate of 12% per annum and that if the award said that the interest has to be paid as was prevalent on the relevant date, it cannot be taken to mean any lesser rate of interest than the rate of 12% per annum. This being the position, the order passed subsequently by the Commissioner does not change either the text, context or the effect of the award in respect of the award of interest. Section 4A Sub-clause (3) of the Act says that where any employer is in default in paying the compensation due under the Act within one month from the date it fell due, the Commissioner shall direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due. A bare reading of the aforesaid provision makes it clear that the statute provide a minimum rate of interest i.e. 12% and if the interest has to be awarded, it has to be 12% and not less than that. It further gives a discretion to the Commissioner to impose and levy interest at a higher rate than 12% but not below that but this rate shall not be more than the maximum of prevalent lending rate at the relevant time, i.e. lending rate of any scheduled bank as might have been specified by the Central Government by notification in the Official Gazette, on the amount due. This again would mean that if the Commissioner in his discretion finds that it is a case where interest at a higher rate than 12% has to be awarded, he can do so but only in accordance with the conditions imposed in the provision itself i.e. not to award interest above the lending rates of any scheduled bank as might have been specified by the Central Government by notification in the Official Gazette. This provision does not leave any ambiguity with respect to the rate of interest to be awarded and, therefore, it can safely be concluded that even under the original award dated 9.10.2003, the interest liability could not have been less than 12% per annum and, therefore, if the Commissioner, by the later order, has brought this fact on record, no prejudice can be said to have been caused to the appellant. The subsequent order passed by the Commissioner only clarifies the earlier order but in no way changes its

context or complexion. So far the payment of amount of interest to Smt. Sughra Begum is concerned, there appears to be no dispute amongst the claimants and, therefore, also it should not be the concern of the appellant as to whom the amount is to be paid. Before concluding our observations on this point, we would like to observe that the Commissioner ought not to have modified the award, which in fact is only the clarification of the award on the application of the claimants without affording any opportunity to the appellant but since we have found that the clarification or modification made is nothing but a recital of the provisions of the relevant section, which otherwise was also the intention of the original award, we do not find it a fit case for quashing the same or setting aside the same. Last submission of the learned Counsel for the appellant that the interest liability could not be realised from the appellant was though not raised before the Commissioner but we give the following reasons for rejecting the said plea also. In the application for paying compensation moved u/s 3 of the Act, the claimants have claimed the amount of compensation along with interest. The owner of the vehicle, namely, respondent No. 5, Praveen Chandra Rastogi, has admitted in his written statement and also in his oral statement that the vehicle was duly insured on the date of accident and has also pleaded that the entire liability whichever is fastened upon the owner, shall have to be met by the Insurance Company. The Insurance Company in its written statement has said that since relevant documents have not been filed, therefore, it was not possible for the Insurance Company to answer them specifically but has denied its liability. On the question of interest no evidence was also led by either of the parties and it appears that since the liability of compensation was fixed upon the owner, therefore, in accordance with statutory provision of Section 4A, Sub-clause (3), the liability of interest has also been fastened upon the owner and the Insurance Company has been made liable for payment of the same. Learned Counsel for the appellant, Insurance Company, relying upon the Judgment in Writ Petition No. 341 of 2003: P.J. Narayan v. Union of India and Ors. IV (2005) ACC 563 (SC), decided on 8.8.2003 by the Apex Court, submitted that there was no contract between the Insurance Company and owner of the truck for indemnifying the liability of interest also apart from the compensation which was to be paid. Judgment of the Apex Court in this case says as under:

There is no statutory liability on the Insurance Company. The statutory liability under the Workmen's Compensation Act is on the employer. An insurance is a matter of contract between the Insurance Company and the insured it is always open to the Insurance Company to refuse to insure similarly they are entitled to provide by contract that they will not take liability for interest. In the absence of any statute to that effect Insurance Company cannot be forced by Courts to take on liabilities which they do not want to take on. The writ petition is dismissed. No order to costs.

16. The argument of the learned Counsel for the appellant is that since in the insurance policy the Insurance Company has not taken the liability of payment of interest on the compensation which could have been awarded under the

Workmen's Compensation Act, the Commissioner was not competent to impose the liability of payment of interest also on the Insurance Company, the payment of compensation not being a statutory liability on the Insurance Company under the Act.

17. The statutory liability of payment of compensation under the Workmen's Compensation Act is on the employer. When the Insurance Company enters into a contract with the employer for indemnifying the liability with respect to the compensation awarded, the binding contract between the two comes into effect. Both these parties are bound by the terms of the contract. The liability of payment of compensation awarded under the Act, to the affected workman basically is of the employer but in terms of the contract entered into between the Insurance Company and the employer, this liability passes over to the Insurance Company, who is to make the payment, unless there is a contract to the contrary, or the insurance policy makes some reservation with respect to the amount awarded in compensation, fixing or restricting the liability of the Insurance Company. On award of such an amount of compensation, the Insurance Company cannot say that it would make the payment to a particular extent or to a restricted extent. For denying such a liability, there has to be a contract between the two, refusing to bear any such liability.

18. In the case of P.J. Narayan (*supra*) the Apex Court has observed that an insurance is a matter of contract between the Insurance Company and the Insured. It is always open to the Insurance Company to refuse to insure. Similarly they are entitled to provide by contract that they will not take liability for interest.

19. This clarifies that in case the Insurance Company is not prepared to take the liability of interest, there has to be specific mention of the same in the insurance policy and in the absence of such an exclusion clause, it cannot be presumed that liability of payment of interest on the compensation awarded, would not fall upon the Insurance Company.

20. In the present case, the Insurance Company has neither taken this plea before the Commissioner nor has mentioned in its written statement that there was any such contract between the employer and the Insurance Company, which prohibited the employer from seeking indemnity on the quantum of interest on the compensation awarded nor such a plea was taken and it is only in the appeal that such a ground has been taken.

21. Learned Counsel does not dispute that in the insurance policy such an exclusion clause is not there. Exclusion clause regarding the liability of interest being not paid by the Insurance Company is not there, but his case is that for payment of interest there should be a specific provision in the policy itself. We are not able to accept the plea.

22. Even otherwise when compensation is to be awarded under the Act and the Act also provides for award of interest on the compensation, so awarded, it

cannot be taken to mean that interest so awarded would not form part of the compensation awarded. The compensation awarded and the interest levied thereon would, in fact, be the total amount of compensation awarded to the affected workman or his heirs, as the case may be, and, therefore, in terms of the insurance policy, the Insurance Company cannot say that it will not meet the liability of interest, which has been awarded only on the compensation awarded by the Commissioner, and forms part of the compensation.

23. In view of our findings on the aforesaid questions raised by the learned Counsel for the appellant, we do not find any merit in the appeal.

24. The appeal is dismissed.