(2007) 02 KL CK 0027

In the High Court Of Kerala

Case No : MFA No. 174 of 2005

The Senior Divisional Manager	APPELLANT
Vs	
Sundhari, Sheeba, Aneesh and Thomas, Southern Erectors (P) Ltd.	RESPONDENT

Date of Decision : 28-02-2007

Acts Referred:
Motor Vehicles Act, 1988 — Section 147

Citation : (2007) 02 KL CK 0027

Hon'ble Judges : S. Siri Jagan, J;P.R. Raman, J

Bench : Division Bench

Advocate : K.K.M. Sherif, for the Appellant; Santhan V. Nair, for the Respondent

Final Decision : Allowed

Judgement

S. Siri Jagan, J.—This appeal arises from the order dated 5-5-2005 of the Commissioner for Workmen''s Compensation, Thiruvananthapuram, in W.C.C. No. 25/2002, by which the Commissioner has directed the appellant-Insurance Company herein to satisfy the order of directing payment of compensation amounting to Rs. 3,29,010/- with 12% interest thereof due to the legal heirs of late Wilson, who died in an accident arising out of and in the course of employment with the 4th respondent-employer. The New India Assurance Company Ltd., is the appellant-Insurance Company. The claimants in the workmen''s compensation case are respondents 1 to 3 herein, who are the legal heirs of the late Wilson. The 4th respondent is the employer of the late Wilson, who died in an accident arising out of and in the course of employment with the 4th respondent. The only point raised by the appellant before us is that the appellant-Insurance Company is not liable to pay the interest portion of the award in so far as the policy of insurance issued by the appellant in favour of the 4th respondent excludes any liability for payment of interest and penalty on the compensation amount.

2. The issue as to whether the Insurance Company is liable to pay interest on the

amount of compensation does not pose any challenge to us, in so far as that question has been settled by judicial decisions, both of this Court and that of the Supreme Court in various decisions. In the decision of National Insurance Company Ltd. v. Unni and Ors. ILR 1999 (Ker) 64, a Division Bench of this Court held that the liability undertaken by the Insurance Company to indemnify the insured being a contractual liability, the parties are bound by the contract and the Insurance Company is liable to indemnify the insurer only to the extent of the liability undertaken by them, which means that when the policy excludes the liability to pay interest and penalty on the compensation amount, no interest and penalty are payable by the Insurance Company. In the decision of P.J. Narayan Vs. Union of India (UOI) and Others, , the Supreme Court also held that insurance being a matter of contract between the Insurance Company and the insured, they are entitled to provide by contract that they will not take on liability for payment of interest. It was further held that in the absence of any statute compelling to do so, the Insurance Company cannot be forced by Courts to take on liabilities which they do not want to take on. These decisions have been further elaborated upon by the Supreme Court of India itself, very recently, in a detailed judgment in New India Assurance Company Ltd., v. Harshadbhai Amrutbhai Modhiya 2006 (2) KLT 667 (SC). In that decision, the Supreme Court noted that the Workmen''s Compensation Act does not contain any provision like Section 147 of the Motor Vehicles Act which provides for compulsory insurance to the extent stipulated in that Section. In the absence of any statutory provision requiring any particular mode of compulsory insurance coverage, the Insurance Company and the employer are free to enter into a contract of policy with conditions of their choice and such a contract of insurance would be governed by the terms of the contract entered into by volition of the parties to the contract of insurance. Therefore, it was held that in the absence of any law 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 the insurer only in respect of a particular head or a particular amount, when it relates to a claim for compensation to a third party arising under the Workmen''s Compensation Act, the obligation of the Insurance Company clearly stands limited and the proviso in the policy provided for exclusion of liability for interest or penalty has to be given effect to. In view of the above binding decisions, we need not look elsewhere to conclude that if there is a specific exclusion of liability of the Insurance Company in respect of liability to pay interest and penalty in the contract of policy, the Workmen''s Compensation Commissioner would not be correct in directing the Insurance Company to pay interest and penalty also when it decides that the employer is liable to pay compensation and the insurer is liable to satisfy the award. Therefore, the only question which has to be decided by us is as to whether the policy in this case between the appellant-Insurance Company and the 4th respondent-employer excludes the liability of the appellant to pay interest on the compensation amount as computed by the Workmen''s Compensation Commissioner.

3. Ext.D1 is the policy of insurance which has been legally proved before the Commissioner. The policy insures the 4th respondent against the claims of his workmen arising out of and in the course of their employment. The same contains the following proviso:

Provided that the Insurance granted hereunder is not extended to include:

(i) any interest and/or penalty imposed on the insured on account of his/their failure to comply with the requirements laid down under the W.C. Act, 1923 and

(ii) any compensation payable on account of occupational diseases listed in Part "C" of Schedule iii of the W.C. Act, 1923.

That being so, there cannot be any doubt that the policy between the appellant-Insurance Company and the 4th respondent specifically excludes the liability of the Insurance Company to pay interest or penalty in respect of the compensation amount payable by the 4th respondent to his workmen for injuries arising out of and in the course of the employment with the 4th respondent. In the present case, the Insurance Company had, in fact, raised a specific contention that in view of the specific exclusion in the policy, the appellant- Insurance Company is not liable to pay interest on the compensation amount which contention has been specifically noted in the discussion on issue No. 5 by the Workmen''s Compensation Commissioner. However, the Commissioner, on the reasoning that since the 4th respondent had in fact informed the appellant-Insurance Company about the accident in time, held that the Insurance Company is liable to pay interest portion also of the award. To say the least, this finding of the Commissioner is perverse. The primary liability to pay compensation is on the employer. If he commits default in payment, it is he who is liable to pay interest. It cannot be simply assumed that once he intimates the Insurance Company about the accident, his liability is over. If he wants to avoid payment of interest, he must pay the compensation payable under the Act and seek reimbursement of the amount from the Insurance Company. If he chooses to wait till the Workmen''s Compensation Commissioner passes an award on a claim by the claimant, he takes the risk of payment of interest and penalty also, which is statutorily provided for. The exclusion of liability to pay interest cannot depend upon the intimation or lack of it by the employer to the Insurance Company. That liability has to be decided on the basis of the policy of insurance itself. The Commissioner also must have noted the specific exclusion contained in the policy, since the insurance policy was before him, duly proved as Ext. D1 and the appellant had raised a specific contention to that effect. As such, the finding of the Commissioner that the appellant-Insurance Company is liable to pay interest and also penalty in case the employer is ordered to pay the same suffers from very serious legal infirmities and therefore is liable to be set aside to that extent. We do so. Accordingly, we modify the award of the Workmen''s Compensation Commissioner, Thiruvananthapuram in W.C.C. No. 2 5/2002 to that extent and direct that the appellant-Insurance Company would not be liable to pay the interest as directed in the award. Although the Commissioner has stated that the

Insurance Company is liable to pay interest and also penalty in case the employer is ordered to pay the same, the award does not contain any direction to pay any penalty. Whatever that be, we make it clear that the appellant-Insurance Company would not be liable to pay to respondents 1 to 3 interest as ordered by the Workmen''s Compensation Commissioner or penalty, if any, in view of the specific exclusion of payment of interest and penalty in Ext. D1. Consequently, the appellant-Insurance Company would be entitled to refund of the interest portion which they have deposited with the Workmen''s Compensation Commissioner against disbursement of which there is a stay in this appeal. Needless to say, the 4th respondent would be liable to pay interest on the compensation amount to respondents 1 to 3 as directed by the Commissioner and the respondents 1 to 3 would be entitled to realise the same from the 4th respondent-employer. The appeal is allowed as above.