IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

XOBJC-206-CII-2015 (O&M) in/and
FAO No.5369 of 2015 (O&M)

Date of decision: 13.11.2018

HDFC ERGO GENERAL INSURANCE CO LTD .. Appellant

Versus

MALA DEVI AND ORS .. Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present : Mr. Rajneesh Malhotra, Advocate
for the appellant.

Mr. Sagar Aggarwal, Advocate
for the claimants/cross objectors.

None for respondent No.5.

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<u>REKHA MITTAL, J. (Oral)</u>

This order will dispose of FAO No.5369 of 2015 and cross objections No.206-CII of 2015 as these have emerged out of the same award dated 13.05.2015 passed by the Commissioner under Employees Compensation Act, 1923 (in short 'the Act').

FAO No.5369 of 2015 has been filed by HDFC Ergo General Insurance Co. Ltd. (hereinafter to be referred as 'the insurance company') whereas the cross objections have been filed by the claimants seeking enhancement of compensation.

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Counsel for the insurance company would urge that as per plea of the claimants, deceased was working as conductor of tractor No.HR-05/AH-7649 owned by Ramesh Kumar, respondent No.5. As per the insurance policy, the insurance company is not liable to indemnify the insured with regard to injury or death of a conductor when admittedly deceased was not a driver on the tractor in question. In the alternative, it is argued that as per IMT-28, the insurance company is not liable to indemnify the insured as the insured has failed to take reasonable precautions to prevent accident, stated to have taken place when the deceased was standing on the lift of aforesaid tractor attached with a rotavator at the time of cultivating land.

Counsel representing the claimants has supported findings of the Tribunal holding the insurance company liable to pay compensation. However, it is contended that income of the deceased was Rs.8000/- per month but the Tribunal has wrongly assessed income at Rs.5342/- per month. It is further argued that as the employer failed to pay the amount within one month from the date it fell due, claimants are entitle to penalty under Section 4A of the Act.

There is no representation on behalf of respondent No.5, despite service.

Indisputably, the tractor in question was insured vide policy No.2316200502134100000 Ex.R6 that was in force on the day of occurrence. In addition to premium paid for basic third party liability, the

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insured had paid premium of Rs.100/- towards PA cover for owner driver of Rs.2 lakh and Rs.50/- for LL to paid driver &/or conductor &/or cleaner (IMT-28). IMT-28 deals with legal liability to paid driver and/or conductor and/or cleaner employed in connection with the operation of insured vehicle (for all classes of vehicles). A relevant extract therefrom reads thus:-

> "In consideration of an additional premium of Rs.25/- notwithstanding anything to the contrary contained in the policy it is hereby understood and agreed that the insurer shall indemnify the insured against the insured's legal liability under the Workmen's Compensation Act, 1923 , the Fatal Accidents Act, 1855 or at Common Law and subsequent amendments of these Acts prior to the date of this Endorsement in respect of personal injury to any paid driver and/or conductor and/or cleaner whilst engaged in the service of the insured in such occupation in connection with the vehicle insured herein and will in addition be responsible for all costs and expenses incurred with its written consent.
>
> Provided always that
>
> (1) this Endorsement does not indemnify the insured in respect of any liability in cases where the insured holds or subsequently effects with any insurer or group of insurers a Policy of Insurance in respect of liability as herein defined for insured's general employees;
>
> (2) the insured shall take reasonable precautions to prevent accidents and shall comply with all statutory obligations;
>
> *(3) the insured shall keep record of the name of each paid driver conductor cleaner or persons employed in loading and/or unloading and the amount of wages and salaries and other earnings paid to such employees and shall at all times

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allow the insurer to inspect such records on demand.

(4) in the event of the Policy being cancelled at the request of the insured no refund of the premium paid in respect of this Endorsement will be allowed.

Subject otherwise to the terms conditions limitations and exceptions of the Policy except so far as necessary to meet the requirements of the Motor Vehicles Act, 1988.

*In case of Private cars/ motorised two wheelers (not used for hire or reward) delete this para."

On a conjoint reading of the relevant clause in the policy coupled with IMT-28, it is difficult to accept contention of the insurance company that the insurance company is not liable to pay compensation in respect of injuries sustained by the conductor that proved fatal.

This brings the Court to second submission with regard to failure of the insured to take reasonable precautions to prevent accident in the light of Clause 2 of proviso prescribed in IMT-28. Perusal of the written statement filed by the insurance company would reveal that no such plea has been raised by the insurance company, to be decided on the basis of evidence. That being so, the insurance company cannot be allowed to raise a factual plea for the first time in appeal. In this view of the matter, contentions raised by counsel for the insurance company are not meritorious and accordingly rejected. Coming to the cross objections preferred by claimants seeking enhancement of compensation, plea of claimants is that the deceased was drawing salary of Rs.8000/- per month. Under Clause 3 of proviso prescribed in IMT-28, the insured is obligated to

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keep record of the name of each paid driver, conductor, cleaner or persons employed in loading and/or unloading and the amount of wages and salaries and other earnings paid to such employees and shall at all times allow the insurer to inspect such records on demand. In the case at hand, no such evidence has been adduced by the insured that any such record was maintained by him wherein salary of the deceased has been entered and that too @ Rs.8000/- per month. In the given scenario, admission of plea of the claimants with regard to salary of the deceased @ Rs.8000/- per month by the employer cannot be taken sufficient to uphold plea of the claimants that deceased was paid salary of Rs.8000/- per month. Claimants have failed to adduce any other evidence to establish their plea with regard to salary of the deceased. Under the circumstances, the Tribunal has rightly taken a clue from minimum wage available at the relevant time for assessing income of the deceased and computing compensation.

Counsel for the claimants has pressed their claim for payment of penalty as the employer committed default in payment of compensation due under the Act within one month from the date it fell due by invoking Section 4A thereof. Perusal of para 21 of the award makes it evident that authorised representative of the claimants pressed for payment of penalty contemplated by Sub-Clause (b) of Clause 3 of Section 4A of the Act. The Tribunal has not recorded any finding in this regard. Taking into consideration the provisions of Section 4A coupled with that the Act is beneficent legislation enacted for payment of compensation to the victim or

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victim's family, claimants shall be entitle to Rs.50,000/- towards penalty, payable exclusively by the employer.

In view of what has been discussed hereinbefore, finding no merit, the appeal filed by the insurance company is dismissed. As the appeal has been decided on merits, application for condonation of delay is of academic relevance only. However, the cross objections are partly allowed in the aforesaid terms.

13.11.2018 **(REKHA MITTAL)**
ashok **JUDGE**

Whether speaking/reasoned: Yes / No
Whether reportable: Yes / No

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