(2008) 02 CHH CK 0045

In the Chhattisgarh High Court

Shyam Sunder Agrawal APPELLANT

Vs

Jawahar Prasad and Others RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:
Workmens Compensation Act, 1923 — Section 25, 4(1)(b), 4A(3)

Citation : (2008) 118 FLR 475

Hon'ble Judges : D.R. Deshmukh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

D.R. Deshmukh, J.—In this appeal filed by the employer, who is aggrieved by the award dated 24.11.2006 passed by the Court of Commissioner, Workmen''s Compensation, Labour Court, Bilaspur (hereinafter referred to as "the lower Court"), the following substantial questions of law arise for determination:

(i) Whether the Commissioner for Workmen''s Compensation was justified in awarding compensation u/s 4(1)(b) & (c) of the Workmen''s Compensation Act, 1923 in the absence of medical evidence to prove the nature and the extent of disablement suffered by the workman?"

(ii) Whether the Commissioner for Workmen''s Compensation was justified in exonerating the insurance company on the ground that the accident occurred when the process of loading and unloading of shellac had stopped?"

(iii) "Whether the Commissioner for Workmen''s Compensation was justified in awarding penalty under Sub-clause (b) of Sub-section (3) of Section 4A of the Workmen''s Compensation Act, 1923 without giving a reasonable opportunity to the employer to show cause?

2. The following facts have not been disputed in this appeal:

(A) On 12.2.2001 at about 8 A.M., Jawahar Prasad was a workman under the employment of the appellant/employer in the Shellac factory at Sakti.

(B) Jawahar Prasad climbed up to the Boiler for removing the chelli (a temporary platform created with bamboos and ropes to facilitate work at the desired height) and fell down therefrom at about 8 A.M. on 12.2.2001.

(C) The respondent No. 2/insurance company had issued a general policy of insurance under the Workmen''s Compensation Act, 1923 (hereinafter referred to as "the Act, 1923") vide Ex. D-5 on 19.1.2001 which Was valid up to 18.1.2002.

3. The respondent No. 1/claimant-Jaw.ahar Prasad preferred an application for compensation before the lower Court alleging that upon being instructed by the appellant/employer, he climbed towards the boiler for removing the chelli and in the process fell down and sustained grievous injuries and suffered hemi paresis in the loft side of the body and 100% permanent disability. He was aged 27 years on the date of the accident. It was pleaded that he was employed at a daily wage of Rs. 72/- by the appellant/employer. Compensation of Rs. 2,39,881/- with interest and penalty was claimed. Certificate of disability Ex. P-4 was filed by the claimant and exhibited, showing that the claimant had suffered hemi paresis and disability to the extent of 50%.

4. The appellant/employer admitted that he was the owner of the Shellac factory and that the respondent No. I/claimant had on. 12.2.2001 sustained injuries due to fall from the chelli. It was denied that the respondent No. I/claimant had sustained 100% disability. It was pleaded that the respondent No. l/claimant was fit to resume duty, It was further pleaded that liability to pay compensation rested solely with the respondent No. 2/insurance company.

5. The respondent No. 2/insurer denied liability to pay compensation on the ground that at the time of accident, manufacturing process of shellac had stopped and the work undertaken by the respondent No. 1/claimant at the time of accident was not covered under the policy.

6. The three-fold submission by Shri Sourabh Sharma, learned Counsel for the appellant/employer is as under:

(A) In the absence of the medical evidence to prove the nature and extent of disablement suffered by the claimant, the Commissioner for Workmen''s Compensation was not justified in holding that the claimant had suffered 50% permanent disability and awarding compensation u/s 4(i)(b) & (c) of the Act, 1923. Reliance was placed on Narayan Chakraborty v. Swapan Debnath and Anr. 2007 Lab. I.C. 1087 Dinesh Chandra Ray v. State of Assam and Ors. 2000 Lab. I.C. 3811 and a decision of the Allahabad High Court in Burhwal Sugar Mills Ltd. v. Ramjan 1982 Lab. I.C. 84 and a decision of Calcutta High Court rendered in Bengal Coal Co. Ltd. Cirimint Colliery v. Sew Pujan Harijan 1983 Lab. I.C. 1285.

(B) Secondly, on a finding recorded by the lower Court on issues No. 1 & 2 that the accident had occurred on 12.2.2001 while the respondent No. 1/claimant was under employment and that the respondent No. 1/claimant sustained personal injury in an accident arising out of and in the course of employment and the fact that the respondent No, 2/insurer had covered the risk of the appellant/employer under the Act, 1923 by issuing a policy of insurance Ex. D-5, the liability for payment of compensation ought to have been fastened on the insurance company, and

(C) The lower Court was not justified in awarding penalty without giving reasonable opportunity to the appellant/owner to show cause why it should not be awarded as mandated under the proviso to Sub-section (3) of Section 4A of the Act, 1923.

7. Shri Abhishek Sinha, learned Counsel for respondent No. 2/insurance company argued that the policy of insurance Ex. D-5 clearly mentioned that the risk was covered only for any personal injury sustained during the process of loading and unloading of shellac, and therefore, since, admittedly the process of manufacturing of shellac had stopped at the time of accident, the insurance company was not under any contractual liability to indemnify the appellant/ employer and was therefore rightly exonerated by the lower Court.

8. Shri H.B. Agrawal, learned Senior Advocate for respondent No. 1 claimant argued that the finding that the respondent No. 1/claimant had sustained injury arising out of and in the course of his employment was a finding of fact which ought not to be interfered in this appeal to be heard purely on substantial questions of law framed by this Court It was further argued that the appellant/ employer did not object to Disability Certificate Ex.P-4 issued by the Medical Board which clearly proved that the respondent No. 1/claimant had'' sustained 50% permanent disability due to hemi paresis. The appellant/employee also made no prayer to summon the medical evidence to rebut the document Ex.P-4 filed by the respondent No. 1/claimant. It was also argued that the words "loading and unloading of shellac" in the policy of insurance Ex.D-5 were merely illustrative and not exhaustive in nature and the terms and conditions of the policy clearly proved that at any time during the period of insurance any employee in the insured''s immediate service shall sustain personal injury by accident or disease arising out of and in the course of his employment by the insured in the business and if the insured shall be liable to pay compensation for such injury, the insurance company shall be liable to indemnify the appellant/ employer. It was further contended that the liability therefore ought to have been fastened on the insurance company to pay compensation. Learned Senior Counsel argued that the order of the lower Court for awarding penalty was in accordance with law as the appellant/employer had sufficient opportunity in the proceedings to show cause against award of penalty and it was not incumbent on the lower Court to give fresh opportunity to the appellant/employer after passing the impugned award to show cause why penalty should also not be awarded against him.

9. In this appeal, it is not in dispute that personal injury was caused to Jawahar Prasad Yadav, a workman, by accident arising out of and in the course of his employment. The first question that arises for determination, therefore, is

whether in the absence of medical evidence to prove the nature and extent of disablement suffered by the workman, the lower Court was justified in recording a finding that due to personal injury Jawahar Prasad Yadav had sustained permanent disablement arid loss of earning to the extent of 50%?

10. Section 25 of the Act, 1923 prescribes the method of recording evidence by the lower Court. It reads as under:

25. Method of recording evidence-The Commissioner shall make a brief memorandum of the substance of the evidence of every witness as the examination of the witness proceeds, and such memorandum shall be written and signed by the Commissioner with his own hand and shall form part of the record:

Provided that, if the Commissioner is prevented from making such memorandum, he shall record the reason of his inability to do so and shall cause such memorandum to be made in writing from his dictation and shall sign the same, and such memorandum shall form part of. the record:

Provided further that the evidence of any medical witness shall be taken down as nearly as may be word for word.

11. The words "the evidence of any medical witness shall be taken down as nearly as may be word for word" make it mandatory for the lower Court to record the evidence of a medical witness. It is for the claimant to establish whether the extent of disability suffered falls under Part-I or Part-II of the Schedule-I of the Act, 1923. This could be done only by leading medical evidence. The only exception to this rule could be where the disability suffered by the claimant is not disputed by the employer. Viewed from another angle, in a case where the sufferance of permanent disability by the claimant/workman is in dispute, it would also be contrary to the principles of natural justice to sustain a finding that the claimant/workman had suffered permanent disablement in the absence of medical evidence and any opportunity to the employer to rebut the evidence by cross-examining the medical witness or by leading evidence, A Division Bench of this Court approved this principle in Rajesh Kumar Kaushik v. Tej Narayan Singh and Ors. (order dated 20.7.2007 passed in Misc. Appeal (C) No. 818/2007) while agreeing with an observation in Sudhir Bhuiya Vs. National Insurance Co. Ltd. and Another, which is as under

If the appellant really wants support from the opinion of any doctor or board of doctors, the Insurance Company and the owner of the vehicle, against whom the said opinion will be used, should be given an opportunity to cross-examine those persons for the purpose of ascertaining the truth of their opinion contained in the certificate; it is preposterous to suggest that by mere producing a certificate showing that a person had become disabled, he can force the Insurance Company or the owner of the vehicle to pay compensation though the genuineness of the document is not proved and they are not in a position to cross-examine the person who has allegedly given such opinion.

12. In the present case, the appellant/employer had categorically denied that the claimant/workman had suffered permanent disablement and had further pleaded that as per certificate of the medical practitioner the claimant was fit to resume duty. In this backdrop, the finding of 50% permanent disablement suffered by the claimant recorded by the lower Court cannot be sustained in the absence of medical evidence. I am fortified in my above view by two judgments of the Guwahati High Court rendered in Narayan Chakraborty v. Swapan Debnatli and Anr. 2007 Lab. I.C. 1087 Dinesh Chandra Ray v. Stale of Assam and Ors. 2000 Lab. I.C. 3811 and a decision of the Allahabad High Court in Burhwal Sugar Mills Ltd. v. Ramjan 1982 Lab. I.C. 84 and a decision of Calcutta High Court rendered in Bengal Coal Co. ltd. Girimint Colliery v. Sew Pujan Harijan 1983 Lab. I.C. 1285.

13. The view taken by the Hon''ble High Court of Kerala in Dr. (Mrs.) Pushpa Vishnu Kumar Gurtu Vs. State of Maharashtra and others,) and United India Insurance Co. Ltd. v. Abdul Gafur and Anr. 2004 (Suppl.) GLT 118 that the appellants did not question the disability certificate, and therefore, it could not be said that the non-examination of the doctor had prejudiced their case does not apply to the present case. The appellant/employer had not only specifically denied the fact of permanent disablement suffered by the claimant but had also led documentary evidence in the form of medical certificate Ex.D.3 dated 1.4.2002 by Dr. Kedar Agrawal that the claimant/workman was fit to resume duty. It is also pertinent to note that in the disability certificate Ex.P.4, it has not been mentioned as to which side of the body of Jawahar Prasad Yadav had suffered hemi paresis. Nothing could be inferred from the photograph of the claimant/workman affixed to the said certificate. The learned lower Court also did not make note of its personal observation regarding the disability suffered by the claimant when he deposed before it. The testimony of the claimant/workman Jawahar Prasad Yadav also did not mention whether the left or the right, hand and feet had become nonfunctional. The respondent/claimant also did not file any documents relating to the treatment undertaken by him after the accident and also did not examine the treating doctor. The certificate of disability was issued more than 10 months after the accident.

14. In the light of the facts and circumstance mentioned above, a duty was cast upon the lower Court to give an opportunity to the parties to adduce evidence in support of the disability certificate Ex.P.4 and the fitness certificate Ex.D.3. The finding that the claimant had suffered 50% permanent disablement is, therefore, unsustainable under law. Substantial question No. 1 is answered accordingly,

15. So far as the second question of law is concerned, in this appeal it is not in dispute that the claimant had sustained personal injury in an accident arising out of and in the course of his employment. The liability of the insurer under the Act 1923 arises under a contract and is not a statutory liability. In New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and Another,) the Apex Court has observed as under:

In Workmen''s Compensation Act, there are no provisions corresponding to those in the Motor Vehicles Act, insisting on the insurer covering the entire liability arising out of an award towards compensation to a thirty party arising out 6f a motor accident/Neither in the Act nor in any other there is any provision which stands in the way of an insurance company and the insured entering into a contract confining the obligation of the insurance company to indemnify to a particular head or to a particular amount when it relates to a claim for compensation to a third party arising under the Workmen''s Compensation Act. Therefore, the obligation of the insurance company clearly stands limited and the relevant proviso providing for exclusion of liability for interest or penalty has to be given effect to. The entitlement of the claimant under the Workmen''s Compensation Act is to claim the compensation from the employer. As between the employer and the insurer, the rights and obligations would depend upon the terms of the insurance contract. Construing the contract involved here it is clear that the insurer has specifically excluded any liability for interest or penalty under the Workmen''s Compensation Act and confined its liability to indemnify the employer only against the amount of compensation ordered to be paid under the Workmen''s Compensation Act.

16. In the light of the Apex Court judgment in New India Assurance Co. Ltd. v. Harshadbhai Amrutbhai Modhiya and another (supra), it is necessary to construe the contract between the respondent/Insurer and the appellant/employer. Shri Abhishek Sinha, learned Counsel for the insurer laid much emphasis on the words "loading, unloading of shellac" in the cover note issued by the insurance company. However/these words do not appear in the cover note under any particular head and are, therefore, merely illustrative and cannot be said to be exhaustive. The type of policy is mentioned as "Workmen''s Compensation (General). The terms and conditions of the policy have been enclosed separately. It is specifically mentioned in the terms and conditions as under:

NOW THIS POLICY WITNESSETH that if at any time during the Period of Insurance any employee in the insured''s immediate service shall sustain personal injury by action or disease arising out of and in the course of his employment by the insured in the Business and if the insured shall be liable to pay compensation for such injury either under.

Then subject to the terms exceptions and conditions contained herein or endorsed hereon the Company will indemnify the insured against all sums for which the Insured shall be so liable and will in. addition be responsible for all cost and expenses incurred with its consent in defending any claim for such compensation.

It is thus clear the policy issued by the insurance company is a general policy of insurance which covers a case of personal injury sustained by the workman due to accident arising cut of and in the course of his employment with the insured and is not restricted to loading and unloading of shellac. Therefore, even though the process of manufacturing of shellac had stopped at the time of accident, it would make no difference because the respondent/claimant sustained injury due to accident arising out of and in the course of his employment with the insured and in this view of the matter, there is no room for any doubt that the insurance company is, under the contract with the employer, liable to indemnify the employer for any compensation payable by the employer under the Act, 1923. In this view of the matter the finding recorded by the lower Court whereby the insurance company was exonerated from payment of compensation is liable to be and is accordingly set aside.

17. As regards the last substantial question of law is concerned, the proviso to Sub-section (3) of Section 4A of the Act, 1923 leaves no room for any doubt that an order for payment of penalty shall not be passed under Sub-section (3) without giving a reasonable opportunity to the employer to show cause why it should not be passed. A duty was cast on the lower Court to afford a reasonable opportunity of hearing to the employer before making an order for payment of penalty. Therefore, the order for payment of penalty passed by the lower Court against the appellant/employer is also liable to be set aside.

18. In view of the findings recorded on the substantial questions of law framed by this Court, the appeal is allowed. The finding recorded by the lower Court that the claimant/workman-Jawahar Prasad Yadav had suffered 50% permanent disablement in the accident is set aside. It is further held that the insurance company is liable to indemnify the appellant/employer for any such compensation, as may be determined afresh by the lower Court for the nature of disablement suffered by the respondent/claimant. The lower Court shall give reasonable opportunity to the appellant/employer as also the respondent/ claimant and the insurance company to lead medical evidence, oral as well as documentary, regarding the nature of injury suffered by the respondent/ workman and shall thereafter make fresh assessment of the type of disablement, if any, suffered by the respondent/claimant and the compensation payable therefore by the respondent/insurance company to the respondent/claimant. It shall further give a reasonable opportunity of hearing to the appellant/owner before making an order for payment of penalty.

