THE HON'BLE SRI JUSTICE N.BALAYOGI

Civil Miscellaneous Appeal No.806 of 2008

JUDGMENT :

The appellant aggrieved by the Award and Order dated 30.11.2007 in W.C. No.44 of 2005 of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Kadapa, preferred this appeal.

2. The contention of the appellant/R2 - Insurance Company is that the appellant cannot be fastened with the liability of payment of penalty which shall be paid only by the employer.

3. *Per contra,* the respondent/applicant contended that the Insurance Company has to indemnify the liability of the owner of the lorry by virtue of the policy including interest and penalty.

4. The brief case of the applicant/1st respondent is that the applicant/1st respondent is working as a cleaner under the 1st respondent in the W.C. Case and the 2nd respondent in the appeal who is the owner of the lorry bearing No. AP 26 U 5776. The owner used to pay a salary of Rs.3,000/- per month. While the claimant was present on the lorry as a cleaner going from zuari cement factory to Ramapuram of Nellore District with load of cement on the intervening night of 15/16-3-2003 at 4 AM and when lorry reached near Managampet, the driver of the said lorry drove it in a rash and

negligent manner with high speed and when tried to overtake a Punjab lorry going ahead of it, during that course, left portion of the lorry in which the claimant was present as a cleaner, hit to the right side of the other lorry. As a result, the claimant sustained severe injuries and the left side of the lorry was completely damaged. He sustained fracture of left clavicle, fracture of left scapula, fracture of left humerus, fracture of left femur, fracture of left patella, fracture of left tibia and left ankle and he was admitted in SVIMS Hospital, Tirupathi, later, admitted in NIMS Hospital at Hyderabad on 29-3-2003 and took treatment till 5.5.2003 and underwent two surgeries. On several times, he visited NIMS hospital for treatment and spent Rs.70,000/- towards medicines and Rs.30,000/- towards transportation. One personal attendant was appointed on payment of Rs.10,000/- per month towards his charges. The claimant required another surgery which costs Rs.20,000/- and he suffered permanent disability of 50%.

5. After the accident, the claimant is not able to discharge his duties as cleaner of lorry, as such, he was removed from the service. The lorry bearing No. AP 26 U 5776 was insured with the appellant – 2nd respondent.

6. The Insurance Company filed counter contending that policy does not cover the risk of the cleaner of the lorry. More over, the claimant is not a cleaner on the lorry and he travelled as unauthorized passenger and he was not earning Rs.3,000/- per month. As per the policy, the owner of the lorry bearing No. AP 26 U 5776 is

one K.Dushyanth Kumar Reddy, but not Dushyanth Reddy, as mentioned in the application.

7. It is further contended that there is no rash and negligence on the part of the driver of the lorry. The lorry bearing No. AP 26 U 5776 was tried to cross another lorry, the lorry gave way to lorry bearing No.AP 26 U 5776 and when this lorry was about to cross the said lorry, suddenly, the lorry going ahead came to the right side, hence the accident took place. Therefore, the negligence is on the part of the lorry which was moving in front of the lorry bearing No. AP 26 U 5776. Therefore, this petition is bad for non-joinder of insurer and insured of that lorry.

8. The injuries sustained by the petitioner are healed up and he was hale and healthy and attending his normal duties without pain and suffering. The said allegations with regard to income, paying of Rs.10,000/- to the attendant, incurring expenditure of Rs.70,000/- towards medicines, Rs.30,000/- towards transportation, negligence on the part of the driver of the offending lorry are all false. Further, the contention is that the Insurance Company cannot be penalised for payment of interest during the period which the applicant has taken adjournments, as that would amount to penalty against it for no fault of it.

9. After hearing both sides, the following issues were settled for trial :

> "1) Whether the applicant is a workman as per the provisions of the Workmen/s Compensation Act, 1923 and he met with accident arising out of and in the course of his employment resulting into disability and loss of earning capacity?
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> 2) What was the age of the injured applicant at the time of the accident?
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> 3) What was the wages paid to the injured applicant at the time of the accident?
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> 4) What is the loss of earning capacity suffered and permanent disability percentage faced by the injured applicant?
>
> 5) What is the quantum of compensation payable to the applicant?
>
> 6) Who are liable to pay the compensation?"

