

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO 445/2010**

% **5th March, 2014**

NEW INDIA ASSURANCE CO. LTD. Appellant
Through: **Mr. D.D.Singh and Mr. Navdeep Singh, Advocates.**

VERSUS

BABITA MISHRA & ORS. Respondents
Through: **Ms. Monika, Adv. for Mr. S.N.Parashar, Advocate for R-1 to 5.**

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Section 30 of the Employee's Compensation Act, 1923 impugning the judgment of the Commissioner dated 9.9.2010 by which the claim petition filed by the claimants, respondents no.1 to 5 herein was allowed by awarding compensation of Rs.4,24,387/-. It is not in dispute that the deceased employee Sh. Dalip Kumar Mishra was working as a driver with respondent no.5 herein and while performing his duties of driving the vehicle no.DL-DIM-0606 on 14.2.2008 he was kidnapped alongwith the vehicle and thereafter found

murdered. FIR was registered at police station Seema Puri, Delhi vide FIR No.56/2008 dated 15.2.2008. The body of deceased Dalip Kumar Mishra was subsequently recovered by the police officials. The claim petition thereafter came to be filed.

2. The Commissioner has noted that there is no dispute as to relationship of employer and employee as also the fact that the accident resulting in the death of the deceased employee Sh Dalip Kumar Mishra arose out of and in the course of employment. These aspects are also not disputed before me.

3. Counsel for the appellant-insurance company before me has urged the following aspects:-

(i) Since the admitted wages of the deceased employee were Rs.2500/- per month, Commissioner erred in taking the wage at the minimum wages figure of Rs.4057/-. Counsel for the appellant also urges that in this case the Commissioner should have taken the wage at Rs.2500/- which is the figure of wages admitted by the employer and not the minimum wage of Rs.4057/-. It is further argued that maximum wages as per the Act as applicable on the date of the accident was a sum of Rs.4000/- in terms of Explanation II of Section 4(1), and which can only be payable once wages are proved to be higher than Rs.4000/-, however, the wages are only Rs.2,500/- in this case.

(ii) The age of the deceased has wrongly been taken at 30 years at the time of his death on 14.2.2008 although the documents filed by respondent nos. 1 to 5 before the Commissioner i.e the election identity card as also the ration card showed that the deceased was 34 years of age at the time of his death.

(iii) Since the employer had paid a sum of Rs.2 lacs to the employee, the appellant-insurance company is liable for adjustment of this amount against the compensation granted.

4. So far as the first argument of the Commissioner having taken the minimum wages and not actual wage of Rs.2500/-, when the attention of the counsel for the appellant was drawn to Section 4(1)(B) of the Employee's Compensation Act, 1923, the argument urged could not be seriously pressed because as per the provision of Section 4(1)(B) the wages which are to be taken for purposes of Section 4(1)(B) to determine compensation will have to be the wages as fixed by the government i.e minimum wages. Accordingly, the Commissioner has committed no illegality in taking the wages for calculation of compensation under Section 4(1) at the figure of minimum wages of Rs.4057/-. After the judgment was dictated, counsel for the appellant pointed out that Section 4(1)(B) was not existing when the

accident took place on 14.2.2008 and therefore the issue has again been considered. This argument urged on behalf of the appellant-insurance company is also misconceived for the reason that though the employer claimed that the wage were Rs.2500/-, no evidence was led to prove this fact. Although, respondent nos. 1 to 5 claimed that the deceased was earning Rs. 6000/- even they did not file any documentary evidence. The Commissioner has therefore in my opinion, taken the minimum wage which is due and payable in law, and considering that there is only a difference of Rs.57 between the figure of Rs.4000/- as per Explanation II to Section 4(1)(a) of the Act and the figure of Rs.4057/- taken by the Commissioner, I do not think that it is necessary to disturb the finding of the Commissioner taking the monthly wage figure at the minimum wage figure of Rs.4057.

5. So far as the second argument is concerned, the argument has merit because the age of 30 years as found by the Commissioner is on the basis of the driving licence of the deceased, however, the respondent nos. 1 to 5 have themselves filed the ration card and election identity card both of which have more authenticity than the driving licence, and which documents showed that the deceased was not 30 years old but was 34 years of age at the time of his death. Once that is so, the factor of determining the

compensation will be lesser and accordingly, it is held that in the present case, the factor would be 199.40 for the age of 34 years and the Commissioner will now re-calculate the compensation taking the age of the deceased as 34 years and taking the factor as 199.40.

6. The third argument urged on behalf of the appellant is misconceived because the liability of the appellant-insurance company is in terms of the insurance policy and as per which the insurance company is liable to make payment of compensation which is payable by the employer on account of an accident arising under the Employee's Compensation Act, 1923. This aspect was not disputed before me but what was argued was that once Rs. 2 lacs was paid by the employer, then, the entire compensation amount could not be awarded, against the appellant- insurance company. In my opinion, the issue can be resolved by ordering that out of the total compensation which has to be paid under the amount awarded after re-calculation by taking the age of the deceased as 34 years, a sum of Rs. 2 lacs will be paid by the appellant-insurance company not to the respondent nos. 1 to 5 herein and who were the claimants before the Commissioner, but to the respondent no.6 which is the insured under the insurance policy.

7. In view of the above, the appeal is allowed to the limited extent that there will be recalculation of the compensation taking the age of the deceased as 34 years and the factor as 199.40. Rest of the contentions urged on behalf of the appellant are rejected.

8. In case the respondent nos. 1 to 5 have withdrawn the total amount of compensation including a sum of Rs.2 lacs, it will always be open to the employer-respondent no.6 herein to recover this amount from the respondent nos. 1 to 5 herein.

9. In case, after recalculation, it is found that the appellant-insurance company has deposited an amount in excess with the Commissioner, such excess amount will be refunded to the appellant-insurance company alongwith interest accrued thereon if any. Parties are left to bear their own costs.

MARCH 05, 2014
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VALMIKI J. MEHTA, J.