IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

TUESDAY, THE 15TH DAY OF DECEMBER 2020 / 24TH AGRAHAYANA, 1942

MFA.No.90 OF 2012

AGAINST THE ORDER IN WCC 26/2008 OF THE COMMISSIONER FOR WORKMEN'S COMPENSATION (DEPUTY LABOUR COMMISSIONER), KOTTAYAM

APPELLANT/SECOND OPPOSITE PARTY:

**THE NEW INDIA ASSURANCE COMPANY LIMITED
CHANGANASSERY NOW REPRESENTED BY ITS MANAGER,
REGIONAL OFFICE, M.G.ROAD, KOCHI-11.**

**BY ADVS.
SRI.MATHEWS JACOB (SR.)
SRI.P.JACOB MATHEW**

RESPONDENTS/APPLICANT & FIRST OPPOSITE PARTY:

**1 JANEESH K.T.
S/O.THANKAPPAN, KALLUMPARAMBIL HOUSE, MAMMOOD P.O., CHANGANASSERY, PIN-686 654.**

**2 THOMAS ANTONY
MATTAPARAMBIL HOUSE, KURISUMMOOD P.O., CHANGANASSERY, PIN-686 654.**

R1 BY ADV. SRI.A.P.SUBHASH

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2020, THE COURT ON 15-12-2020 DELIVERED THE FOLLOWING:

Dated this the 15th day of December, 2020

J U D G M E N T

In WCC No.26/08, the Workmen's Commissioner awarded an amount of Rs.3,64,409/- as compensation to the applicant with interest and also penalty of 30% of the amount from the date of default. Being aggrieved by the judgment, the second opposite party, New India Assurance Company filed this appeal.

2. One of the questions of law emerging for consideration is whether the applicant who was a door keeper of stage carrier KL-05/P-3221 is covered by 'act only policy', in case the accident could not be shown to be covered by Ext.B1 policy issued by the appellant.

3. The applicant was indisputably the door keeper (cleaner) of the stage carrier. He sustained personal injuries on 16.1.2006 while being engaged

in changing the tyre of the vehicle. Risk of a cleaner is not covered by Section 147 of the Motor Vehicles Act, 1988, as held in **Ramashray Singh v. New India Assurance Co.Ltd. & ors. (2003 ACJ 1550)** and **Vanajakshan v. Joseph [2003(2) KLT 462 (FB)].** That means unless additional premium is collected by the insurer, liability cannot be fastened on the company to indemnify the loss sustained by the insured.

4. The Workmen's Commissioner held that risk of the injured was covered by Ext.B1 policy. The learned counsel for the appellant submitted that risk of the applicant is not covered by Ext.B1. The learned counsel also submitted that there is some confusion as regards the entries made in Ext.B1 policy. Sufficient time was given to the counsel at her request to take instructions from the appellant, Insurance company. It was lastly

submitted that the company is not in a position to give instructions in the matter. Since none of the respondents appeared, this Court did not have the advantage of consulting them. In view of this position, I am of the opinion that there is no reason to interfere with the finding of the Commissioner that the risk of the applicant is covered by Ext.B1 policy.

5. The injured sustained severe injuries including fracture to vertebra (back bone) and fracture to both bones in the right leg. The Medical Board assessed 50% of permanent disability. The occupational disability was, however, assessed at 100% since the injured was found to be not in a position to attend to his duty as porter though he could work with his upper limbs and involve in other small jobs. The Commissioner taking into account all these circumstances fixed 70% of

disability. According to the learned counsel for the appellant, the amount of compensation ought to have been based only on disability of 50%. I find my way difficult to accept this contention since the Commissioner after assessing the facts and circumstances, came to a concluded finding that applicant's disability should be limited to 70% though the Medical opinion was in favour of 100% occupational disability. No question of law therefore arises in this respect.

6. But there is substance in the contention raised by the appellant to the effect that the Commissioner went wrong in imposing liability on the appellant for payment of 30% of penalty. Going by the provisions in Workmen's Compensation Act, 1923, the primary liability to pay the amount of compensation and interest is upon the employer. Conceptually the liability for penalty cannot

extend to a person who undertakes to indemnify the insured, employer for his own default. This was so held in **Ved Prakash Garg v. Premi Devi & Ors. [(1997) 8 SCC 1]**. Therefore that part of the judgment directing the appellant to pay penalty is liable to be interfered with.

In the result, appeal is allowed in part and the direction in the judgment as against the appellant to pay amount of penalty is vacated. In all other respects, the impugned judgment dated 29.9.2011 would stand confirmed.

All pending interlocutory applications are closed.

Sd/-

T.V.ANILKUMAR
JUDGE

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