(1997) 10 KAR CK 0032

In the Karnataka High Court

Case No : M.F.A. No. 1766 of 1988

Oriental Insurance Co. Ltd. APPELLANT

Vs

Vellachi (Smt.) and Another RESPONDENT

Date of Decision : 22-10-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Workmens Compensation Act, 1923 — Section 4 A, 4 A (3)

Citation : (1999) ACJ 409 : (1999) 3 LLJ 512

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : S.P. Shankar, for the Appellant; N.R. Kumaraswamy, for the Respondent

Final Decision : Allowed

Judgement

Harinath Tilhari, J.—Heard the learned Counsel for the appellant Sri. S.P. Shankar, in this appeal.

The only point that has been raised before this Court is that the Insurance Company has been made liable for payment of penalty or the interest on the amount of compensation which was payable by respondent No. 2, to respondent No. 1.

2. Learned Counsel contended that the Company had never assured the Insured to pay amount imposed on him as penalty or as interest for the Insured''s failure to comply with the requirements of law to pay the compensation on the due date. Learned Counsel contended that this has specifically been also made clear as per endorsement made in the insurance policy of which insured was possessed of. The appellant had only taken the undertaking to pay the compensation for injury. Learned Counsel asserted that there was an endorsement in the policy to the effect that coverage of the policy shall not extend, then they may indemnify the insured in respect of any interest which may be imposed on failure to comply with the requirements of Workmen''s

Compensation Act.

As regards the liability for the compensation or the compensation assessed, that has not been disputed on behalf of the appellant. Counsel for the appellant also pointed out that amount of interest, no doubt has been deposited and paid.

3. Section 4A of the Workmen''s Compensation Act, 1923, for short, "Compensation Act", provides that the compensation u/s 4, shall be paid as soon as it falls due. The liability for compensation is primarily fastened on the employer and compensation is payable by the employer on the due date. Section 4A provide that if the employer does not accept his liability of the compensation to the extent claimed, then he may have to make provisional payment of the amount to the extent admitted by him and that amount shall be deposited with the Commissioner or be paid to the Workman without prejudice to the right of the Workman to make any further claim. Sub-section 3 of Section 4A provides that where the employer is in default in the matter of payment of compensation due under the Act, within one month from the date it falls due or it fell due, then Commissioner has been empowered to direct the payment of interest at the rate of 6% on the amount together with the penalty which may not exceed 50% of such amount of compensation. Section further provides that the penalty amount shall be recovered from the employer.

A reading of this Section makes it clear that the liability is on the employer to pay the penalty, in case of his failure to discharge his obligation to pay the compensation on the due date. Unless it is specifically proved and established that the; Insurance Company had undertaken to pay the amount of penalty imposed for failure of employer to discharge his obligations to pay off the compensation on the due date, the liability to pay penalty or interest on the amount of compensation under statutory provision of Section 4A is that of the employer.

4. A person, who wants to claim the benefit, he must prove the exception or the provision conferring benefit on him, if the employer wanted to claim benefit and wanted to fasten liability on the Insurance Company for payment of penalty and interest along with the compensation and particularly, penalty imposed, because of own fault of the employer, the burden did lay on him to produce the policy and to show that policy did contain the condition to the effect that Insurance Company had undertaken to pay the penalty and interest, otherwise statutory liability is primarily of the insured, that is, the employer.

5. Before the Workmen''s Compensation Commissioner, the employee did not put in appearance and did not file the insurance policy. The Insurance Company also failed to produce the entire policy document, it only produced the Schedule.

6. At the time of hearing, an application had also been filed under Order 41, Rule 27 of the CPC (sic) to produce the major part of the policy containing that condition. No doubt, Insurance Company did not file the entire policy, but primarily, the burden was on the insured to have filed the policy.

