

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 62 OF 2016

1. Rashid Khan s/o Gous Khan,
Age 68 years,
Occ. Driver at present nil,
R/o Kandhar,
District Nanded. ... Appellant

Versus

1. Kashinathrao s/o Bhendarkar,
Age Major, Occ. Transport business,
R/o Kandhar, Taluka Kandhar,
District Nanded.
2. The Manager,
United India Insurance Corporation
Branch Nanded
Near Malpani Building,
Vazirabad,
Nanded. ... Respondents

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Advocate for Appellant : Mrs. Smita K. Nagarkar h/f Mr. K. M. Nagarkar
Advocate for Respondent No. 1 : Mr. Pathan Hamzakhan I.
Advocate for Respondent No. 2 : Mr. V. R. Mundada
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CORAM : V. K. JADHAV, J.
DATED : 9th MARCH, 2016

JUDGMENT:-

1. Admit. By consent of parties, taken up for final disposal forthwith.
2. Being aggrieved and dissatisfied with the judgment and award dated 26.2.2010, passed by the learned C.J.S.D. Nanded in

W.C.N.F.A No. 1 of 1987, the appellant-original petitioner has preferred this appeal.

3. Brief facts giving rise to the present appeal are as follows:-

Undisputedly, respondent No.1 was the owner of matador bearing registration MTB-7330 on the date of accident i.e. on 1.7.1986, and the said matador was insured with respondent No.2- Insurance Company. The appellant-petitioner was in the employment of respondent No.1 and was working as a driver on the said matador. On 1.7.1986, the said matador, being driven by the appellant-petitioner from Kandhar to Nanded, met with an accident. In the said accident, the appellant-original petitioner had sustained injuries to his left eye. Even after long medical treatment, the appellant-petitioner lost vision of his left eye and consequently, he is not able to drive any vehicle. On the background of above facts, the appellant-petitioner filed claim petition before learned C.J.S.D. Nanded. Learned C.J.S.D., Nanded, by its judgment and order dated 26.2.2010, allowed the petition with proportionate costs and thereby directed the respondent jointly and severally to pay compensation of Rs.4,27,140/- to the appellant-petitioner and further directed respondent No.1 to pay simple interest @ 12% p.a. on the compensation amount from the date of occurrence, so also, to pay

penalty of Rs. 2,13,570/- to the appellant.

4. Learned counsel for the appellant submits that at the time of incident, the appellant was 22 years of age and accordingly he filed claim petition before the Court below by mentioning the same age. However, learned Judge of the trial court, by placing reliance on the medical certificate issued by the concerned doctor, wherein age of the appellant is mentioned as 27 years, assessed the compensation by considering age of the appellant as 27 years. In fact, Dr. Sahastrabudhe had examined the appellant in the year 1997 and accident had taken place in the year 1986. Learned counsel further submits that learned C.J.S.D. Nanded has committed gross error of law in directing respondent No.1 alone to pay penalty amount. Learned counsel submits that both the respondents are jointly and severally liable to pay penalty amount to the appellant. Learned counsel for the appellant submits that learned Judge of the trial court has not awarded interest on penalty amount. Respondent No.1 alone is directed to pay the interest at the rate of 12% p.a. on the compensation amount when respondent No.2, being the insurer of vehicle involved in the accident, is also jointly and severally liable to pay interest alongwith respondent No.1.

5. Learned counsel for respondent No.1 submits that the learned

Judge of the trial court has rightly considered the age of appellant as 27 years on the date of accident. There is no documentary proof to substantiate the contention of appellant that he was 22 years of age at the time of accident. In criminal case, age of the appellant is shown as more than 25 years at the time of accident. Respondent No.2 is also liable to pay penalty jointly and severally alongwith respondent No.1. Learned counsel for respondent No.1 submits that respondent No.1 is not liable to pay interest alone on the compensation amount, as awarded by learned Judge of the trial court.

6. Learned counsel for respondent No.2-insurer submits that penalty is leviable after show cause notice and considering explanation of the employer, and the same is not automatic. Insurance company cannot be held liable to reimburse the penalty and burden of penalty is to be borne by the employer and not by the insurance company.

Learned counsel for respondent No.2, in order to substantiate his contentions, places reliance on the following judgments:-

1. *Ved Prakash Garg vs. Premi Devi and others*, reported in AIR 1997 SC 3854,

2. *New India Assurance Co. Ltd. vs. Harshadbhai Amrutbhai Modhiya and another*, reported in 2006 (8) LJSOFT (S.C.) 69
3. *Smt. Kalpana Rajendra Kumawat and others vs. Vilas Dattu Fulwari and another*, reported in 2015 (4) LJSOFT 34.
4. *United India Insurance Co. Ltd. vs. Smt. Panchafula w/o Jaysingh and others*, reported in 2012 (6) LJSOFT 237
5. *United India Insurance co. Ltd. vs. Dattuji s/o Sonba Kodape and others* reported in 2010 (12) LJSOFT 210,
6. *United Insurance Co. Ltd. vs. Sarsabai w/o Kishanrao Sontakke and others*, reported in 2006 (5) Mah.L.J. 630 and
7. *New India Assurance Co. Ltd. vs. Mohan Bhanudas Bansode and others*, reported in 2005 (4) Mah.L.J. 158

Learned counsel further submits that the court below has rightly considered the age of applicant-petitioner and correctly worked out compensation as per the provisions of Workmen's Compensation Act. Learned counsel submits that the impugned judgment thus, calls for no interference and appeal is thus liable to be dismissed.

7. Though the appellant, in the claim petition, filed in the year 1987, mentioned his age as 22 years, the same is disputed by

respondent No.1-employer in the written statement while resisting the claim before the court below. It was thus incumbent on the part of applicant-petitioner to prove his age by placing relevant documents on record. The appellant was having driving licence to drive the vehicle, issued to him in the year 1986, and after the accident took place, the same was cancelled in the same year. It is not disputed that the driving licence is issued only after verifying the date of birth etc. It appears that the petitioner has withheld the best evidence available with him to claim the compensation by mentioning the age as 22 years when the other side has denied the same. Even in criminal case, wherein the petitioner was acquitted, his age is shown more than 25 years of age. Dr. Sahastrabudhe, who has issued certificate at Exh.138, has mentioned the age of appellant-petitioner as 27 years. Thus, in absence of any documentary evidence, it is difficult to say that the appellant-petitioner was 22 years of age at the time of accident. Learned Judge of the trial court has thus rightly considered that the petitioner was 27 years of age at the time of alleged accident.

8. So far as the question of penalty is concerned, learned counsel appearing for respondent No.2 has placed his reliance on various judgments, as mentioned above. It is well settled that the burden of payment of penalty is to be borne by the employer and not by the

insurance company. It is held that the insurance company cannot be held liable to reimburse the penalty. Thus, there is no substance in the submission advanced by learned counsel for appellant that respondent No.2 shall also bear the penalty as awarded by learned Judge of the trial court.

9. So far as the direction to pay interest @ 12% p.a. on the principal compensation amount is concerned, even in the cases on which reliance is placed by learned counsel for respondent No.2, it is held that the payment of interest under section 4-A (3) (a) is part of statutory liability, which is legally required to be discharged by the insured employer under the provisions of Workmen's Compensation Act and the compensation alongwith interest is to be made good by the insurance company jointly with the insured employer. Learned counsel for the appellant has not shown any provisions, which permit the court to grant interest on the penalty amount. In view of this, the appeal is required to be allowed partly to that extent by holding respondent Nos. 1 and 2 jointly and severally liable to pay simple interest @ 12% p.a. on the compensation amount of Rs.4,27,140/- to the appellant-petitioner from the date of occurrence of the incident. The rest of the impugned judgment and award is required to be confirmed. Hence, the following order:-

O R D E R

- I. The appeal is hereby partly allowed.
- II. The judgment and award dated 26.2.2010 passed by the learned Civil Judge, Senior Division, Nanded in W.C. N.F.A. No. 1 of 1987 is modified to the extent that the respondent Nos. 1 and 2 shall jointly and severally pay simple interest at the rate of Rs.12% p.a. on the compensation amount of Rs.4,27,140/-. Rest of the judgment and award stands confirmed.
- III. Award be drawn up accordingly.
- IV. First appeal is disposed of in the above terms. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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