

(1991) 04 OHC CK 0002
In the Orissa High Court
Case No : M.A. No's. 88, 89 and 90 of 1989

Sharma S.D.

APPELLANT

Vs

Ramesh Mahakud and Another

RESPONDENT

Date of Decision : 16-04-1991

Acts Referred:

Motor Vehicles Act, 1939 — Section 95, 95(2)
Orissa Motor Vehicles Rules, 1993 — Rule 95
Workmens Compensation Act, 1923 — Section 4A

Citation : (1993) ACJ 385 : (1999) 3 LLJ 418

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : Pradip Mohanty and B.P. Ray, for the Appellant; P. Roy, S.K. Ghose, L. Dash, S. Roy, Sanjit Mohanty, P.K. Mohanty and S.C. Samantray, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—These three appeals by the employer u/s 30 of the Workmen's Compensation Act, 1923 (hereinafter referred to as "the Act") arise out of the same accident. All the three appeals having arisen out of the common order, they are heard together and are disposed of in this common judgment.

2. Truck bearing registration No. ORJ 4474 belonging to the appellant risk of which covered by respondent No. 2, the insurer, under terms of the policy was returning from Raxding to Nadidih mines on April 15, 1982. Bahadur Munda, Ramesh Mahakud and Mangal Munda were travelling in the truck. Near Jamdih, truck met with an accident. Bahadur and Mangal sustained fatal injuries and Ramesh was injured. Bahadur and Ramesh were coolies in the truck whereas Mangal was driver of another truck belonging to the appellant. Widows of deceased Bahadur, deceased Mangal and Ramesh himself claimed compensation under the Act on account of deaths and injuries respectively. Since the risk in respect of the truck in which they were travelling was covered under a policy

issued by the insurer to the owner, insurer was called upon to show cause why liability would not be fixed on it to pay the compensation amount.

3. Commissioner awarded compensation to the claimants and directed payment of interest at 6 per cent per annum and penalty at 25 per cent of the awarded amount. He directed insurer to pay compensation amount to Ramesh, the injured workman and widow of Bahadur, the deceased workman. He, however, directed the owner appellant to pay compensation determined to the widow of Mangal. Interest and penalty were directed to be paid by the owner also. This is the grievance of owner appellant in these three appeals.

4. Mr. B.P. Ray, learned counsel for the appellant, submitted that compensation to widow of Mangal Munda ought to have been directed to be paid by the insurer. His further submission is that insurer ought to have been liable to pay the interest and penalties. Next submission of Mr. Ray is that interest and penalty ought not to have been imposed in the same order as appellant was not given any opportunity to show cause against it. Last submission of Mr. Ray is that there is no justification for imposing penalty at 25 per cent of the compensation amount.

5. Mr. P. Roy, learned counsel for the insurer, on the other hand, submitted that Mangal being the driver of another truck, Commissioner rightly directed the owner to pay compensation in respect of his death since there is no evidence that insurer has covered the risk of the other truck. Mr. P. Roy submitted that insurer is not liable to pay interest and penalty.

6. Mr. Surath Roy, Advocate who has joined the noble profession in recent past, being present in Court made a study of the questions involved and assisted amicus curias in submitting decisions on the points involved and his assistance and ability is acknowledged by me.

7. On plain reading of the Act, it would not be possible for the Commissioner to give direction to insurer to discharge liability of the employer who is owner of the vehicle. Employer is to pay the amount and he may recover the same from the insurer under terms of the policy which is a contract. However, both the Act and provisions in the Motor Vehicles Act, 1939, so far as compensation on account of injuries in an accident, are beneficial provisions for the claimants. Therefore, by judicial interpretation, this Court has laid down the law which is now settled so far as this Court is concerned that Commissioner can give a direction to the insurer after giving it opportunity of being heard to pay the compensation determined which is normally payable by the employer who is owner of the vehicle. Since insurer has been dragged in by judicial interpretation, in cases where it is aggrieved, it can prefer appeal. Since u/s 30 of the Act, employer is called upon to deposit the amount as a precondition to his preferring appeal, insurer under the law is not required to deposit the same while preferring an appeal. While interpreting a benevolent provision broadly, satisfaction of a precondition for preferring an appeal not being a benevolent provision and being

regulatory in nature is to be construed in a manner by which only those persons who are specifically regulated are to satisfy the precondition. Insurer does not come within that category and, therefore, is not required to deposit the amount.

8. As regards interest and penalty as provided u/s 4A, on the language of the Section insurer is not liable. Insurer has no means to know of the accident. When it receives notice from the Commissioner, it makes enquiry. It is bound to take some time to know the correct position to bring it to the knowledge of the Commissioner to discharge its liability direct. Due date is the date of accident. Employer is supposed to know it. To bring knowledge of the accident to the insurer who has no control over the vehicle would be unreasonable.

9. Power of Commissioner to direct payment of interest and impose penalty is provided u/s 4A of the Act. It reads as follows :

"4-A. Compensation to be paid when due and penalty for default,-- (1) Compensation u/s 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman as the case may be, without prejudice to the right of the workman to make any further claim.

(3) 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 may direct that in addition to the amount of the arrears, simple interest at the rate of six per cent per annum on the amount due together with, if in the opinion of the Commissioner there is no justification for the delay, a further sum not exceeding fifty per cent of such amount shall be recovered from the employer by way of penalty."

10. Mr. B.P. Ray, learned counsel for the appellant in all the three appeals, submitted that insurer ought to have been made liable for the interest and penalty levied. Mr. Ray relied upon the decision of Madhya Pradesh High Court in *Om Prakash v. Ramkali* 1987 ACJ 803, in support of his contention that insurer is liable to pay interest and penalty levied by the Commissioner.

11. In the said decision, Madhya Pradesh High Court has not accepted decision of this Court in *Oriental Fire and General Insurance Co. Ltd. v. Matias Burla* 1986 ACJ 732 , where this Court held that Section 4A(3) being a penal provision, has to be construed strictly. Madhya Pradesh High Court has also distinguished the decision of Allahabad High Court in *Mathura Prasad v. Saiyed Khurshed Ahmad* 1982 ACJ 153 , where it was held that liability in respect of compensation was distinct from that of interest and penalty.

12. Since decision of this Court in respect of liability of insurer for penalty and interest u/s 4A of the Act was the first of its nature in this Court which was directly dissented from by Madhya Pradesh High Court I requested Mr. Surath

Ray, Advocate to assist me if the question has been the subject-matter of consideration in any other decision. He has brought to my notice the Division Bench decision of Karnataka High Court in *Oriental Insurance Co. Ltd. v. Jevaramma* 1994 III LLJ 1036, and of Delhi High Court in *Oriental Insurance Co. Ltd. v. Hasmat Khatoon* 1989 ACJ 862 .

13. In *Oriental Insurance Co. Ltd. v. Jevaramma* (supra), it has been observed at pp. 1038-1039:

"There is another important question to be considered in this case. It is, whether the insurer is liable to pay penalty when the insurance policy is taken to cover specifically and only the risk of injury or death of the insured. 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 the 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. In the instant case, we find that there is no specific term or condition in the insurance policy which binds the insurance company to pay penalty apart from compensation. We are of the opinion that the insurance company is not liable to pay the penalty in instant case."

The Delhi High Court has taken into consideration the decisions of this Court, Karnataka High Court and Madhya Pradesh High Court. It was observed :

".... The learned Judge has held that the word "liability" used in Section 95 covers liability to pay special interest and penalty and if the insurance company wants to avoid such liability, it should provide for such a term in the contract of insurance. The burden is on the insurance company to show that it has not taken upon itself the liability to pay special interest and penalty. The learned judge has referred to and distinguished several decisions of Madhya Pradesh High Court and other High Courts. However, with respect, it has to be noted that the learned Judge has not analysed the nature of liability and the kinds of liability under Motor Vehicles Act and the Workmen's Compensation Act. So also, the object and the machinery for mandatory payment of the statutory amount under Workmen's Compensation Act has not been brought to the notice of the learned Judge. When the Workmen's Compensation Act has expressly provided for an exhaustive remedy of recovery of compensation by way of arrears of land revenue; when the Workmen's Compensation Act has expressly exempted the compensation amount from being assigned or being subjected to any charge; when the minimum compensation is assured by the Statute itself, I do not find any necessity of very widely interpreting the word "liability" in Section 95, as done by the learned Judge. Casting a negative burden on the insurance company and to exclude itself from liability to pay interest and penalty is not warranted by the provisions of insurance of vehicles under the Motor Vehicles Act or under the

