

(1995) 07 OHC CK 0031
In the Orissa High Court
Case No : M.A. No. 677 of 1992

New India Assurance Company Ltd.

APPELLANT

Vs

Raj Kishore Nayak and Others

RESPONDENT

Date of Decision : 19-07-1995

Acts Referred:

Workmens Compensation Act, 1923 — Section 10

Citation : (1997) 3 LLJ 452

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : Debasis Das, for the Appellant; P.C. Mishra and A.K. Mohapatra for Respondents Nos. 1 to 4, for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, J.—Two points are urged by New India Assurance Company Ltd. (hereinafter referred to as "insurer") in support of this appeal u/s 10 of the Workmen's Compensation Act, 1923 (in short, the "Act"). Firstly it is submitted that there is no material to show service of any intimation about the accident by Ramswarup Ram, owner of vehicle bearing registration No. WB-33-, 0386 (hereinafter referred to as "owner"). Secondly, it is submitted that in view of clinching evidence that Hrushikesh Nayak (hereinafter referred to as "deceased") was 28 years of age at the time of death. Deputy Labour Commissioner-cum-Commissioner for Workmen's Compensation, Cuttack (in short, the "Commissioner") should not have worked out entitlement of Respondents 1 to 4 (hereinafter referred to as "claimants") at Rs. 86,764/-taking age of the deceased to be 25 years.

2. Mr. P.C. Misra, learned counsel appearing for claimants submitted that plea relating to non-service was neither raised in the written statement filed before the Commissioner nor during adjudication. It is submitted that there is ample material on record to show that the deceased in respect of whom compensation was claimed was 25 years of age at the time of his death.

3. So far as point relating to service of notice is concerned, a bare reference to Section 10 of the Workmen's Compensation Act, 1923 (in short, the "Act") under which statute claim was made would suffice to repeal the contention.

4. Fourth Proviso to Section 10(1) permits entertainment of a claim notwithstanding the fact that notice has not been given or claim has not been preferred in due time as provided in Sub-section (1) of Section 10 of the Act. The said provision reads as follows:

"10. Notice and claim -- (1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within (two years) of the occurrence of the accident or, in case of death, within (two years) from the date of death:

Provided that, where the accident is the contracting of a disease in respect of which the provisions of Sub-section (2) of Section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease:

Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to absent himself from work, the period of two years shall be counted from the day the workman gives notice of the disablement to his employer: Provided further that if a workman who, having been employed in an employment for a continuous period, specified under Subsection (2) of Section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:

Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim -

(a) if the claim is preferred in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises of place where the accident occurred, or

(b) if the employer or any one of the several employees or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred:

Provided further that the Commissioner may entertain and decide any claim to

compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred in due time as provided in this Sub-section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause."

No dispute appears to have been raised before the Commissioner that before presenting claim petition, requisite notice u/s 10 of the Act on the insurer was not served. This defence having not been taken before the Commissioner, as evident from his order and not been stated in the written statement filed by the insurer that claim petition was liable to be rejected because of lack of notice, that question cannot be raised for the first time in this appeal. Fourth proviso to Sub-section (1) of Section 10 of the Act applies in full force to the facts of this case. According to the said provision want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which injured workman was employed had knowledge of accident from any other source at or about the time when it occurred.

5. So far as second plea is concerned, I find that there is conflicting material about age of the deceased. Two of the witnesses have stated that age of the deceased was 28 years. They are wife and brother-in-law of the deceased. However, the father of the deceased stated the age of deceased was 25 years. In view I of the fact that no satisfactory explanation could be offered by claimants before the Commissioner as to how there could be variation in evidence regarding age, I find substance in the plea of Mr. Das mat age should have been taken to be 29 years. Worked out on that basis, entitlement of claimant comes to Rs. 84,716/-. Out of the said amount, a sum of Rs. 65,000/- shall be kept in fixed deposit in the following manner:

Jamamani Nayak -- widow -- Rs. 35,000/- Raj Kishore Nayak -- father -- Rs. 10,000/- Sushila Nayak -- mother -- Rs. 10,000/- Harichandra Nayak -- minor son through mother Jamamani Nayak -- Rs. 10,000/- The appeal is allowed to the extent indicated above.