The interest of justice requires that as the question of burden or liability has to be determined, really, Insurance Company should also have taken steps to file policy before the Tribunal. Anyway, the application has been made under Order 41, Rule 27 to file the copy of policy to enable this Court to determine the exact liability of Insurance Company and owner with respect to the amount of compensation, penalty and interest and by whom it is payable. It appears just and proper to take on record the major portion of the document of policy. The document is taken on record.

7. In the case of Oriental Insurance Company Ltd. Vs. Jevaramma and Others, , the Division Bench of this High Court has also expressed the view to the effect that in absence of a contrary condition in the insurance policy, the Insurance Company is not liable to pay the penalty. There is a rationality, if there is default on the part of the employer to discharge the statutory obligations within time prescribed without sufficient cause the person liable to be punished is the employer. It is his primary liability to pay the amount of penalty, it is only where a specific condition is there in terms of policy that is Insurance Company undertaking to indemnify the insured in case of default of the insured to comply with the requirements of law, to pay the amount of compensation within the time prescribed and a penalty is imposed, the insured has to prove that the policy did contain a term, whereunder, the Insurance Company has specifically undertaken to indemnify for the penalty also imposed on the insured, that is, the employer for his own default to comply with requirement of law, to pay the compensation within statutorily prescribed period.

When I so opine. I find support from the following observations of the Division Bench, in the case of Jayarama, referred above, the observations are as under:

"On careful examination, we are of the opinion that the Insurance Company is liable to meet only the compensation payable for the risk covered and not the penalty, unless the terms of the policy specifically include payment of penalty also. Penalty is not a necessary part of compensation. Compensation is pecuniary damages payable in respect of the damage or injury caused including death. But, penalty is material reparation payable for breach of duty to pay the compensation within the statutory period prescribed under the Act. Penalty is distinctly different from compensation."

Penalty is distinguishable from compensation. The condition was not proved to the effect that Insurance Company had undertaken to pay the penalty imposed on the employer for his failure to comply with statutory obligations.

I am further fortified in this respect from the perusal of the policy itself which had been filed along with application under Order 41, Rule 27 of the Code of Civil Procedure.

8. The endorsement in the policy reads:

"It is hereby understood and agreed that the cover provided by the policy shall not extend to indemnify the insured in respect of any interest or penalty which may be imposed on him on account of his failure to comply with the requirement laid down in the Workmen''s Compensation Act."

A perusal of the policy really, reveals that the Insurer had very clearly and specifically provided and indicated that it will not be liable to pay the amount of penalty or interest, if it is imposed on the insured for his failure to discharge his obligation. Even in absence of a condition in (sic) the policy, the position of law appears to be that the Insurance Company, unless a condition is shown to exist, that it (sic) undertakes to indemnify the amount of penalty and interest, the Insurance Company could not be held to be liable to pay the amount of penalty or interest.

9. Anyway, the appellant has been very gracious to pay the amount of interest earlier to this decision. The order of the Workmen''s Compensation Commissioner is modified only to this extent that the amount of compensation awarded, no doubt, is payable by the Insurer as well as on behalf of the employer. As regards the amount of penalty imposed u/s 4A and interest at the rate of 6% on the amount of compensation and penalty amount imposed, in total, is the liability of the insured to pay to the claimant-Respondent No. 1, in the present appeal. The claimant respondent No. 1, is always entitled to recover the amount of penalty from the employer, that is, the insured--Respondent No. 2 only. The Insurance Company, i.e., appellant is not liable to pay the penalty imposed on employer or the interest u/s 4A of Workmen''s Compensation Act, and that the claimant can recover amount of penalty and interest from the employer, i.e., insured only in terms and conditions of the Insurance policy as quoted above, in Para ''8'' of this order. No doubt, the Insurance Company has paid the interest amount of its own volition.

Rest of the order of the Workmen''s Compensation Commissioner is confirmed. Accordingly, this first appeal is allowed and award given by Workmens'' Compensation Commissioner is modified and stands modified to the above extent. Cost of the appeal made easy.

