

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No. 1067 of 2014**

The Oriental Insurance Co. Ltd. Thru - Its Divisional Manager, Divisional Office, 1st Floor, Rama Trade Centre, Near Bus Stand, Bilaspur, Civil and Revenue Distt, Bilaspur C.G.

---- Appellant**Versus**

1. Somar Sai @ Son Singh S/o Mangal Sai Aged About 53 Years.
2. Smt. Larang Kunwar W/o Somar Sai Aged About 51 Years.
3. Ku. Radha D/o Somar Sai Aged About 17 Years Minor, Thru- Father Somar Sai @ Son Singh.

All are R/o- village- Gumga, P.S. Premnagar, Tah. Ambikapur, Distt. Sarguja C.G.

4. Sardar Jagjeet Singh S/o Gurudeep Singh, R/o. Mig- 2/44, Rajendra Prasad Nagar, Housing Board Colony, Korba, Distt. Korba C.G.
5. Gopi Kumar S/o Ramlal Chandra Driver, Sumran Co., Hadbadiya Seth, Adjacent To Niharika Talkies, Korba, P.S. and Tah. Korba, Distt. Korba C.G.

--- Respondents

For Appellant : Mr. R. N. Pusty, Advocate.

For Respondent No.1 to 3 : Mr. Anurag Dayal Shrivastava, Advocate.

For Respondent No.4 to 5 : Mr. S.P. Kale & Shri K.P.S. Ghandhi, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, CJ

Hon'ble Shri Parth Prateem Sahu, J

Order on Board**Per Parth Prateem Sahu, J****17/09/2020**

1. Appellant/Insurance Company has filed this appeal under Section 30 of the Employee's Compensation Act, 1923 (earlier Workmen's Compensation Act, 1906) (for short 'the Act of 1923') challenging the impugned judgment/award dated 22.07.2014 passed by the learned Commissioner for Employees

Compensation - cum - Labour Court, Ambikapur, (CG) in Claim Case No.68/W.C.ACT/2006, whereby the Commissioner allowed application filed by the applicant Nos.1, 2 & 3/claimants, warded Rs.3,22,920/- and further awarded penalty to the tune of 50% of the amount of compensation alongwith interest at the rate of 12%.

2. Facts relevant for disposal of this appeal are that applicant Nos.1, 2 & 3/claimants have filed an application under Section 22 of the Act of 1923 pleadings therein that deceased -Ram Singh was working as 'Assistant Driver-cum-Helper' with Non-applicant No.2/driver of truck under the employment of non-applicant No.1/owner of truck. Non-applicant No.1/owner was paying Rs.3,000/- per month as salary and Rs.100/- per day as daily allowances to the deceased when he was on duty out of station. On 05.06.2005 deceased -Ram Singh was on duty on Truck bearing registration No.CG04/E/0466, owned by non-applicant No.1 and went to Grasim Cement Factory, Rawan from Korba alongwith Non-applicant No.2. After loading the cement in the factory at about 11:00 pm, they have parked the truck in the truck-yard at Rawan. After tying tarpaulin over the truck and taking their meals/dinner, they slept near the truck. Ram Singh was sleeping on the ground in front of the truck. On 06.06.2005 between 3:00 am to 5:00 am some unknown truck/vehicle ran over the body of Ram Singh and caused accident. Ram Singh died due to the accidental injuries suffered by him.

3. Claimants have filed an application under Section 22 of the Act of 1923 claiming compensation of Rs.3,50,000/- on the ground that death of deceased-Ram Singh was on account of accident arising out of and in the course of employment.

4. Non-applicants No.1 & 2/owner and driver of truck, submitted their reply to application and denied the pleadings made therein. They have denied the employment of deceased with Non-applicant No.1 and pleaded that truck owned by non-applicant No.1 and driven by Non-applicant No.2 is not involved in any manner in accident. It was further pleaded that as per pleadings made in application, accidental death of deceased Ram Singh was from unknown truck/vehicle. In alternate, they have pleaded that on the date of accident, truck was insured with Non-applicant No.3/Insurance Company, therefore liability, if any, to make payment of amount of compensation would be of Insurance Company

5. Non-applicant No.3/Insurance Company filed its reply to application and while denying the pleadings made therein denied the fact with regard to the employment of deceased. It was pleaded that deceased was not under the employment of Non-applicant No.1/owner and also denied the manner of accident pleaded by claimants in application. It was further pleaded that accident occurred with unknown vehicle/truck, therefore, no liability to pay the amount of compensation can be fastened upon Insurance Company.

6. On appreciation of pleadings and evidence placed on record by the respective parties, the learned Commissioner partly allowed application, awarded compensation of Rs.3,22,920/- and a sum of Rs.1,61,460/- as penalty (50% of the amount of compensation) along with interest at the rate of 12%.

