

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.1349 OF 2014

Associated Cargo Movers and
Packers Private Limited,
Having Its Head Office At 11,
Ram Complex, 3rd Floor,
Aundh Road, Khadki,
Pune – 411 -2-.
Through It's Managing Director,
Ved s/o Prakash Sharma,
Age 64 years, Occupation Business,
R/o: B-2, Radhika Empress,
Jagtap Nagar, Wanavadi, Pune.

...Appellant.
(Orig.Respdt.)

VERSUS

- 1) Hanumant s/o Raghunath Mali,
Age 26 years, Occupation Nil,
R/o Bamni Taluka and Dist.
Osmanabad. (Orig.Applicant)
- 2) Bajaj Allianz General Insurance Co.Ltd.,
Registered Office At G.E.Plaza, Airport
Road, Yerwada, Pune – 411 006. ...Respondents.

....

Mr. Amit Savale, Advocate for Appellant.
Mr. A. S. More, Advocate for Respondent No.1
Mr. S. G. Chapalgaonkar, Advocate for Respondent No.2

....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Judgment :
26-06-2019.**

**Date of Pronouncing The Judgment :
04-09-2019.**

JUDGMENT :

1. Present appeal has been filed by the original respondent No.1.

Before turning to other aspects of the matter, it will not be out of

place to mention here that, the present appeal was heard and decided by this Court on 27-07-2015 and it stood dismissed. Thereafter, the present appellant filed Special Leave to Appeal (Civil) No.3040 of 2016 before Hon'ble Apex Court, however that was withdrawn with liberty to approach this Court by way of review petition after impleading the Insurance Company. After that decision, Review application (Civil) No.196 of 2016 was filed and the said review came to be allowed by this Court. The judgment delivered on 27-07-2015 dismissing the first appeal was set aside. The Insurance Company was then added as respondent No.2 to the appeal.

2. With the above said background it is to be noted that, the present respondent No.1 had filed petition for compensation under Workmen's Compensation Act. He had come with a case that, he was working as a labour. He went to Bangalore with Truck bearing No.MH-14/ A-7825 on 10-09-2007. The said truck belonged to present appellant – original respondent No.1. He was taken along with the truck for unloading the marbles and there were other labours also along with him at that time. All the labours were unloading the said truck at Bangalore as per the direction of the original respondents No.1 and 2, however unfortunately some marbles fell on the body of the applicant, as a result of which he sustained grievous injuries in the nature of fracture to his right

hand, left leg and injury to head. Original respondent No.2 admitted him to hospital at Bangalore for treatment, where he was treated as indoor patient till 18-09-2007. Thereafter, the respondent No.2 shifted him to Sasoon Hospital, Pune for further treatment and he was in the said hospital from 19-09-2007 to 09-10-2007. It is stated that, though he has been discharged from the hospital yet he is still taking treatment as outdoor patient with Nagar Accident Hospital, Osmanabad. It is stated that, the said accident had taken place when he was on duty and under the employment of respondents No.1 and 2. He was 21 years old at that time and was getting Rs.150/- per day. He therefore, prayed for compensation. The Insurance Company was then respondent No.3 to the main petition and it was stated that, even the Insurance Company is liable to pay the compensation to the applicant along with the respondents No.1 and 2. It has been also contended that, respondents No.1 and 2 were bound to pay compensation to him as per the Workmen's Compensation Act, however when they did not give him compensation, he issued notice to respondent No.1 on 24-03-2008 through advocate. It returned back with endorsements that the address is not sufficient, and therefore, another notice was issued to respondent No.2 on 09-09-2008, which was refused. Under such circumstance, the applicant has claimed 50 % penalty in view of Section 4 A (3) (a) (b) of the Workmen Compensation Act.

3. Respondents No.1 and 2 filed written statement at Exhibit 11. It was denied that, the applicant was the employee of the respondents. It is stated that, there was no employer employee relationship and therefore there is no liability to them to pay compensation. They have denied that the applicant had gone to Bangalore along with their truck for unloading marbles and then met with the accident. Special defence has been taken that, the applicant is not the labour and alternatively it was contended that, if it is found that the applicant is the labour then they had taken Insurance and the policy with respondent No.3 covered reimbursement of the amount to be paid towards labour.

