

(2009) 08 SHI CK 0018
In the High Court Of Himachal Pradesh

The New India Assurance Company Limited	APPELLANT
Vs	
Billa alias Daljit Singh and Another Singh Vs Kailash Arora and Another	RESPONDENT

Date of Decision : 03-08-2009

Acts Referred:

Workmens Compensation Act, 1923 — Section 30

Citation : (2009) 3 ShimLC 231

Hon'ble Judges : V.K. Ahuja, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Ahuja, J.—The aforesaid two appeals are being disposed of by a common judgment, as both the appeals have been filed u/s 30 of the Workmen's Compensation Act, hereinafter referred to as "the Act", against the award passed by the Commissioner, Workmen Compensation, dated 30.3.2005, vide which the learned Commissioner has awarded a sum of Rs. 4,27,582/-, alongwith interest, as against the Insurance Company. FAO No. 224 of 2005 has been filed by the appellant/Insurance Company and FAO No. 454 of 2005 has been filed by the appellant/claimant against the aforesaid award of the learned Commissioner.

2. Briefly stated the facts of the case are that an application u/s 22 of the Act was filed by the claimant as against respondent No. 1 being the owner and as against the Insurance Company, who was impleaded as respondent No. 2 (appellant in FAO No. 224 of 2005), being the insurer of the vehicle. The claimant alleged that he was working as a driver on Tanker No. PBW-7847 with respondent No. 1 on monthly salary of Rs. 5,000/-. The vehicle was insured with respondent No. 2/Insurance Company. The claimant was driving the vehicle on 6.8.2002, which met with an accident with another vehicle and the claimant suffered injuries and his left leg was amputated. He allegedly spent Rs. 30,000/- on treatment and medicines. He alleged his age as 23 years and claimed compensation to the extent of Rs. 10.00 lacs.

3. Respondent No. 1/owner admitted that the applicant was the driver, but it was pleaded that he was drawing wages at the rate of Rs. 60/- per day. The appellant/ Insurance Company took the plea that the claimant was not having a valid and effective driving license. On conclusion of the case, the learned Commissioner held that the wages of the claimant were Rs. 81/- per day and he was entitled for additional wages for 10 days in a month and his total wages were assessed at Rs. 3,240/-. The age of the claimant was held to be more than 23 years and applying the schedule under the Act, the learned Commissioner granted the compensation to the claimant amounting to Rs. 4,27,582/-, which was allowed as against the owner and was to be indemnified by the Insurance Company. The claimant was also awarded interest at the rate of 12% per annum from the date of application till the date of deposit. However, it was directed that in case the Insurance Company failed to deposit the amount within 30 days of the date of order, they shall be liable to pay interest at the rate of 15% on the compensation amount payable to the applicant.

4. I have heard the learned Counsel for the parties and have gone through the record of the case. The appeal has been filed by the Insurance Company challenging the award on various grounds. It was submitted that there is no proof on record that the claimant was entitled to the wages at the rate of Rs. 81/- per day plus for 10 days and that he had not suffered 100% disability and, therefore, the grant of compensation, treating the disability as 100%, was wrong. It was also submitted that there was clear cut breach of the policy since there was nothing to establish on record that the claimant was having a valid and effective driving license on the date of accident. The last ground taken was in regard to the grant of interest awarded by the learned Commissioner and no penal interest could have been granted.

5. Coming to the first plea raised by the learned Counsel for the Insurance Company in regard to the income as assessed by the learned Commissioner, as detailed above, the claimant had alleged that he was getting a monthly salary of Rs. 5,000/-. Respondent No. 1 had pleaded that the claimant was being paid at the rate of Rs. 60/- per day. The claimant appeared in the witness box as AW-4 and reiterated that he was getting Rs. 5,000/- per month. The respondents had examined RW1 Sant Ram, Attorney of respondent Owner, who stated that the claimant was being paid Rs. 60/- per day. However, he did not produce any record in regard to the payments made to the claimant. This cannot be disputed that under the provisions of the industrial law, an employer is required to maintain a record in regard to the payments made to a worker and as such this record must be available with the owner. However, he failed to produce any record and keeping in view the evidence and discussion made by the learned Commissioner, I find no reason to disagree with the findings of the learned Commissioner, who assessed the daily income of the claimant at Rs. 81/- plus for 10 days, as calculated by him. Therefore, the said findings do not require reconsideration by this Court.