10. On behalf of the claimant/respondent A.W.1 was examined and Exs.A1 to A9 were got marked. On behalf of the Insurance Company, Ex.B1 was got marked and no oral evidence was adduced.

11. Now the point that arises for determination is :

> *"Whether the Insurance Company can be fastened with liability of interest and penalty"*

12. The consistent evidence of the claimant – A.W.1 is that he was appointed by the 1st respondent, owner of the lorry bearing No.AP 26 U 5776, as a cleaner. On 15/16-3-2008 the driver of the said lorry drove it with high speed in rash and negligent manner and caused the accident.

13. The accident as per the evidence of A.W.1 and Ex.A1 – F.I.R., Ex.A3 – certified copy of the charge-sheet goes to suggest that the driver drove the lorry with high speed in rash and negligent manner and while overtaking another lorry going ahead of it, hit the

right side of the said lorry with the left side portion of the offending lorry bearing No. AP 26 U 5776. The Investigating Officer, after thorough investigation, filed Ex.A3 – charge sheet against the driver of the lorry bearing No.AP 26 U 5776 finding that the accident was due to rash and negligent driving of the driver. Though the 2nd respondent/appellant took the plea that there is no negligence on the part of the driver of the offending lorry, because the Punjab lorry has initially given way to lorry bearing No.AP 26 U 5776 and when this lorry was about to cross the said lorry, suddenly, the lorry going ahead came to the right side, hence the accident took place, drivers of both lorries were not examined. The drivers of both lorries are material witnesses. It is the not the case of the appellant that the drivers of both lorries are not available.

14. In the absence of any such rebuttal evidence, the evidence of A.W.1 supported by Exs.A1 and A3 well established that accident was due to rash and negligence of the driver of the lorry bearing No. AP 26 U 5776.

15. It is the clear evidence of A.W.1 that he sustained fracture of left clavicle, fracture of left scapula, fracture of left humerus, fracture of left femur, fracture of left patella, fracture of left tibia and left ankle. The injuries on the person of A.W.1 are supported by Ex.A2 - wound certificate, Ex.A7 - discharge summary issued by NIMS Hospital. Under Ex.A2, five injuries are mentioned and except injury No.4, all other injuries are stated to be grievous in nature.

In Ex.A7 – discharge summary also the Doctor noted the following injuries :

1) Lacerated wound of about 6x5 cm over (L) parietal region;
2) Closed # (L) clavicle # spine of (L) scapula;
3) Closed # (L) humerus u/n 3rd;
4) Closed comm. subtroch. # (L) femur;
5) Closed # lower pole (L) patellar undisplaced;
6) Closed comm. # (L) tibia M/3rd ;
7) Closed rimalleolar # (L) ankle; and
8) Pressure sore of about 4x3 cm over back of knee.

16. In Ex.A7 it was mentioned that initially patient was admitted in RUIA hospital, Tirupati and therefrom he was shifted to NIMS for further management. Basing on the evidence of P.W.1, injuries sustained, and expenditure incurred as per Ex.A6 - Rs.85,000, as per Ex.A8 - Rs.32,500/-, as per Ex.A9 - Rs.3,348/-, the Commissioner came to the conclusion that A.W.1 became disabled and his disability was assessed at 55%, which is permanent. The claimant is a workman as defined under Workmen's compensation Act, who is appointed by the 1st respondent – owner.

17. Absolutely there is no document filed by the claimant to prove the age of A.W.1. Therefore, the Commissioner, taking into consideration the evidence of A.W.1 and the age of the petitioner mentioned in petition as 21 years and also the age noted in Ex.A2 - 20 years and also the age noted in the disability certificate under Ex.A5 - 22 years, on an average assessed the age of the petitioner as 21 years at the time of the accident.

18. With regard to wages, there is no document, but the evidence of A.W.1 is that he was appointed by the 1st respondent as a

cleaner on the lorry bearing No. AP 26 U 5776 and used to pay Rs.3,000/- per month. In the absence of any such proof of income, the Commissioner applied the minimum wages for a cleaner fixed as per G.O.Ms.No.58, dated 19.6.1991 and computed the minimum wages at Rs.1,905.75 as on the date of the occurrence. The evidence of A.W.1 further established that he is unable to work. The disability as per Ex.A5 is 50%. The Commissioner considered the same disability as physical disability at 50% and find that he is not fit for cleaner job. The Commissioner, having considered physical disability mentioned at 50% in Ex.A5 and the evidence of A.W.1 that he is not functioning as cleaner and he was removed by the owner as cleaner and he is not doing any work, assessed the loss of earnings at 50% basing on the oral and documentary evidence and also on physical verification of the applicant. The Commissioner computed the quantum of compensation payable as, age 20 years factor 224.00 x 60/100 x 50/100 x 1905.75 = Rs.1,28,066.00, besides the stamp duty at Rs.256.00.

19. With regard to the payment of interest, there is no dispute. However, the Commissioner, having considered Section 4-A (3)(a), came to the conclusion that granting of interest is mandatory at statutory minimum rate of 12% per annum. He also relied on the decision in the case of ***Mamta Travels Vs. Dhanu Raik Wav and another*** (2005 ACJ 2854) and by applying Section 4-A(3), ordered that by virtue of Ex.B1 policy, the Insurance Company has to

indemnify the 1st respondent – owner in payment of compensation along with interest. Section 4-A(3)(a) contemplates that the owner of the vehicle is liable to pay penalty within 30 days. Therefore, the Commissioner awarded Rs.1,28,066/- as compensation, besides stamp duty of Rs.265/- along with interest at 9% per annum from the date of accident till the date of realization of payment of compensation by way of Demand Draft drawn in favour of the Commissioner for Workmen's Compensation and Deputy Commissioner of Labour, Kurnool, drawn on State Bank of India, Kurnool, within 30 days from the date of receipt of the order. It is further ordered if they failed to deposit the award amount within stipulated time, they have to pay penalty under Section 4-A (3) (b) of the Workmen's Compensation Act, 1923.

20. The Insurance Company filed the appeal disputing fastening of penalty to the insurance company. In the case of ***National Insurance Co. Ltd. Vs. Bhim Singh*** (2011 SCC OnLine Del. 1705) the Apex Court held that in the scheme of Section 4-A of Compensation Act, the legislative intent is clearly discernible that once compensation falls due and within one month it is not paid by the employer, then as per Section 4-A (3)(a) interest at the permissible rate gets added to the said principal amount of compensation as the claimants would stand deprived of their legally due compensation for a period beyond one month which is statutorily granted to the employer concerned to make good his liability for the benefit of the

claimants whose bread-winner might have either been seriously injured or might have lost his life. Thus, so far as the interest is concerned it is almost automatic once default, on the part of the employer in paying the compensation due, takes place beyond the permissible limit of one month. No element of penalty is involved therein. Accordingly, the principal amount as well as the interest made payable thereon would remain part and parcel of the legal liability of the insured to be discharged under the Compensation Act and not *de hors* it.

21. The penalty amount as imposed upon the insured employer would get out of the sweep of the term 'liability incurred' by the insured employer as contemplated by the proviso to Section 147(1)(b) of the Motor Vehicles Act as well as by the terms of the Insurance Policy found in provisos (b) and (c) to Sub-section (1) of Section II thereof. The claim for compensation along with interest will have to be made good by the insurance company jointly with the insured employer. But, so far as the amount of penalty imposed on the insured employer is on account of personal fault of the insured, the insurance company cannot be made liable to reimburse the penalty. Accordingly, the compensation with interest is payable by the insurance company, but not penalty.

22. From the above discussions and relying on the decision discussed above, I am of the considered view that by virtue of Ex.B1 policy the insurance company/appellant has to indemnify the liability

of the employer/owner, including interest, but it cannot be fastened with the liability of the penalty.

23. Following the said decision and for the reasons stated therein, the impugned order to the effect that they have to pay penalty under Section 4-A(3)(b) of the Workmen's Compensation Act requires modification.

Accordingly, it is modified that the appellant is not liable to pay the penalty, but is liable to pay the compensation with interest by virtue of Ex.B1 policy.

24. The Civil Miscellaneous Appeal is, accordingly, allowed in part to the extent of penalty is concerned and rest of the Award and Order dated 30.11.2007 in W.C. No.44 of 2005 of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Kadapa is confirmed. No order as to costs.

25. Consequently, miscellaneous petitions pending, if any, shall stand closed.

JUSTICE N.BALAYOGI

04th April, 2018

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