

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

First Appeal No. 204 of 1999

* United India Insurance Co.
Through its Assistant Manager,
authorised and signatory
Aurangabad Division, Aurangabad. .. **Appellant.**

Versus

- 1) Mulla Chandpasha s/o Maheboobsab,
Age 40 years, Occupation Nil,
R/o Helamb, Taluka Udgir,
District Latur.
- 2) Shaikh Shahabuddin S/o Mastansab,
Age Major,
Occupation : Business,
R/ Bagwangalli, Bhalki,
District Bidar. .. **Respondents.**

Shri. A.B. Gatne, Advocate, for appellant.

Shri. C.R. Deshpande, Advocate, for respondent No.1.

Shri. V.D. Gunale, Advocate, for respondent No.2.

With

First Appeal No. 291 of 2001

* United India Insurance Co.
Through its Sr. Divisional Manager,
authorised signatory,
representative Ahmednagar

Division, Kisan Kranti Building,
Ahmednagar,
District Ahmednagar.

.. Appellant.

Versus

- 1) Vitthal Laxman Sasane,
Age 50 years,
Occupation : Labour.
- 2) Sumanbai Vitthal Sasane,
Age 45 years,
Occupation : Household work.
- 3) Sampat Vitthal Sasane,
age 18 years,
Occupation: Nil.

Nos. 1 to 3 residents of
Tisgaon, Taluka Pathardi,
District Ahmednagar.

- 4) Hanif Umar Shaikh,
Age 45 years,
Occupation: Business,
R/o Tisgaon, Taluka Pathardi,
District Ahmednagar.

.. Respondents.

Shri. A.B. Gatne, Advocate, for appellant.

Shri. D.R. Jayabhar, Advocate, for respondent Nos.1 & 2.

Shri. A.V. Hon, Advocate, for respondent No.4.

With

First Appeal No. 30 of 2007

* United India Insurance Co. Ltd.
Through its Divisional Manager and
authorised representative and
signatory, Jalgaon Divisional Office,
Mansingh Market, IInd Floor,
Near Railway Station,
District Jalgaon.

.. Appellant.

Versus

- 1) Dayaram Tukaram Mali,
Age 46 years.
- 2) Anjubai Dayaram Mali,
Age 42 years.
- 3) Rohit Dayaram Mali,
Age 17 years.
- 4) Seema Dayaram Mali,
Age 14 years.

All R/o at Taramatinagar,
Varad Road, Chopda,
Taluka Chopda, District Jalgaon.

- 5) Darshansing @ Dharamsing
Nanaksingh Grower,
Age 50 years,
Occupation : Contractor,
R/o 24, Ganpati Nagar,
Jalgaon, District Jalgaon.

.. Respondents.

Shri. A.B. Gatne, Advocate, for appellant.

Shri. G.L. Deshpande, Advocate, for respondents 2 to 4.

Shri. A.G. Talhar, Advocate, for respondent No.5.

CORAM: T.V. NALAWADE, J.

DATE : 17th DECEMBER 2015

JUDGMENT:

1) All the appeals are heard together on the request made by learned counsel for the appellant, insurance company, as he wants to argue the same point, *"the tenability of the appeals filed by the insurance company under section 30 of the Workmen's Compensation Act 1923 when compensation amount is not deposited by the insurance company"*. Both the sides are heard.

2) First Appeal No.204 of 1999 is filed against the judgment and award of W.C.A. No.59/1996 which was pending before the Commissioner of Workmen's Compensation appointed under the Workmen's Compensation Act (hereinafter referred to as "the Act") Latur. The Commissioner has granted compensation of Rs.2,33,568/- in favour of respondent No.1 of this appeal, who is injured employee. Interest at the rate of 12% per annum is granted on this amount and penalty of Rs.10,000/- is separately imposed on the employer. The

insurance company is directed to pay compensation and the interest.

3) First Appeal No.291/2001 is filed against the judgment and award of WCA No.12/1998 which was pending before the Commissioner appointed under the Act at Ahmednagar. It was death claim and in this matter direction is given by the Commissioner against the insurance company to deposit compensation amount of Rs.2,19,950/- with interest at the rate of 12% per annum. In this matter notice of show cause is issued against the employer in which he is asked to show cause as to why he should not be directed to deposit 50% more amount as penalty on the basis of compensation calculated.

4) First Appeal No.30 of 2007 is filed against WCA No.14/2000 which was pending before the Commissioner appointed under the Act at Jalgaon. It was death claim. In this matter, the employer and the insurance company, both are jointly and severally directed to deposit the compensation of Rs.1,74,000/-. If the amount is not deposited within one month from the date of decision,

they are to pay interest at the rate of 9% per annum till the date of realization of the amount. In this matter no penalty is imposed. Against the aforesaid decisions only the insurance company has filed appeals.

5) Respondent No. 1 Mulla Chandpasha of the first proceeding, injured employee, was working as driver on the truck of other respondent of this appeal. According to him, he was getting monthly salary of Rs.2200/- and he was paid daily allowance of Rs.25/- by the employer. It is his case that on 2-7-1996 when he was on driver's seat and when traffic police were inspecting the goods which he was carrying in the truck of the employer, on Bhalki - Hyderabad Road near Manyakali at about 2.00 a.m. another truck gave dash to his truck from back side and due to that he was pressed between steering wheel and the seat and he was virtually thrown out. It is his case that accident took place during course of employment. It is his case that he sustained fracture injuries due to which he is suffering from permanent total disability. He had made claim against the owner and the insurance company of the truck.

6) In the aforesaid First Appeal No.204 of 1999 employer admitted the fact that Mulla was working as driver with him. He denied that Mulla sustained injury and due to injury he has suffered permanent total disability and he cannot drive the truck. Insurance company also contested the matter by filing say. It contended that order of compensation cannot be made against it only because the vehicle was insured with it and as per the provisions of the Act and the terms and conditions of policy the owner can be proceeded against and liability can be fastened on the owner. It also denied that the claimant Mulla is suffering from permanent total disability.

7) Mulla examined himself to prove the injury sustained by him and he examined one Doctor who gave disability certificate to him. He and his doctor gave evidence that he cannot drive the truck due to injury sustained in that accident. For giving evidence in rebuttal the insurance company examined one doctor. The Commissioner believed the claimant and his witness and awarded aforesaid compensation.

8) In the appeal memo of Appeal No.204/1991 the Insurance company is contending that it was simple injury and as no record was produced like X-ray plate, the Commissioner ought not to have believed the claimant and his doctor. These contentions are considered by this Court (other Hon'ble Judge) while admitting the appeal. By order dated 19-3-1999 following substantial question of law came to be formulated.

"Whether the Commissioner under the Act has considered the material in relation to the provision of the Act while ascertaining the nature of injury and loss of earning capacity and due to that there is perversity in the decision of the Commissioner ?"

The learned counsel for the insurance company was allowed to argue in all the three appeals on one more substantial question of law as follows :

"Whether the bar created by proviso 3 to section 30 of the Act is applicable as against insurance company and for filing appeal it should first deposit the amount ?"

9) In First Appeal No.204/1991 before filing of the appeal no amount at all was deposited by the insurance

company as the compensation, as provided in section 30 of the Act. Civil Application No.1434 of 1999 was filed by the insurance company in the appeal for getting the relief of stay to the execution of the judgment and award of the Commissioner. This Court made conditional order in the said application on 19-3-1999 and directed the insurance company to deposit the amount of compensation. Insurance company deposited only the compensation amount, the amount of Rs.2,33,568/- but it did not deposit the interest on this amount at the rate of 12% per annum as directed by the Commissioner. Penalty amount is also not deposited. In view of these circumstances, learned counsel appearing for the original claimant submitted that the appeal of the insurance company cannot be heard on merit and it is liable to be rejected in view of the bar of third proviso to section 30 of the Act.

10) In WCA No.12/1998 against which First Appeal No.291 of 2001 is filed, compensation was claimed by the parents of the deceased employee. He was working as driver on tempo of respondent No.1, Hanif Umar Shaikh. The age of the deceased was given as 24 years. The

claimants had contended that he was getting salary of 2500/- per month and he was getting daily allowance of Rs.25/- from the employer. The employer did not file written statement. The defence of the insurance company is similar in respect of liability as it was taken in the aforesaid proceedings. The Commissioner presumed that the income of the deceased was Rs.1000/- per month and the age was 23 years. On that basis the compensation is calculated. In this matter when insurance company was directed to deposit the compensation amount with interest at the rate of 12% per annum, the amount of Rs.50,000/- only is deposited and that too as per order made by this Court on 12-10-2001. No compensation amount was deposited under section 30 of the Act. While admitting the appeal this Court (other Hon'ble Judge) had expressed that substantial questions of law need to be formulated on Grounds II and III mentioned in the appeal memo. On the basis of these grounds it can be said that following substantial question of law can be considered in this appeal.

"Whether the Commissioner has committed error in holding that the deceased was holding valid and effective driving licence ?"

It is already observed that learned counsel for the insurance company is allowed to argue on the substantial question of law in respect of proviso 3 to section 30 of the Act.

11) In W.C.A. No.14 of 2000 against which First Appeal No.30 of 2007 is filed, compensation was claimed in respect of death of the cleaner of JCB machine by his parents. It was contended in the matter that deceased was getting Rs.1000/- per month and he was getting daily allowance of Rs.50/-. The insurance company had contested the matter by contending that there was no relationship between deceased and the owner as employee and employer. From the judgment it appears that there was no specific defence that the deceased was not covered under the policy. The Commissioner has granted the compensation only. It appears that the owner had the knowledge about the accident and even notice

was given to the owner on 22-11-1999 by the claimants but the conditional order is made and interest is directed to be deposited if within one month compensation amount is not deposited. The Commissioner made the order on 16-6-2003 and the insurance company deposited cheque of Rs.1,74,000/- as compensation amount in the appeal in January 2004. No interest even at the rate of 9% as awarded by the Commissioner is deposited. This amount was also not deposited due to bar of proviso 3 to section 30 of the Act. This Court (other Hon'ble Judge) admitted the appeal but no substantial question of law was formulated. In the appeal first time the insurance company has contended that there was no cover to the risk of the cleaner. In view of this contention, the learned counsel for the insurance company was allowed to argue on the following substantial question of law :-

"Whether the defence of no coverage of insurance can be considered first time in appeal and that too against the employee ?"

In this matter also the other point of effect of proviso 3 to section 30 of the Act was argued.

12) The learned counsel for the insurance company argued on following points :--

(I) That the tenability of the appeal under section 30 of the Act when compensation amount is not deposited needs to be considered from different angles. The learned counsel has filed written submission also dated 27-8-2015 in that regard. He submitted that the words "shall lie" used in the third proviso mean that appeal can be entertained and only at the time of admission of the appeal, the condition shown in the third proviso can be considered. He placed reliance on case reported as **AIR 1961 SC 1134 (Commissioner of Income Tax Bombay v. Filmistan Limited)**;

(II) that the word 'insurer' is used only in section 14 of the Act and so the liability of insurer arises only under the circumstances mentioned in section 14 of the Act;

(III) that the insurance company is different and separate legal entity and so the third proviso to section 30 of the Act cannot be used against it. This interpretation is

possible as the word 'employer' is used in section 30 and the word "appellant" or 'aggrieved party' is not used in section 30. In view of these circumstances, the bar is applicable only against employer and not against the insurance company;

(IV) that the insurance company has right to take defences available under the provisions of the Motor Vehicles Act 1988 and also under the terms and conditions of the policy. The provisions of the Act also need to be considered. When it is settled law that the insurance company cannot be made liable to pay "penalty" for filing appeal it cannot be made to deposit the compensation as mentioned in the third proviso. Further, the third proviso is applicable for provision of section 30(1)(a) and it is not applicable to the provision of section 30(1)(aa). Reliance is placed on the case of **Ved Prakash Garg v. Premi Devi** reported as **(1997) (8) SCC 1**.

13) Learned counsel for the insurance company submitted that there are many reported cases of other High Courts on the aforesaid points but there is no

decision of this High Court and so it has become necessary to decide this point.

14) Before considering the points involved from the angles quoted above, it needs to be kept in mind that the Act is a special statute and it is beneficial and social legislation made in favour of employees and the object is to give immediate relief as it is a separate, special legislation. The provisions regarding tenability of appeal or right of appeal given in Civil Procedure Code like section 96 and Order 41 cannot be used in the same form in the present matter. This procedure is summary in nature, not regular civil proceeding.

15) Power of the Commissioner is quoted in 19(1) of the Act and it runs as under :-

"19. Reference to Commissioners (1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement, be settled by a Commissioner."

This provision shows that all questions relating to the liability of party who is required to indemnify the employer need to be decided under the Act and not in separate proceeding. Reliance is placed on case reported as **(2007) 13 SCC 446 (Gottumukkala Appala Narsimha Raju v. National Insurance Co. Ltd.)** As the Commissioner is given power to decide the matter even against the insurer, the insurer gets right to challenge the decision.

16) The liability of the insurer under the contract of policy is liability to indemnify the employer on the basis of policy. As per provision of Section 147 of the Motor Vehicles Act, 1988 (Section 95 of the old Act) it is statutory liability of the insurer. These provisions show that the insurance company is bound to give coverage to the employee like driver and cleaner of the vehicles mentioned in this section though the liability of the insurance company can be limited to the extent of liability provided under the Act. There can be contractual liability in respect of employees like cleaner or other employees also under section 147 of the Motor Vehicles Act. It can be said that in view of this provision, when motor vehicle

is involved, the liability of the insurance company can be restricted in respect of employees upto the limit given under the Act. It is settled law that the liability to pay compensation includes the liability to pay the interest on the compensation amount. Section 149 of the Motor Vehicles Act also can be referred on this point. This point is not disputed by the learned counsel for the insurance company also. In view of this position of law, unless there is a term for contracting out the liability to pay interest, insurance company cannot say that it is not liable to pay the interest. In the present matters, there was no such negative clause, for contracting out.

17) Contract of insurance is a contract of indemnity and it is between only the insurer and the assured. There is no privity of contract between the insurance company and the employee who is entitled to make claim against the employer. In view of these circumstances, employee cannot directly sue the insurer and in ordinary course, cause of action for claiming indemnification against the insurer accrues to the assured when assured is damnified, he is required to pay to third party. In ordinary course, the

suit by assured against the insurer before sustaining actual loss is premature. Only due to statutory provision like provision of section 147 and section 149 of the Motor Vehicles Act the claim can be made against the insurer and owner by the victim of accident or by the employee of the owner of the vehicle. In view of provision of Section 149 of the Motor Vehicles Act, the insurer is required to satisfy the award made against the owner. Thus, the liability of the owner becomes the liability of the insurer and the liability can be limited under the contract up to the extent mentioned in Section 147 of the Motor Vehicles Act. When award is made against the insurer and the assured, the insurer can challenge the award but for that the insurer steps in the shoes of the insured, owner of the vehicle. If in the appeal filed against compensation amount, the insurer succeeds, it is the success of the owner as the liability of insurer depends on the liability of the owner of the vehicle. In view of these circumstances, the insurer cannot contend that it has independent identity. It can be said that only when award made is in respect of liability which was not undertaken under the contract by the insurer, the insurer has independent right

to challenge the award in view of provisions of sections 30 and 19 of the Act. The provisions of sections 124 and 125 of Contract Act show that the assured is entitled to recover all damages which he is compelled to pay in a proceeding in respect of any matter to which the promise to identify applies and that includes even costs of the proceeding. It is, however, subject to conditions laid down in section 125 of the Contract Act. This provision also shows that the insurance company is liable not only to pay the compensation but also the interest which is payable on the compensation amount.

18) The proposition made by the learned counsel for the insurance company that liability of the insurance company under section 14 of the Act is limited one and that arises only when the conditions given in section 14 are satisfied is not at all acceptable. This provision only says that the employee steps into the shoes of the employer to make claim against the insurance company when the employer becomes insolvent. This is enabling provision and it does not restrict the right of the employee or the power of the authority to decide the claim under

section 19 of the Act. Statutory liability undertaken by the insurance company is the general liability of the owner of the vehicle. The dispute about liability to indemnify can be decided by the authority under section 19 of the Act.

19) The aforesaid position of law needs to be kept in mind while ascertaining the nature of conditions imposed in third proviso to section 30 of the Act. Relevant portion of section 30 of the Act is as under :-

"30. Appeals (1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely, :-

(a) an order as awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or part for a lump sum;

(aa) an order awarding interest or penalty under section 4A;

Provided that

Provided further

Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against."

The proviso shows that it is applicable only in respect of the order made by the Commissioner under section 30(1) (a). In Section 4A of the Act it is provided that when the employer makes default in making the payment of compensation which is due under the Act within one month from the date it fell due, the interest as provided under section 4A(a) becomes payable and if the Commissioner is satisfied that there was no justification for the delay caused in making payment, he can use the power under section 4A (3)(b) also and make employer pay the penalty which may extend to 50% of the amount which was payable by the employer. If the aforesaid portions of section 30 are interpreted literally and section 4A is read into section 30 of the Act, it can be said that the condition given in the third proviso is only in respect of the payment of compensation and it is not in respect of the interest or penalty which can be made payable under section 4A of the Act. It is already observed that the learned counsel for insurance company has not disputed that it is settled law that the insurance company is liable to pay interest on the compensation under the policy unless there is contracting out in respect of such interest.

Though there is such liability, for filing appeal, only the compensation amount needs to be deposited by the insurance company. It can be said that if the insurance company wants to challenge only the order of penalty which could not have been made against it, it can file appeal only in respect of that amount without producing certificate of deposit. In that case it will be open to the employee to execute the award against the owner and the insurance company in respect of the compensation awarded. Similarly, appeal can be filed only respect of interest and for that there will be no necessity of certificate of deposit of compensation. In that case also employee can proceed with execution proceeding to recover the compensation amount.

On the aforesaid point there is decision of Full Bench of Madhya Pradesh High Court reported as **2004 ACJ 2134 (MP) (New India Assurance Co. Ltd. v. Savita Sen)**.

20) In view of the object behind the legislation and particularly imposing the condition mentioned in the third provision, it is clear that the condition is mandatory and

the appeal cannot be entertained without depositing the compensation amount mentioned in section 30(1)(a) of the Act. The proposition made by the learned counsel for the insurance company that appeal can be entertained and this point can be decided at the time of admission of appeal is not at all acceptable. Even after filing of the appeal, there is one more condition like mentioned in first proviso to section 30 viz there is substantial question of law involved in the appeal. This hurdle also needs to be overcome by the insurance company.

21) In all the three provisos to Section 30 of the Act the words used are "no appeal shall lie". The first proviso is in respect of making out of the involvement of substantial question of law by the appellant and so the appellant has the right to make out such case before the Court. In view of this circumstance, the appeal needs to be accepted by the office and it is upto the Court to decide as to whether substantial question of law is involved or not and then the Court will decide as to whether the appeal needs to be admitted or not. In the third proviso, which is already quoted, it is made clear that the appeal

shall not lie unless the memorandum of appeal is accompanied by certificate to the effect that the appellant has deposited the amount payable under the order appealed against. It is the job of the office and not of the Court to see and confirm that the amount is already deposited. Only after that, the appeal memo can be accepted by the office. Otherwise the office can refuse to accept the appeal memo. Thus, there is difference between the two provisos and it cannot be said that it is upto Court to decide this point. In view of the third proviso, which is mandatory, the Court has no power to direct the office to accept the appeal when the amount mentioned in this proviso is not deposited. However, the manner of deposit of such amount can be regulated by the Court and the Court can direct to deposit such amount in the Court or with the Commissioner first. Thus, from all angles, the proposition is not acceptable that appeal can be entertained, considered by the Court if it is filed by insurance company without certificate of deposit and the pre-condition is not applicable to the insurance company.

22) So far as merits of the matters are concerned, it can be said that when there was opportunity to the owner and insurance company to refer the injured claimant to medical board to ascertain the extent of liability, such step was not taken in the first matter. It is summary procedure and so the degree of proof in such matter is not as per the degree of proof required in regular civil procedure. It can be said that there was no evidence at all given by the employee in the matter. It can be said that it was not scheduled injury. Provisions of Sections 4,11 and the schedule if considered together, it can be said that the employee is required to prove that he has lost his earning capacity due to injury sustained by him during the course of employment and for that he is expected to examine qualified medical practitioner. There is no arithmetic formula available and so the nature of the job and the effect of the injury needs to be considered to ascertain the loss of earning capacity. The opinion given by medical practitioner is the opinion of expert and it is upto the authority, Court either to accept the opinion as it or presume few things on the basis of other circumstances. One doctor is examined by insurance

company. Evidence of this doctor shows that the employee was referred to the hospital having more facilities, bigger hospital and this doctor has no personal knowledge about the nature of examination made in the hospital where the employee was referred. In view of provision of section 11 of the Act steps could have been taken by the employer and the insurance company for referring the employee to medical board. Such steps were not taken. It cannot be disputed, in view of the aforesaid provisions of law, that if no scheduled injury is sustained by the employee, regard can be had to corresponding or proximate injuries mentioned in Schedule I and on that basis expert can give opinion. This can be done in view of provision of Section 4(1)(c)(ii) Explanation II. In view of these circumstances, this Court holds that it is not possible to interfere in the order of the Commissioner in the first proceeding. So, the substantial question of law framed in that matter is answered against the appellant.

23) In the second matter, the substantial question about licence is framed. In this case also it was necessary for the insurance company to lead substantive evidence to

prove breach of condition of policy. No such attempt was made by the insurance company and so this point needs to be answered against the insurance company.

24) In the third matter before the Commissioner no defence was taken by the insurance company that risk in respect of cleaner of JCB machine was not covered and accordingly the matter was considered by the Commissioner. First time in appeal the insurance company has tried to contend that there was no coverage of insurance to the cleaner. In view of these circumstances, and as no attempt is made in the appeal also to lead evidence and make amendment in the written statement in that regard, such defence cannot be considered and so the question of law already quoted is answered against the insurance company.

25) This Court has already discussed the approach adopted by the insurance company at the time of filing of the three appeals. Along with appeal memo there was no certificate of the Commissioner as required by the third proviso to section 30 of the Act. Some amounts were

deposited in all the three proceedings only due to direction given by the Court but those directions were for giving stay to the execution of the awards and not for allowing the insurance company to file appeal. The amounts were deposited very late, under the orders, and so in all the matters there will be point of limitation. There cannot be condonation of delay automatically though the appeal came to be registered even when there was no compliance of condition laid down in the third proviso to section 30 of the Act and so it needs to be presumed that there was no condonation of delay in all the three matters in respect of the period for which the compensation amount was not deposited by the insurance company. In one matter, even compensation as mentioned in section 30(1)(a) is not deposited till today. Due to these circumstances, the appeals need to be dismissed for non compliance of the condition laid down in the third proviso to section 30 of the Act. All the substantial questions of law are answered against the appellant.

26) In the result, all the appeals stand dismissed.

Sd/-
(T.V. NALAWADE, J.)