A.F.R.

**HIGH COURT OF ORISSA: CUTTACK**

**F.A.O. No. 167 of 2011**

From a judgment dated 1st March, 2011 passed by Commissioner for Workmen's Compensation-Cum-A.D.M., Dhenkanal in W.C. Case No. 5 of 2007.

---

M/s. New India Assurance Co. Ltd.
Link Road, through its Manager of
T.P.Cell, Badambadi-Kathjodi Road,
Cuttack.

... Appellant

-Versus-

Nim Indrajit Singh and another ... Respondents

For Appellant : Mr. S.S. Rao

For Respondents : Mr. Biswajit Mohanty
[For Respondent No.1]

---

P R E S E N T:

**THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA**

Date of Judgment: 10.05.2013

***B.N. MAHAPATRA, J***. This appeal has been filed challenging the award dated 01.03.2011 passed by learned Commissioner for Workmen's Compensation-Cum-A.D.M., Dhenkanal (for short, "the Commissioner") in W.C. Case No.5 of 2007 directing the appellant to pay a sum of Rs.3,25,365/- within 30 days from the date of the award, failing which interest @ 9% per annum is to be paid from the date of filing of the case.

2. The appellant's case in a nutshell is that W.C. Case No.5 of 2007 was filed by respondent no.1-claimant alleging that the Bus bearing Registration No.OR-05-R/7796 belonging to respondent no.1 in which her son Jadab Indrajit Singh was working as Helper, met with an

accident on 06.02.2007 and capsized near Chandikhole Odanga. As a result of such accident, the deceased sustained grievous injury and died on the spot. Respondent no.1-claimant claimed that the death of the deceased occurred in course of employment and therefore, she is entitled to a compensation of Rs.3,50,000/- as her deceased-son, who was working as Helper, was getting Rs.3,000/- per month as wages. Further case of the claimant was that the vehicle in question having been insured with opposite party No.2-Insurance Company, it is liable to indemnify the owner by paying the amount of compensation to the claimant.

3. Opposite Party No.2-Insurance Company appeared and filed written statement before the learned Tribunal taking various grounds. Opp. party no.2 had called upon the claimant to prove the case by producing the policy that the vehicle in question was covered by valid policy. A specific stand was taken that opposite party No.2-Insurance Company cannot be fastened with the unlimited liability in the spirit of Section 147 (2) of the M.V. Act, 1988 and sought for protection under Section 149 (2) of the M.V. Act. It is claimed by opposite party No.2 that the wage of the deceased as fixed by the Commissioner is without any basis.

4. During the course of hearing the parties have adduced oral and documentary evidence. The claimant has produced the records of connected Police case arising out of the incident in question. Learned Commissioner held that the claimant is entitled to compensation. The age of the deceased was fixed at 25 years as per the post mortem report. On the basis of Zimanama, opp. party no.2-Insurance Company was found to have

insured the offending vehicle and was directed to pay a sum of Rs.3,25,365/- as compensation within a month and in the event of failure to deposit the same, opp. party no.2 was directed to pay interest @ 9% per annum from the date of filing of the case. Being aggrieved with the aforesaid award of compensation, opposite party No.2-Insurance Company has filed the present appeal.

5. Mr. S.S. Rao, learned counsel appearing on behalf of the appellant-Insurance Company submitted that the award passed by the learned Commissioner directing the appellant to pay a sum of Rs.3,25,365/- towards compensation to the claimant is exorbitant, contrary to law and based on no evidence. Learned Commissioner is not justified to fix the wage of the deceased at Rs.3,000/- per month on oral evidence without being supported by any documentary evidence, which is also bad in law. In absence of any documentary evidence, learned Commissioner should have taken the minimum wage as declared by the Government of Odisha in its Labour Department which was Rs. 1875/- per month at the relevant time. Further, the direction of the Commissioner to pay interest @ 9% per annum with retrospective effect from the date of filing of the claim case in the event of failure to pay the amount of compensation within 30 days from the date of order is bad in law and contrary to the verdict of the Hon'ble Supreme Court in the case of *P.J.Narayan Vs. Union of India and others*, 2004 ACJ 452 and judgment of this Court in the case of the *Oriental Insurance Company Ltd. Vs. Harapriya Nayak and others*, 1994(I) OLR 88 wherein it was held that the

interest in the event of default that too retrospectively is without jurisdiction. When the appeal period under the law is 60 days, the direction to pay 9% interest for non-compliance of the order within 30 days from the date of award is nothing but curtailing of the right of the appellant to prefer appeal. There is no material on record to show that the deceased was working as Helper with Respondent No.2; even there has been no registration of employee as workman under law before the competent authority. Neither the complainant nor the owner of the vehicle has pleaded or led any evidence to contend that the appellant-Insurance Company has taken any additional premium to cover any liability in addition to the statutory liability nor copy of the Insurance Policy was filed by either of them. The Commissioner relying on the zimanama (Ext.5) in the connected police case held that the vehicle belongs to respondent No.2 and the appellant was insured covering the period of accident, but he did not touch anything about the coverage by the appellant and the liability under the policy to indemnify the owner.

6. Mr. Rao, further submitted that the appellant produced the true copy of the policy along with an application as an additional evidence under the provisions of Order 41, Rule 27 of CPC as the said document is necessary for complete adjudication. The policy would show that the basic premium for undertaking coverage of any employee other than the driver and conductor was taken. Mr. Rao, further submitted that admittedly the deceased was a Helper in a passenger carrying vehicle. The appellant is not liable to indemnify the owner of the offending vehicle which is a passenger

carrying vehicle as the statute of the policy of the insurance does not require covering the Helper. Quantum of compensation is high and excessive. In order to have extra liability the insurer must take a policy by making extra premium which has not been paid by the owner in the instant case. The insurance policy issued by the appellant would clearly show that the vehicle was not insured to cover the liability for the Helper. In absence of the premium paid for that and in absence of acceptance of coverage of Helper by the appellant, the impugned award directing the appellant to indemnify the owner is bad in law.

7. It is further submitted by Mr. