
(2004) 04 GAU CK 0051
In the Gauhati High Court
Case No : M.F.A. No. 33 of 2004

Oriental Insurance Company Ltd.

APPELLANT

Vs

Joya Ghosh and Another

RESPONDENT

Date of Decision : 23-04-2004

Acts Referred:

Workmens Compensation Act, 1923 — Section 5

Citation : (2004) 3 GLR 435 : (2005) 1 LLJ 274

Hon'ble Judges : P.P. Naolekar, C.J.; Amitava Roy, J

Bench : Division Bench

Advocate : S.K. Goswami and R. Kathakatia, for the Appellant;

Judgement

P.P. Naolekar, C.J.—The facts for disposal of this appeal in a narrow compass are that Dibakar Ghosh, husband of the Respondent No. 1, was employed by Smt. Seva Rani Biswas, Respondent No. 2, as driver of the vehicle No. AS-18/3337 and the vehicle was insured with the appellant Oriental Insurance Company Ltd. On an incident on 10.05.2001 Dibakar Ghosh, the driver of vehicle, sustained injuries and ultimately succumbed to his injuries. A claim petition was filed by the respondent No. 1, wife of the deceased driver, before the Commissioner, Workmen's Compensation, Kamrup, Guwahati. It is an admitted fact that the deceased was an employee of the respondent No. 2, the owner of the vehicle, for two days only prior to the date of accident and he was paid an amount of Rs. 100 per day. The Commissioner, Workmen's Compensation has calculated the monthly wages of the deceased at Rs. 3,000 per month and on that basis the award was made. Aggrieved by the award, the appellant-Insurance Company preferred the present appeal.

2. The only submission made by the learned counsel for the appellant Insurance Company is that the Commissioner, Workmen's Compensation has not calculated the monthly wages in accordance with the provisions of Section 5(b) and (c) of the Workmen's Compensation Act 1923. The submission of learned counsel for the appellant is that the calculation of monthly wages should have been on the

basis of the minimum wages applicable to the nature of employment carried out by the deceased. The minimum wages under the Minimum Wages Act for the work of a driver was Rs. 67 per day, and therefore, the Commissioner, Workmen's Compensation should have calculated the wages on the basis of the minimum wages, which has been fixed by the Government for similar nature of work that has been carried out by the deceased Workman.

3. Section 5 of the Workmen's Compensation Act prescribes the method and manner in which the monthly wages of a workman shall be calculated. Clause (b) of Section 5 covers the cases, where the workman's whole of the continuous period of service immediately preceding the accident is less than one month. Admittedly, in the present case, the deceased workman served his employer less than a period of one month, therefore the monthly wages is to be calculated as per the provisions of Clauses (b) and (c) of Section 5. To appreciate the submissions made by the learned counsel for the appellant it would be apposite to look into Section 5 of the Workmen's Compensation Act, 1923, which reads as under:

"5. Method of calculating wages: In this Act and for the purpose: thereof the expression "monthly wages" means the amount of wages deemed to be payable for a month's service (whether the wages are payable by the month or by whatever other period or at piece rates) and calculated as follows, namely-

(a) where the workman has, during a continuous period of not less than twelve months immediately preceding the accident, been in the service of the employer who is liable to pay compensation, the monthly wages of the workman shall be one-twelfth of the total wages which have fallen due for payment to him by the employer in the last twelve months of that period;

(b) where the whole of the continuous period of service immediately preceding the accident during which the workman was in the service of the employer who is liable to pay the compensation was less than one month, the monthly wages of the workman shall be the average monthly amount which, during the twelve months immediately preceding the accident, was being earned by a workman employed on the same work by the same employer, or, if there was no workman employed, by a workman employed on similar work in the same locality;

(c) in other cases including cases I which it is not possible for want of necessary information to calculate the monthly wages under Clause (b), the monthly wages shall be thirty times the total wage earned in respect of the last continuous period of service immediately preceding the accident from the employer who is liable to pay compensation, divided by the number of comprising such period."

4. Clause (b) says that where the period of service with a employer immediately preceding the accident is less than one month then his monthly wages shall be calculated on the basis of wages earned by the workman employed on the same work with the same employer, that is to say, if the employer is engaged some other employee to carry out similar nature of work, which was carried out by the

deceased workman, then the wages shall be calculated on the basis of the wages earned by that workman during 12 months immediately preceding the accident. If there is no workman employed in similar nature of work carried out by the deceased workman then the wages shall be calculated on the basis of similar work carried out by a workman in the same locality. Thus, although the workman is not engaged by the same employer the wages earned during 12 months immediately preceding the accident by workmen carrying out similar nature of work would be taken into consideration for the purpose of calculating the monthly wages of the deceased workman, who has worked with his employer less than one month. If the calculation of the wages is not possible for want of necessary information as required under Clause (b) of Section 5, then Clause (c) of Section 5 is attracted. Under this clause, the total wages earned in respect of the last continuous period of service immediately preceding the accident, is divided by the number of days the workman worked with his employer, and it shall be taken to be the wages earned for a day and on that basis the monthly wages, i.e., 30 days wages, shall be calculated.

5. In the present case, admittedly, the workman has worked with his employer for two days only and has earned wages of Rs. 200/-. The Commissioner, Workmen's Compensation need not take the minimum wages payable to the workman carrying out a particular nature of employment as base for calculation of the monthly wages. There is nothing in the section to indicate that while calculating monthly wages either under Clause (b) or Clause (c) the minimum wages fixed by the Government should be taken into consideration. On the other hand, the method of calculation has been specifically prescribed.

6. On a bare reading of Clauses (b) and (c) of Section 5, it is clear to us that for the purpose of calculation of the wages of a deceased workman, who has worked less than one month with his employer, would be the actual wages drawn by the workman engaged in similar nature of work with the same employer or with some other employer carrying similar nature of work in the locality, or as per Clause (c), if the calculation is not possible as mentioned in Clause (b), the wages earned immediately preceding the incident will be taken into consideration by dividing the number of days comprising such period. There may be a difference between the minimum wages and the actual wages paid. The fixation of the minimum wages under the Minimum Wages Act is the minimum wages, which is required to be paid by the employer to his employee for a particular work carried out, and that does not mean that the employer could not or cannot pay wages more than the fixed wages under the Minimum Wages Act. Under Clauses (b) and (c), it is the actual wages drawn or paid have to be taken into consideration for calculation of the monthly wages of the workman, who has worked for less than a month with his employer and not the minimum wages fixed in the nature of employment under the Minimum Wages Act.

7. In that view of the matter, we are of the opinion that the Commissioner, Workmen's Compensation has rightly calculated the monthly wages of the

deceased workman to be Rs. 3,000/- per month for ascertaining the amount of compensation. We do not find any infirmity in the order passed by the learned Commissioner, Workman's Compensation and accordingly the appeal stands dismissed.