6. In regard to the disability, the learned Commissioner had observed that keeping in view the certificate AW-1/A coupled with the statement of AW-1 Dr. Manoj Mathew, it stands proved that the left leg of the applicant was amputated above the knee. The applicant as AW-4 had clearly stated that his left leg above the knee was amputated as a result of this accident. There is no mention in the evidence in regard to the percentage of disability, but keeping in view the statement of the applicant and the medical evidence that the leg above the knee was amputated, it can be termed as 100% disability, which has been so assessed by the learned Commissioner. In this regard, I am supported by the decision relied upon by the learned Counsel for the claimant in

7. Oriental Insurance Company Limited Hyd. Vs. Koti Koti Reddy and another, In that case, the workman was a driver of a truck and had sustained calcaneum fracture, injuries on forehead and right foot. Doctor assessed permanent disability of 30% and it was observed that the workman cannot drive a heavy vehicle. It was held that the workman was entitled to compensation on the basis of loss of 100% earning capacity.

8. Keeping in view the above decision and the nature of the injury, it can be said that the claimant had suffered 100% disability and he cannot work as driver and, therefore, the grant of compensation by the learned Commissioner on that basis does not call for an interference by this Court.

9. Coming to the next point raised by the learned Counsel for the appellant that there was a breach of the policy, since there was nothing on the record to establish that the driving license of the claimant was a valid one. It has been submitted by the learned Counsel for the owner that it was for the Insurance Company to prove that the driving license of the driver was not a valid one, in which they have failed and, therefore, the owner was not liable.

10. I may make a reference to the pleadings of the Insurance Company as respondent No. 2 in which it was simply pleaded that the driver was not holding any valid and effective driving license and as such there was violation of the terms and conditions of the policy. The learned Commissioner had observed that no evidence had been led by the Insurance Company to prove that the applicant was not having a valid and effective driving license. The applicant as AW-4 has reiterated that he was having a valid and effective driving license. It had come up in the evidence of RW-2 Sant Ram, Attorney of the Owner/respondent No. 1 that they had seen the license with the applicant and he denied the suggestion that the OD claim was rejected since the driving license was fake one. A perusal of the record, as pointed out by the learned Counsel for the appellant/Insurance company, shows that an application was filed for supplying particulars of the driving license by the appellant. In the reply, respondent No. 1/Owner clearly pleaded that the driver was having a driving license and in view of the specific suggestions put up in this regard by the Insurance Company to the applicant, it is clear that the license whichever was in possession of respondent No. 1 was supplied to the Insurance Company and they rejected the OD claim since the

license was not valid. This clearly shows that the driving license or its copy was in possession of the appellant/Insurance company and they took no steps to get the same verified from the Licensing Authority, which issued the same. An application, as referred to above, was filed by the appellant seeking particulars of the driving license and as per the order, dated 13.12.2004, it was observed by the learned Commissioner that from the reply filed as well as from the statement of RW-1, it is clear that the particulars of the driving license were with the Insurance Company and, therefore, the application was rejected. It was required of the Insurance Company to have produced evidence to prove that the driving license was fake which was in their possession, but they filed an application seeking better particulars of the driving license. The said application was, therefore, rightly rejected by the learned Commissioner and thereafter, an application under Order 26 of the CPC was filed for appointment of Commissioner for examination as to whether the license was issued by the RTO, Kohima. The said application was also dismissed by the learned Commissioner observing that there is nothing on the record to show that the license was issued from Kohima. A perusal of the application filed by the applicant under Order 26 of the CPC shows that it was nowhere alleged that as to from where they came to know that the license was issued from Kohima and simple prayer was made that a Commissioner be appointed to prove that the license was fake. There was no material available with the Commissioner to allow the application since it was nowhere alleged by the appellant as to how they were in possession of this license. However, they had pleaded that as per the report of the investigator, this license was found to be fake but never alleged that this was the same license supplied by the owner to them which, on verification, was found to be fake. Therefore, the learned Commissioner had rejected the said application with the result that there remains no evidence on the record to substantiate the claim of the appellant/Insurance Company that the license was fake. The onus was upon the Insurance Company in which they had failed since they did not take reasonable steps to prove this fact and as such the responsibility for payment of the compensation was rightly fastened upon them. There is no merit in the contention raised by the learned Counsel for the appellant/Insurance Company and the same is repelled being devoid of any force.

11. Coming to the last question as to from which date the interest was payable or the penal interest could have been awarded, on the point of interest, the learned Counsel for the appellant/Insurance Company had relied upon the following decisions.

12. The decision in National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, passed by the Apex Court shows that the interest is payable from the date when it became due and it was held that starting point is on completion of one month from the date it fell due. It was also held that the date fell due means the date of adjudication. It was further observed that the Legislature has not used the expression "from the date of accident" and unless there is an adjudication, the question of amount falling due does not arise.

13. Reliance was also placed upon the decision in Kamla Chaturvedi Vs. National Insurance Co. and Others, in which their Lordships had reiterated the decision in Mubasir Ahmed's case (supra) and similar observations were made.

14. On the other hand, the learned Counsel for the respondent/owner had relied upon the decision of a Constitutional Bench in case Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, The said decision and the decision in Mubasir Ahmed's case were discussed by a learned Single Judge of this Court in Sita Ram v. Satvinder Singh and Anr. Latest HLJ 2008 (HP) 1110 . The Learned Single Judge had referred to a decision of the Hon'ble Supreme Court in Mubasir Ahmed's case (supra) wherein it was held that the starting point is on completion of one month from the date from it fell due and the date fell due was interpreted as the date of the adjudication of the claim. However, it referred to a decision of the Constitutional Bench in Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, It was also held that this decision of the Constitutional Bench appears to have not been referred to before the Hon'ble Apex Court in Mubasir Ahmed's case and after considering the law as to which of the decision was applicable, it was held that in case of conflict, the decision of the Constitutional Bench or of the Larger Bench has to be preferred and accordingly the decision of the Constitutional Bench in Partap Narain Singh Deo's case (Supra) was relied upon. In coming to this conclusion the learned Single Judge had also placed reliance upon a Division Bench judgment of the Kerala High Court in National Insurance Co. Ltd. Vs. Rekha, In that case also the judgment of the Apex Court in Mubasir Ahmed's case and earlier decisions were referred to and accordingly it was held that there was no ground to interfere in that part of the order awarding interest from the date of accident. Keeping in view the above decision of the Division Bench of Kerala High Court and the decision of the learned Single Judge of this Court, it is clear that in case some provisional compensation had been deposited by the employer within one month of the accident, then the interest would have been payable only from the date of adjudication but once no such compensation was deposited, the interest has to be awarded from the date of the accident and accordingly the order passed by the Workmen Commissioner suffers from an illegality who granted the interest only from the date of adjudication and that too @ 9 % against the statutory provisions of granting of interest @ 12%.

15. It is, therefore, clear that the interest was payable, in case provisional compensation has been deposited by the owner after one month of the adjudication, but in case no provisional compensation has been deposited, the interest was payable at the rate of 12% after 30 days from the date of accident till the date of deposit. In the present case, the learned Commissioner had awarded interest at the rate of 12% from the date of application, which deserves to be modified accordingly. It shall be read as granted after 30 days of the date of accident, as mentioned above.

16. Coming to the question of penalty, the learned Commissioner had directed

that in case the amount is not paid within 30 days from the date of order, respondent No. 2 i.e. Insurance Company shall be liable to pay interest at the rate of 15%, which was in the form of penalty. However, there is nothing on the record to show that any notice was issued to the owner in this regard before imposing this interest in the nature of penalty. The penalty, if directed, is payable by the owner only, but according to the provisions of Section 4 proviso of the Act, the penalty cannot be imposed until and unless a notice is issued to the owner. In the present case, there is nothing specific to show that before imposing this interest in the form of penalty, any notice was issued to the owner. Therefore, the owner shall not be liable. However, the claimant shall be entitled to the interest even after the date of application i.e. upto the date of deposit. A perusal of the record shows that the owner had the knowledge about the accident when the owner visited the claimant in the hospital as per the evidence. However, in such eventuality, if no amount of provisional compensation was deposited by the owner, the claimant shall be entitled to interest after 30 days from the date of the accident till the date of deposit. The appeal filed by the appellant/Insurance Company is accordingly dismissed, since there is no merit in the appeal, with some modifications as made above. No case is made out for the enhancement of the compensation. However, the claimant has been held entitled to interest upto the date of deposit, as detailed above. The appeal filed by the claimant stands partly allowed accordingly.