7. Mr. R.N. Pusty, the learned counsel for the appellant/Insurance Company submits that engagement and employment of deceased with non-applicant No.1/owner has not been proved and even after accepting the pleadings and evidence of claimants, it shows that deceased was a spare driver, for which, no amount of premium was charged by Insurance company to indemnify the risk of

insured. He further submits that as per the pleadings and evidence brought on record, deceased was not sleeping inside the truck but was sleeping outside the truck on road. Accident took-place with another unknown vehicle/ truck, therefore, death of deceased cannot be treated on account of accident arising out of and during the course of employment as envisaged under Section 3 of the Act of 1923. He further submits that even if it is presumed that deceased was working with Non-applicant No.1/Owner than also Insurance Company will not be liable to pay any amount of compensation because the act of deceased was imprudent as he exposed himself to the danger. He further submits that no accident took place by the truck which was insured by appellant/Insurance Company, award of penalty cannot be fastened upon Insurance Company as the award of penalty is on account of non-payment of amount of compensation on the date when it fell due by employer. Liability to pay the amount of penalty can only be upon Non-applicant No.1/employer. In support of his submission, he places his reliance on the judgment passed by the Hon'ble Supreme Court in case of **Mallikarjuna G. Hiremath vs Branch Mamanager of Oriental Insurance** reported in **(2009) 13 SCC 405**.

8. Mr. Anurag Dayal Shrivastava, learned counsel for respondent No.1,2 & 3/claimants submits that under the provision of the Motor Vehicles Act, 1988 (for short, the MV Act) it is envisaged that claim application is maintainable when any accident is arising out of the use of a motor vehicle. He submits after taking into consideration the entire facts and evidence placed on record by claimants the learned Commissioner held that deceased was engaged as 'assistant driver-cum-helper' by non-applicant No.1/owner. Deceased went to Grasim Cement Factory Rawan, Raipur from Korba with non-applicant No.2/driver, where after loading the cement on truck, they slept on the side of truck. They are having the responsibility to guard the truck when the truck is

outside the residence area of owner of truck and, therefore, in no circumstances, they could have let the truck lying unmanned. The accident took-place when deceased was on duty. He also submits that the Commissioner passed the impugned award strictly in accordance with law, which does not call for any interference.

9. Mr. S. P. Kale, the learned counsel for respondent No.4 & 5/driver & owner of truck submits that deceased met with an accident due to his own negligence. There was no accident with the truck owned by non-applicant No.1 and driven by Non-applicant No.2. He further submits that as per pleadings and evidence placed on record by the claimants itself, it is clear that accident took-place with unknown truck. He also submits that deceased was never under employment of Non-applicant No.1/owner and even if it is taken that deceased was employed with Non-applicant No.1 then also looking to the manner of accident, while deceased was taking rest in night outside the truck on road and ran over by some other truck/vehicle, it cannot be said that accident arising out of and during the course of employment. He pointed out that award of penalty is also not sustainable as the Commissioner has not issued any show-cause-notice before passing an award of penalty, as provided under Section 4(a) 3(b) of the Act of 1923. He places his reliance on the Judgment passed by the Hon'ble Supreme Court in the case of **Ved Prakash Garg vs Premi Devi** reported in **(1997) 8 SCC 1** in support of his contentions.

10. By adopting the arguments of Mr. R.N. Pusty, the learned counsel for appellant-Insurance Company, Mr. S.P. Kale, counsel for the respondent/employer & driver further submits that looking to the facts of claim application and further the evidence showing the manner in which accident took place, claim application itself is not maintainable, because the death of

deceased would not come within the purview of the Section 3 of the Act of 1923.

11. We have heard the learned counsel for the parties and perused the records.

12. During the course of hearing this Court has formulated following question of law while admitting appeal on 29.10.2014 :-

“Whether the Commissioner under Workmen Compensation Act cum Labour Court, Ambikapur was justified in imposing the liability of payment of penalty upon the Insurance Company ?”

13. When the case came up for hearing before this Court on 28.08.2020, taking into consideration the rival submission made by the respective parties, this Court has formulated two additional questions of law, which are as under :-

“1. Whether the deceased while sleeping on the side of the road and met with an accident will come within the purview of accidental injuries suffered by him by another vehicle will be covered under Section of the Workmen Compensation Act, 1923?

2. Whether the accident caused by another vehicle will be said to be an accident arising out of use of vehicle insured by the appellant-Insurance Company?”

14. Taking into consideration the submissions made by the learned counsel for the parties, we find it appropriate to deal with the first question of law formulated on 28.08.2020 at first.

15. To appreciate the submissions made by the learned counsel for the parties, we have perused the pleadings made in application where claimants have pleaded that deceased was engaged as 'assistant driver-cum-helper' by non-applicant No.1/owner and travelled on fateful day from Korba to Grasim Cement Factory Rawan at Raipur with non-applicant No.2/driver. After loading cement in truck, due to bad weather parked the truck in yard of Cement Factory Rawan

after tying tarpoling on truck. Deceased was sleeping in-front of the truck down on the ground. At early morning in between 3:00 am to 5:00 am, some unknown truck/vehicle ran over him causing his death.

16. Non-applicant No.1/owner of truck was examined as AW-1 and in first para of his affidavit, he stated that after tying tarpaulin over the truck and taking their meals/ dinner, deceased slept near the truck in early morning between 3:00 am to 5:00 am, some unknown truck/vehicle ran over him.

17. Undisputedly, accidental injuries suffered by the deceased was when he was sleeping on road in front of truck and met with an accident with unknown truck/vehicle. Though the accident can be said to have been taken place when the deceased was guarding the truck sleeping in front of it and not sleeping in the truck or over truck, he met with an accident when he was on duty, but the act of deceased was imprudent as he exposed himself to the danger by sleeping on road.

18. Issue with respect to the admissibility of claim application filed under Section 3 of the Act of 1923, where driver after parking his vehicle went to take bath, slipped into the pond and died was considered by the Hon'ble Supreme Court in case of **Mallikarjuna G. Hiremath** (supra) and held thus :-

“6. As noted above, the stand taken by both the insurer and the appellant was that there was no connection between the accident causing death of the workman and the vehicle and, therefore, neither the insurer nor the insured had any liability to pay any compensation. The High Court allowed the appeal filed by the insurer holding that there was no casual connection and therefore the insurance company was not liable. Further, the High Court granted the liberty to recover the compensation awarded from the appellant.

7. In support of the appeal, learned counsel for the appellant submitted that the death had not been occasioned during and in course of employment. It is also not in dispute that the vehicle was the subject of insurance and the risk of the driver was covered under the policy. The High Court accepted that the

driver did not die as a result of an accident involving the vehicle. But the vehicle was taken by the deceased in the course of employment at the behest of the present appellant to the temple.

The Hon'ble Supreme Court taking into consideration its various judgments has held in Para 12 & 13 thus :-

12. "5. Section 3(1) of the Act which is relevant for the purpose of this case reads as follows:-

"3. EMPLOYER'S LIABILITY FOR COMPENSATION. -
(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter :

Provided that the employer shall not be so liable -

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;

(b) in respect of any injury, not resulting in death or permanent total disablement, caused by an accident which is directly attributable to - (i) the workman having been at the time thereof under the influence of drink or drugs, or

(ii) the willful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii) the willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen."

6. Under Section 3(1) it has to be established that there was some casual connection between the death of the workman and his employment. If the workman dies a natural death because of the disease which he was suffering or while suffering from a particular disease he dies of that disease as a result of wear and tear of the employment, no liability would be fixed upon the employer. But if the employment is a contributory cause or has accelerated the death, or if the death was due not only to the disease but also the disease coupled with the employment, then it can be said that the

death arose out of the employment and the employer would be liable.

7. The expression "accident" means an untoward mishap which is not expected or designed. "Injury" means physiological injury. In *Fenton v. Thorley & Co. Ltd.* (1903) AC 448, it was observed that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed. The above view of Lord Macnaghten was qualified by the speech of Lord Haldane A.C. in *Trim Joint District, School Board of Management v. Kelly* (1914) A.C. 676 as follows:

".....I think that the context shows that in using the word "designed" [Lord Macnaghten] was referring to designed by the sufferer".

The above position was highlighted by this Court in *Jyothi Ademma v. Plant Engineer, Nellore and Anr.* (2006 (5) SCC 513).

13. "20. This Court in *ESI Corpn. v. Francis De Costa* (1996 (6) SCC 1) referred to, with approval, the decision of Lord Wright in *Dover Navigation Co. Ltd. v. Isabella Craig* (1940 AC 190) wherein it was held: (All ER p. 563)

'.....Nothing could be simpler than the words 'arising out of and in the course of the employment'. It is clear that there are two conditions to be fulfilled. What arises 'in the course' of the employment is to be distinguished from what arises 'out of the employment'. The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment--that is, directly or indirectly engaged on what he is employed to do--gives a claim to compensation, unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified. '

21. We are not oblivious that an accident may cause an internal injury as was held in *Fenton (Pauper) v. J. Thorley & Co. Ltd.* (1903 AC 443) by the Court of Appeal:

".....I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

Lord Lindley opined:

"The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish careless from other unintended and unexpected events."

22. There are a large number of English and American decisions, some of which have been taken note of in ESI Corpn.'s case (supra) in regard to essential ingredients for such finding and the tests attracting the provisions of Section 3 of the Act. The principles are:

(1) There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.

(2) The onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

(3) If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case.

25. An accident may lead to death but that an accident had taken place must be proved. Only because a death has taken place in course of employment will not amount to accident. In other words, death must arise out of accident. There is no presumption that an accident had occurred.

26. In a case of this nature to prove that accident has taken place, factors which would have to be established, inter alia, are:

(1) stress and strain arising during the course of employment, (2) nature of employment,

(3) injury aggravated due to stress and strain.

31. In *G.M., B.E.S.T. Undertaking v. Agnes* (1964 (3) SCR 930) referring to the decision of the Court of Appeal in *Jenkins v. Elder Dempster Lines Ltd.* (1953 (2) All ER 1133) this Court opined therein that a wider test, namely, that there should be a nexus between accident and employment was laid down. It also followed the decision of this Court in *Saurashtra Salt Mfg. Co. v. Bai Valu Raja* (AIR 1958 SC 881)

33.. In *Mackinnon Mackenzie & Co. (P) Ltd. v. Ibrahim Mohd. Issak* (1969 (2) SCC 607), this Court held:

"5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words 'in the course of the employment' mean 'in the course of the work which the workman is employed to do and which is incidental to it'. The words 'arising out of employment' are understood to mean that 'during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered'. In other words there must be a causal relationship between the accident and the employment. The expression 'arising out of employment' is again not confined to the mere nature of the employment. The expression applies to employment as such--to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises 'out of employment'. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act."

The above position was again highlighted in **Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali and Anr** reported in (2007) 11 SCC 668 and held thus :-

"20. This Court in *E.S.I. Corporation* (supra) referred to, with approval, the decision of Lord Wright in *Dover Navigation Co. Ltd. v. Isabella Craig*, [1940 AC 190], wherein it was held : (ALL ER p.563 G-H)

"Nothing could be simpler than the words 'arising out of and in the course of employment'. It is clear that there two conditions to be fulfilled. What arises 'in the course of the employment' is to be distinguished from what arises 'out of the employment'. The former words relate to time conditioned by reference to the man's service, the latter to casualty. Not every accident which occurs to a man during the time when he is on

his employment - that is, directly or indirectly engaged on what he is employed to do - gives a claim to compensation, unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified"

22. (1). There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment."

19. If the facts of present case are considered in the light of the judgment passed by the Hon'ble Supreme Court in the aforementioned case, deceased has not slept inside the truck/vehicle or upside the truck/vehicle but has slept on road in front of truck, in which, he said to have engaged as 'assistant driver-cum-helper'. The place where deceased slept is a place where movements of other vehicle were also there. The exposure of deceased to danger was not having any casual connection with engagement of deceased in his employment. Accident suffered by deceased with his own carelessness by exposing himself to an added peril.

20. For the foregoing reasons, aforementioned question of law is decided against the claimants.

21. First question of law framed by this court on 29.10.2014 with regard to the penalty, the provisions under Section 4(a) 3(b) of the Act of 1923 itself specially envisaged in proviso that the Commissioner if opined that there is no justification for delay direct that the employer shall in addition to amount of arrears and interest to pay a further sum not exceeding 50% of such amount and further that a rider has been made that order of penalty shall not be passed without giving a reasonable opportunity to the employer to show cause why it should not be passed. Meaning thereby that the Commissioner has to record his satisfaction that there is no justification for the delay for imposing penalty

but only after issuance of show-cause-notice for giving opportunity of hearing to employer for imposing the penalty.

22. Upon going through the proceedings recorded by the Commissioner, we do not find issuance of any show-cause-notice for imposition of penalty. The Commissioner after closing the evidence, fixed the case for final arguments and after hearing final arguments, impugned award was passed. Thus, there is non-compliance of provisions as prescribed under Section 4(a) 3(b) of the Act of 1923, hence, award of penalty of 50% of the amount of compensation is not sustainable. As per the scheme of the act, liability to pay compensation is upon the employer as soon as it fell due. If the employer fails to comply with the provisions and to discharge the liability casted upon him, penalty is to be imposed upon the employer. Liability of Insurance Company is only to indemnify the insured. The Commissioner erred in awarding penalty without following procedure envisaged under Section 4 (a) (3) (b) of the Act of 1923 and secondly erred in imposing penalty upon appellant -Insurance Company. Hence, award of penalty is not sustainable and is hereby set aside.

23. In view of the above, we do not find it appropriate to decide other questions of law, as we have held that accidental injuries suffered by the deceased do not come within the purview of the Section 3 (1) of the Act of 1923.

24. For the foregoing reasons and law laid down by the Hon'ble Supreme Court in case of **Malika Arjun case** (supra), the appeal is allowed and the impugned award passed by the Commissioner under the Act of 1923 is set aside.

Sd/-

(P. R. Ramamchandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge