

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

CMA No.1152 of 2005

Between:

The New India Assurance Company Ltd.
Rep. by its Divisional Manager, D.O.,1,
Alkarim Trade Centre, M.G.Road,
Ranigunj, Secunderabad.

... Appellant

And

P. Yashoda
and 5 others.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 07.02.2017

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether His Lordship wish to
see the fair copy of the Judgment? Yes / No

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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! Counsel for Appellant : Sri Kota Subba Rao.

^ Counsel for Respondents 1 to 5 : Sri Vemungati Rama Chandar Rao

^ Counsel for Respondent No.6 : ---

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> Head Note:

? Cases referred:

- 1) 2002 ACJ 595 (AP)
- 2) (2010) 13 SCC 777
- 3) 2005 ACJ 479 (Karnataka)
- 4) 2007 ACJ 2486 (MP) = AIR 2007 MP 237
- 5) 1995 (3) ALD 1108 = 1997 ACJ 529 (AP)
- 6) 1993 ACJ 542 (AP)

THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**C.M.A.No.1152 of 2005****JUDGMENT:**

Aggrieved by the Order dated 16.05.2005 in W.C.Case.No.38 of 2003 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Circle-I, Ranga Reddy District, Hyderabad, R2/New India Assurance Company Limited has preferred the instant appeal.

2) The parties in this appeal are referred as they were arrayed before the Commissioner.

3) The factual matrix of the case is thus:

a) The 1st applicant is the wife, applicant Nos.2, 3 and 5 are sons and applicant No.4 is the daughter of the deceased—P.Pandu Reddy. Their case is that deceased was employed by Opposite Party No.1 as driver of the lorry bearing No.AP 9U 115. While so, on 13.01.2003 at about 9.45 PM, when the deceased was proceeding from Hyderabad to Chennai, he stopped the lorry near Karvanvodai Bridge for paying toll tax, at that time another lorry bearing No.AP 16U 6322 came at high speed and dashed the lorry of the deceased from back side. In that collision, the deceased sustained greivous injuries and died at Chennai Hospital. It is averred that the driver of the lorry bearing No.AP 16U 6322 was solely responsible for the accident. On these pleas, the applicants filed W.C.Case.No.38 of 2003

against Opposite Party Nos.1 and 2, who are the owner and insurer of the lorry and claimed Rs.3,00,000/- as compensation.

b) Opposite Party No.1/owner filed counter admitting the material averments made in the application and urged to put the applicants in strict proof of the same. He stated that crime lorry was insured with Opposite Party No.2/Insurance Company and therefore, Insurance Company was liable to pay compensation. Finally, it contended that compensation claimed was highly excessive and exorbitant and thus, prayed to dismiss the application.

c) Opposite Party No.2/Insurance Company in its counter contended that as the accident was occurred during the course of employment, Opposite Part No.1 being the owner was liable to pay compensation and thus disowned its liability.

d) During trial, AW1 was examined and Exs.A1 to A6 were marked on behalf of applicants. RW1 was examined and Exs.R1 to R3 were marked on behalf of Opposite Party No.1 and Ex.B1—Insurance Policy was marked on behalf of Opposite Party No.2.

e) The Commissioner on appreciation of both oral and documentary evidence, awarded compensation of Rs.4,03,987/- against Opposite Parties 1 and 2.

Hence, the instant appeal by Insurance Company.

4) Heard arguments of Sri Kota Subba Rao, learned counsel for appellant/Insurance Company and Sri Vemuganti Rama Chandar Rao, learned counsel for respondents 1 to 5/applicants. Appeal against R6 was dismissed for default vide Court Order dated 03.01.2012.

5) The only question raised by learned counsel for appellant is that the Commissioner committed grave error in treating the daily batta as part of the wages. Learned counsel vehemently argued that the deceased was a driver and on account of his job, he was required to travel outside his hometown and in that context, his employer must have paid him @ Rs.50/- per day towards travelling allowance and to cover special expenses which do not form part of the wages. He relied upon the decision reported in *Oriental Insurance Co. Ltd vs. Koningi Kondal and others*¹. He thus prayed to recomputed the compensation.

6) Per contra, supporting the Award, learned counsel for respondents/claimants would argue that in the instant case daily batta was paid to the deceased by Opposite Party No.1 not to meet any travelling allowance or travelling concession because the deceased would go in the vehicle of Opposite Party No.1 as a driver and hence he was not required to meet any travelling expenses. He further argued that the daily batta cannot also be said to be paid to cover special expenses such as to meet food and lodging expenditure because RW.1 in his evidence has not stated to this effect. Learned counsel would point out that except stating that he used to pay Rs.50/- towards daily batta, the owner has not stated any specific purpose

¹ 2002 ACJ 595 (AP)

for which he used to pay the daily batta. In such an event, the daily batta can be safely regarded as part of the salary. He placed reliance on the decision reported in *S.Suresh vs. Oriental Insurance Company Limited and another*².

7) In the light of above rival arguments, the point for determination is:

“Whether the Commissioner was right in adding the daily batta to wages?”

8) **POINT:** Sec.2(1)(m) of the Employees Compensation Act, 1923 (for short “the Act”) defines the term wages as under:

“wages”, includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of an employee towards any pension or provident fund or a sum paid to an employee to cover any special expenses entailed on him by the nature of his employment.

The above definition is both an inclusive and exclusive definition. In the inclusive category any privilege or benefit which is capable of being estimated in money would fall. Whereas in exclusive category, the travelling allowance, travelling concession, contribution paid by the employer towards any pension or provident fund, a sum paid to an employee to cover any special expenses etc, would come.

9) Now the pertinent question is whether the daily batta falls in the inclusive or the exclusive category. If batta is paid by an employer to the employee in the form of travelling allowance or travelling concession to meet the travelling expenditure or paid to cover any other special expenses

² (2010) 13 SCC 777

like food and lodging expenses, such payment of batta gets excluded from the definition of wages. On the other hand, if out of total wages a portion is paid in the form of daily batta to enable the employee to meet the daily expenses and remaining portion is paid at the end of the month as wages, the daily batta would also assume the character of wages because it is a part of the total wages. In such an instance, merely because some portion of the wages is paid in the form of daily batta that cannot be excluded from the definition of wages. Therefore, determination of the aspect whether the batta is included or excluded from the wages, depends on the fact situation of every case. If batta is paid in the form of excluded category, it will not form part of the wages. Conversely, if it is paid in the form of inclusive category, it comes within the definition of wages.

This aspect has been discussed at length by a Division Bench of High Court of Karnataka in the case of ***New India Assurance Company Limited and another vs. Subhas***³. One of the questions raised before the Division Bench was:

“Whether daily batta charges is part of wages for the purpose of computing the compensation under the Workmen’s Compensation Act, 1923?”

Answering the same, one of the Judges of the Division Bench, Justice R.V. Raveendran (as he was then), observed thus:

“Para 11: This definition is one falling under the category of inclusive-cum-exclusive definitions. It includes any privilege or benefit which is capable of being estimated in money. It excludes

³ 2005 ACJ 479 (Karnataka)

any travelling allowance, or the value of any travelling concession, or the contribution paid by the employer towards any pension or provident fund, or the sum paid to a workman to cover any special expenses entailed on him by the nature of his employment. Where a definition is both inclusive and exclusive, and the exclusion is limited to certain specified categories, all other categories which are not so excluded, will fall within the inclusive definition. It follows therefore that if daily batta falls under the items excluded, it will have to be excluded from 'wages'. On the other hand, if daily batta does not fall under the items excluded, then it will form part of 'wages'."

x x x x...

Thereafter, having discussed the case law on the aspect, learned Judge held further as follows:

*Para 13: If any allowance is paid in consideration of the work done by the workman, even if it is paid daily to facilitate the employee to meet his daily needs, it will be a part of the 'wage'. Similarly, if any allowance is paid to an employee by the employer to meet any special needs or circumstances (relating to his employment) that will also be part of the 'wages'. This is because definition of 'wage' is an inclusive definition which includes any privilege or benefit which is capable of being estimated in money except those enumerated in the definition itself. It is also significant to note that the term 'benefit' is included in the definition of wages under the WC Act, while it is not included in the definition of 'wages' under the Payment of Wages Act. However any allowance paid to a workman can be excluded from 'wages' for purposes of the Act, if it is established that such payment was (a) travelling allowance; or (b) value of travelling concession; or (c) contribution towards pension or provident fund; or (d) amount paid to a workman to cover any special expenses entailed on him by the nature of his employment. **As daily batta paid to a driver does not fall under any of those exceptions, it will necessarily be a part of 'monthly wages' for purposes of the Act. (emphasis supplied)***

a) Then the Division Bench also discussed the argument raised by the appellant/Insurance Company to the effect that generally daily batta will be paid to drivers and cleaners/conductors only when they go on line i.e., when they travel in the lorry/bus from the Headquarters to any destination and back and therefore, such daily batta should be considered as a “travelling allowance” and thereby it should be excluded from the wages. Discarding this argument, the Division Bench observed that in the case of a driver or cleaner/conductor of a lorry/bus, the question of paying any cost of travelling by way of travelling allowance does not arise because they travel in the vehicle of their owner such as lorry or bus free of cost in connection with their employment and they do not incur any expenditure for travelling. Hence, any allowance paid to a driver or the cleaner of a lorry when they go out, is an outstation allowance or an allowance paid to meet the expenses for food or lodging or other incidental expenses. Therefore, any batta paid to a driver and cleaner is not travelling allowance, but an allowance given as a “benefit” which will necessarily fall within the definition of “wages”.

b) The next argument raised before the Division Bench was that since the drivers travel from one place to another place with regard to their employment, batta paid to a driver shall be treated as a sum paid to the workman to cover any “special expenses” entailed on him by the nature of his employment and hence it should be excluded from the wages. This argument was also negated by the Division Bench holding that batta is nothing but a subsistence allowance when employee staying away from his

home or headquarters and it would be paid not only to drivers, cleaners and conductors, but to other employees also who travel outside the headquarters and hence batta charges is not a payment made to the drivers to cover any special expenses entailed on him by the nature of employment.

c) Ultimately, the Division Bench of Karnataka High Court held that subject to the evidence to the contrary in any given case, any allowance paid as “batta” to a driver or cleaner of a lorry/vehicle will have to be treated as “benefit forming part of wages” under the Act.

10) Subsequently, the High Court of Madhya Pradesh in the case of *Smt.Shakuntala and others vs. Kanna Dangi and others*⁴ happened to consider the decision of High Court of Karnataka and other judgments in the context of deciding whether daily batta of Rs.50/- paid to a taxi driver could be included in the wages or not. The High Court of Madhya Pradesh has ultimately held that from the evidence it was found proved that the driver was getting Rs.50/- as batta but nothing had come on record that it was being paid either as food allowance while on duty outside of the city or it was not part of wages and therefore, the batta paid to the deceased was part of the wages, if not paid only for food expenses while on duty outside of the city.

11) Our High Court is concerned, in the decision reported in *New India Assurance Co. Ltd. vs. Kotam Appa Rao and another*⁵, a learned Single Judge of this High Court was inclined to add daily batta of Rs.25/- in the

⁴ 2007 ACJ 2486 (MP) = AIR 2007 MP 237

⁵ 1995 (3) ALD 1108 = 1997 ACJ 529 (AP)

wages of the driver for the reason that the employer did not adduce any evidence to the contra, i.e, the daily batta was given under the excluded category. In that context, learned Judge discussed the earlier decision of this High Court in *National Insurance Co. Ltd. vs. Mohd. Mujataba Khan and another*⁶, in which, the batta of Rs.20/- paid to the driver was not included in the wages. Distinguishing the judgment in *Mohd. Mujataba Khan*'s case (6 supra), the learned Single Judge observed that the judgment in *Mohd. Mujataba Khan*'s case (6 supra) did not state for what purpose, the batta was paid to the workman in that case and there was no discussion on that aspect. On the facts of that case, perhaps the learned Judge took the view that the sum paid towards batta related to special expenses incurred by the workman. So distinguishing the judgment in *Mohd. Mujataba Khan*'s case (6 supra), learned Judge in *Kotam Appa Rao*'s case (5 supra) has held that the daily batta of Rs.25/- could be included in the wages because there was no contra evidence from the employer as to what specific purpose the batta was paid by him to the driver.

12) So from the above decisions discussed supra, it is clear that daily batta can be excluded from the definition of wages only when there is a positive evidence to the effect that it falls in the excluded category. Otherwise, the same can be treated as part of the wages.

13) Learned counsel for appellant relied upon the *Konings Kondal*'s case (1 supra). In that case, learned single Judge of this Court having relied upon *Mohd. Mujataba Khan*'s case (6 supra), has held as follows:

⁶ 1993 ACJ 542 (AP)

“Para 7: It is also settled principle of law that batta paid to the workman cannot be included in the wages in computing the compensation, inasmuch as the amount is paid to cover any special expenses incurred by him due to the nature of his employment. Therefore, following the above two decisions of this Court, the orders passed by the Commissioner are liable to be set aside and are accordingly set aside.”

a) In the above case, it appears, learned Judge was of the view that the batta was paid to cover the special expenses incurred by the driver and accordingly excluded the same from wages.

14) Learned counsel for respondents relied upon *S.Suresh's* case(2 supra) to buttress his argument that batta can be included in the wages. It must be noted that in that case there was no issue as to whether batta can or cannot be included in wages. Hence, the said decision is of no avail to the respondents.

15) Thus, as already discussed *supra*, the exclusion of the batta from wages does arise only when there is cogent evidence to the effect that batta was given under excluded category. In the above backdrop, when evidence is perused, RW.1 in his evidence deposed that he was the owner of the vehicle involved in the accident and the deceased was workman under him as a lorry driver since 6 years prior to the accident and he was paying Rs.4500/- per month as wages and he was also paying Rs.50/- per day as batta. Except this, he did not further specify as to for what purpose he was paying the batta. So there is no positive and clear-cut evidence to hold that the daily batta given by RW.1 was under the excluded category. Hence,

the Commissioner was right in adding batta to the wages for computation of compensation.

16) Accordingly, there are no merits in the appeal and the CMA filed by the appellant/Insurance Company is dismissed by confirming the Order dated 16.05.2005 in W.C.Case.No.38 of 2003 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Circle-I, Ranga Reddy District, Hyderabad. No costs in the appeal.

As a sequel, miscellaneous petitions pending if any, shall stand closed.

Date: 07.02.2017
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U. DURGA PRASAD RAO, J