4. The Insurance Company had also filed written statement at Exhibit 32 denying all the allegations in the petition. It is stated that, intimation of the accident was not given to its office. The applicant has not suffered any permanent disability, and therefore, the Insurance Company cannot be made liable.

5. After the issues were framed, applicant has led evidence - oral as well as documentary. Respondents have not led any evidence. Under such circumstance the learned trial Court held that, there was employer – employee relationship between the applicant and respondents No.1 and 2. Insurance Company has failed to prove that, there was any breach of terms of policy but then still the

Insurance Company was exonerated from payment of liability. Respondents No.1 and 2 have been directed to pay compensation of Rs.5,34,504/- together with interest @ of 12 % per annum from the date of the petition till actual realization of the entire amount. Further they have been held liable to pay penalty of Rs.2,67,252/- together with interest. Original respondent No.1 has challenged the said Judgment and award.

6. Heard learned advocate Mr. Amit Savale for appellant, learned advocate Mr. A. S. More for respondent No.1 – original claimant and learned advocate Mr. S. G. Chapalgaonkar for respondent No.2 – Insurance Company.

7. It has been vehemently submitted on behalf of the appellant that, the applicant had come with a specific case that, he was labour working on the truck belonging to respondents No.1 and 2. On the day of the accident he was taken to Bangalore for unloading of the truck which was filled with marbles. While he was discharging his duty, he met with accident and sustained serious injuries for which he has taken treatment. Though the respondent No.1/ present appellant denied all those facts stating that, there was no relationship between the applicant and it as employee and employer yet the Commissioner at one place has observed that the said fact has been proved. Some contrary observations have been made by

the learned Commissioner. At one breath at some place it has been stated that, no evidence has been led by the appellant except his bare words to state that he was working on the truck belonging to the appellant and at another breath it is stated that said relationship is proved. No doubt there was no suggestion in the cross to the applicant that he was not the employee of respondents No.1 and 2, but that is not fatal. Reliance has been placed on letter Exhibit 46 issued by the Manager of Appellant situated in Bangalore Office. In the said letter Exhibit 46 it was mentioned that, the applicant was working as labour on the truck for unloading of marbles. The said letter was also considered by this Court in its earlier Judgment. The review was filed only with an intention to ascertain the position as regards liability of the Insurance Company. When there was no evidence adduced by the Insurance Company to prove breach of terms of policy, and learned Trial Court had concluded that there was employer and employee relationship, then the Insurance Company ought to have been held liable to pay amount of compensation jointly and severally to the applicant.

8. Per contra, learned advocate appearing for the respondent No.2 Insurance Company submitted that, the applicant had not adduced any evidence to prove that, he was under the employment of respondents No.1 and 2 on the date of the accident. The cross examination of the applicant would show that, he was not working

as driver or cleaner on the truck involved in the accident. It was contended that he was labour and his duty was to load and unload the goods from the truck. It is hard to believe that, the applicant would have been taken in truck for unloading of the marbles as the possibility of availment of daily wage labour at Bangalore. Further it is to be noted that, report about the accident was not at all given to police. There was no proof about the accident that had allegedly taken place from the vehicle involved in the accident i.e. truck No.MH-14/A-7825. Thus when the involvement itself is not proved, respondent No.2 Insurance Company is not liable to pay the amount of compensation. Further the penalty imposed on respondents No.1 and 2 for not paying compensation to labours within 30 days period will have to be taken note of, but that liability cannot be saddled on the Insurance Company. Though it had come on record that, applicant had issued notice to respondents No.1 and 2, there is statutory obligation on the part of the employer to inform about the accident to the Insurance Company. Under such circumstance, the exoneration of the Insurance Company from the liability to pay compensation by the learned Trial Court was justified.

9. At the outset it can be seen that, this Court had already dismissed the appeal on 27-07-2015, however the review was allowed and while allowing the review petition it was pointed out that the truck on which the applicant was working was insured with

respondent No.2. So also the original applicant pointed that, the vehicle was comprehensively insured with the Insurance Company, and therefore, the liability of the Insurance Company ought to have been ascertained in respect of payment of compensation. In view of order in Special Leave to Appeal by Apex Court, the Insurance Company was added as a party, and therefore, it appears that to the limited extent whether the Insurance Company can be held liable to pay compensation or not is required to be considered in this appeal now. However, since the Judgment dated 27-07-2015 itself has been set aside, an impression is also created that all the points would be then open for consideration, and therefore, all the points are now taken up for consideration.

10. The present appellant – original respondent No.1 at one breath contended that, there was no employer-employee relationship between it and the applicant and on the other breath when it was held by the Court that there was such a relationship, it has tried to invoke the policy and then making the Insurance Company liable to pay compensation jointly and severally with it. Now as regards the applicant's submission that he was employed on the day of accident on the truck belonging to the respondent No.1 as labour is concerned, he himself has entered the witness box, reiterated the contentions in the petition, withstood the cross by all the respondents. When he was cross-examined on behalf of the

appellant, there was absolutely no suggestion also that there was no relationship between him and respondent No.1 as employee – employer. On the contrary what has been brought on record through the cross examination on behalf of the appellant that, the medical expenses of the applicant have been borne by respondent No.1. Unless such relationship would have been in existence, appellant would not have incurred those expenses. There was no denial to the letter Exhibit 46, which was issued by Manager, Bangalore Office of respondent No.1. In the said letter Exhibit 46 it was clearly stated that, the applicant was working on the truck belonging to the respondent No.1 and at the relevant time he was unloading the marbles. Unexpectedly, marbles fell down on him at that time and then he had sustained injuries. Explanation was given in that letter itself as to why no report was lodged with the police regarding the said accident. When contrary evidence is not adduced to disprove the evidence that has been led by the applicant, reliance on that letter Exhibit 46 by the concerned trial Court was justified. In fact the issue No.1 is answered in the affirmative which states that, applicant was the employee of respondents No.1 and 2. It had also come on record that, the applicant was getting daily wages, that means though he might be working on daily wage basis with respondent No.1 since past, it was not his fixed job, and therefore, there was no question of issuing any appointment letter or showing

deduction in respect of salary paid to him under the specific name. The law does not expect from a daily wage earner to possess documentary evidence regarding his employment and earning. There was no reason for the respondent No. 1 (appellant) for not examining the author of letter Exhibit 46 to explain under which circumstance that letter was issued by him to the concerned officer from Sasoon Hospital, Pune where the applicant was shifted for further treatment. Under such circumstance, there was sufficient evidence available on record to prove that, applicant was serving as employee and at the relevant time when the accident took place he was under the employment with respondents No.1 and 2.

11. It will not be out of place to mention here that, the Insurance Company has been exonerated by the learned trial Court only on the count that the respondents No.1 and 2 had not informed about the accident to the Insurance Company. This cannot be the ground for exoneration, when there was no breach of terms of policy by the respondent No.1. Merely because the intimation about the accident was not given to the Insurance company, it cannot be exonerated when the Insurance Company had already taken the premium and covered the risk of the applicant under the policy. Though there is a statutory obligation on the part of the respondents No.1 and 2 to inform about the accident to the Insurance Company yet non communication in respect of the same will not exonerate the

Insurance Company. If the respondent No. 1 and 2 had not informed the accident to respondent No. 3, then applicant can not put in disadvantageous position. It was not his fault at all. He should receive the benefits of the policy, when his risk was covered. The learned trial Court has come to the conclusion that, the Insurance Company has failed to prove that there is any breach of terms of policy. Under such circumstance, when it was accepted by the learned trial Court that, the relationship between the applicant and respondents No.1 and 2 is that of employee and employer, further evidence had come on record that the applicant has sustained permanent physical disability in the accident while he was under the employment; the learned trial Judge ought to have straightway saddled the liability to pay compensation on the shoulders of Insurance Company also. When the respondents No.1 and 2 had not committed any breach and had not taken any such defence which could avoid the payment of compensation for the Insurance Company, the exoneration of respondent No.3 by the learned trial Court is erroneous.