general law of insurance. With respect, I am not persuaded by the reasoning of the learned Judge reported in *Om Prakash v. Ramkali*, (supra)"

Considering the reported decisions, I am of the firm view that the interpretation given by this Court in *Oriental Fire & General Ins. Co. Ltd. v. Mafias Burla* 1986 ACJ 732, that u/s 4A of the Act, Commissioner is not justified to direct the insurer to pay interest and penalty is more reasonable besides being binding on me and required no reconsideration by a larger Bench.

14. Next question raised by Mr. B.P. Ray is that in the same order interest and penalty u/s 4A(3) of the Act ought not to have been levied. There is no doubt that u/s 4A(1), payment is to be made as soon as the compensation falls due. Meaning of the term "as soon as it falls due" has been explained by this Court in the decision in *Khillu Chandramma v. Hindusthan Construction Co. Ltd.* 1971 LabIC 135, under Sub-section (2) provisional payment is provided for. Under Sub-section (3) Commissioner has been given discretion to recover the compensation along with interest if the employer is in default in paying the compensation due under the Act within one month from the date when it fell due. Recovery of the interest may also be together with penalty not exceeding fifty per cent of such amount if the Commissioner is of opinion that there is no justification for the delay. Thus, default in paying the amount of compensation as soon as it falls due, gives scope for recovery of interest. An employer under the bona fide impression that he is not liable to pay the compensation, may not pay it. It may be his impression that victim of the accident is not his employee, or he is not injured in course of and arising out of his employment or in cases where the injury is not fatal, employee has not observed the instructions issued as per law or that someone else has taken over the liability. It may so happen that employer could not know of the accident for a long time. These are all illustrations only. Where the employer can satisfy the Commissioner that he had good cause for not being able to pay the compensation, Commissioner may not levy interest and penalty to be recovered. Commissioner has to examine conduct of the employer for failure to pay the compensation on the due date. Before attaching stigma of bad conduct of default, employer should get opportunity to explain his conduct. This would be clear from Section 4A(2) where employer is of the impression that he is to pay less, he is permitted to pay the admitted amount provisionally. If ultimately it is found that he is to pay more, would he be liable to pay interest u/s 4A(3) for the balance amount? Therefore, all wrong impressions of the employer do not attract liability to pay interest. Natural justice demands that the employer gets opportunity to explain his conduct. Submission of Mr. B.P-Ray, learned counsel for the petitioner has force that when notice was given only in respect of compensation, interest is not to be directed to be paid without giving opportunity to the employer of being heard.

15. Levy of penalty stands on a much stronger footing so far as the employer is concerned. Commissioner is to form an opinion in respect of the case of delay. This forming of opinion cannot be unilateral. When a maximum rate of penalty is

provided, Commissioner ought to give a chance to the employer to be heard so that it can form an opinion in respect of the conduct of the employer as well as to determine the rate at which penalty shall be levied.

16. In *Hindustan Steel Ltd. Vs. State of Orissa*, , question of imposition of penalty on a person who was not registered as a dealer under the Orissa Sales Tax Act was considered. It was observed :

"(7) Under the Act penalty may be imposed for failure to register as a dealer; Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the Statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

This observation of Supreme Court has full application to imposition of penalty u/s 4A of the Act.

17. An appeal lies against an order u/s 4A(3) of the Act awarding interest and penalty u/s 30(1)(aa). Under the third proviso deposit of amount of penalty or interest by the employer is not required as a condition precedent to entertain an appeal. This leads to an inference that an award of interest compensation and an award of interest or penalty are two distinct matters. Before any liability is created opportunity is to be given to the person to explain. Merely because he may not have any explanation to offer since the facts found are tell-tale, is no ground to violate the principle of natural justice.

18. In the decision in *Gopal Singh v. Nilamani Pradhan* 1988 ACJ 244, I had observed :

"As has been held in the case of *Hindustan Steel Ltd. v. State of Orissa* (supra) AIR 1969 SC 201, the rate of penalty would depend upon the facts and circumstances of each case."

Though names of the parties are correct, the reference to the journal is not correct. It should have been *Hindustan Steel Ltd. Vs. State of Orissa*, , which has

been correctly referred to by me earlier in this judgment. The decision was not in respect of rate of penalty but imposition of penalty itself. However, in view of my discussion made above, I am inclined to hold that while considering the question of imposition of penalty after giving opportunity to the employer, the rate of penalty to be imposed may also be considered. No hard and fast rule can be laid down which would depend upon facts and circumstances of each case. Whether levy of interest alone would be adequate or levy of penalty alone would be adequate or in case both are to be directed to be paid the rate at which it would be so paid should be considered by the Commissioner and specific finding is to be given. Absence of reason or absence of observance of principle of natural justice is a question of law in respect of which this Court can entertain an appeal.

19. In the decision reported in Baradakanta Mishra Vs. High Court of Orissa and Another, , it was observed :

"If the order of the initial authority is void, an order of the appellate authority cannot make it valid."

Where an award as in this case with regard to interest and penalty was made by the Commissioner without following the principle of natural justice, it is void. In appeal, even if I confirm the order, it will have no legal effect because that which is valid can be confirmed and not that which is void. Accordingly, impugned order so far as it relates to interest and penalty is to be vacated to be reconsidered by the Commissioner.

20. As regards payment of compensation to widow of Mangal Munda on account of his death in course of and arising out of employment, u/s 95 (2) (a) of the Motor Vehicles Act the maximum limit of liability of an insurer under Workmen's Compensation Act, 1923, is six employees. It reads as follows:

" 95. (2) Subject to the proviso to Sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely--

(a) Where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle."

Under Rule 95 (a) of the Orissa Motor Vehicles Rules a bona fide employee of the owner of the vehicle can be carried in a truck. Driver of another vehicle belonging to the owner moving in the ill-fated vehicle in course of and arising out of employment is thus covered u/s 95 of the Motor Vehicles Act, 1939, read with Rule 95 (a) of Orissa Rules. My view is supported by the Division Bench decision of this Court reported in New India Assurance Co. Ltd. v. Orissa Mining Corporation Ltd. 1977 ACJ 234 . Accordingly, Mr. B.P. Ray, learned counsel for the employer, is correct that insurer is to be directed to pay the compensation in respect of death of Mangal.

21. In conclusion:

(a) Insurer is liable to pay the compensation in respect of death of Mangal Munda;

(b) Insurer is not liable to be levied with interest or penalty and employer is liable to pay the same;

(c) Before levy of interest or penalty by the Commissioner employer is to get opportunity to explain circumstances of default or delay, as the case may be.

22. In view of my conclusion as above, Commissioner is required to hear the question of award of interest and penalty afresh. Parties are directed to appear before the Commissioner on May 10, 1991 (Friday) on which day the employer shall show cause in all the three claim petitions why interest or penalty or both shall not be awarded against him in which he may also indicate alternately the rate of penalty which would be just. Commissioner shall also receive the awarded amount from the insurer in respect of death of Mangal. However, initial burden of payment being on employer the amount deposited by him as a condition for preferring the appeal shall be paid to the dependant and to be refunded to the employer on receipt of the amount from the insurer Commissioner shall consider to invest the compensation amounts awarded to the dependants of the deceased workmen in proper securities so that the amounts may not be misutilised as the claimants are ladies. In this respect, the claimants may be heard to satisfy the Commissioner about their immediate necessities to fix the referred amount to be secured.

23. In the result, these three appeals are allowed subject to the directions made. There shall be no order as to costs.