12. Now turning towards the quantum that can be held liable to be paid by the Insurance Company; the Insurance Company can be made liable to pay only the main compensation amount i.e. Rs.5,34,504/- together with interest from the date 10-09-2007 till the actual realization of entire amount. The amount of penalty

cannot be imposed on the Insurance Company since as per the law it was the prime responsibility of the employer only to compensate the employee within stipulated period. Reliance can be placed on the decision in, *Ved Prakash Garg vs Premi Devi & Ors.*, reported in [(1997) 8 Supreme Court Cases 1]; wherein it has been held that,

"On a conjoint operation of the relevant schemes of the aforesaid twin Acts, in our view, there is no escape from the conclusion that the insurance companies will be liable to make good not only the principal amounts of compensation payable by insured employers but also interest thereon, if ordered by the Commissioner to be paid by the insured employers.....Thus 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 dehors it. It, therefore, cannot be said by the insurance company that when it is statutorily and even contractually liable to reimburse the employer qua his statutory liability to pay compensation to the claimants in case of such motor accidents to his workmen, the interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part of the insured liability of the employer. No question of justification by the insured employer for the delay in such circumstances would arise for consideration. It is of course true that one month's period as contemplated under Section 4A (3) of the Act may start running for the purpose of

attracting interest under sub-clause (a) thereof in case where provisional payment becomes due. But when the employer does not accept his liability as a whole under circumstances enumerated by us earlier then Section 4A (2) of the Act would not get attracted and one month's period would start running from the date on which due compensation payable by the employer is adjudicated upon by the Commissioner and in either case the Commissioner would be justified in directing payment of interest in such contingencies not only from the date of the award but also from the date of the accident concerned. Such an order passed by the Commissioner would remain perfectly justified on the scheme of Section 4 A (3) (a) of the Compensation Act. But similar consequence will not follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4A (3) (b) of the Compensation Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay in payment of the compensation amount he is not liable for this penalty. However if ultimately the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then the penalty would get imposed on him. That would add a further sum up to 50% on the principal amount by way

of penalty to be made good by the defaulting employer. So far as this penalty amount is concerned it cannot be said that it automatically flows from the main liability incurred by the insured employer under the Workmen's Compensation Act. To that extent such 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 Vehicle 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. On the aforesaid interpretation of these tow statutory schemes, therefore, the conclusion becomes inevitable that when an employee suffers from a motor accident injury while on duty on the motor vehicle belonging to the insured employer, the claim for compensation payable under the Compensation Act along with interest thereon, if any, as imposed by the Commissioner Section 3 and 4A (3) (a) of the Compensation Act 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 under contingencies contemplated by Section 4A (3) (b) of the Act is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that part of the penalty amount imposed on the employer. The latter because of his own fault and negligence will have to bear the entire burden of the said penalty amount with proportionate interest thereon if imposed by the Workmen's Commissioner".

Therefore, only to the extent of amount of Rs.5,34,504/- the Insurance Company can be made liable to pay the said amount jointly and severally with respondents No.1 and 2. With these observations following order is passed.

ORDER

- 1) The appeal is hereby partly allowed.
- 2) The Judgment and award passed by learned Commissioner for Employee's Compensation Act and Civil Judge, Senior Division, Osmanabad, in W.C.A.No. 02 of 2009, dated 06-03-2014 is hereby set aside to the extent of exonerating the respondent No.3 in the petition (present respondent No.2) from payment of principal amount of compensation and interest thereon and the said award is modified as follows ;

"The respondents No.1 to 3 shall jointly and severally pay an amount of Rs.5,34,504/- (in words rupees five lakh thirty four thousand five hundred and four) to the present appellant along with interest @ of 12 % per annum with effect from 10-09-2007 till the said amount is recovered."
- 3) It is clarified that the rest of the award is hereby confirmed and maintained as it is.
- 4) No order as to costs.

(SMT. VIBHA KANKANWADI)
JUDGE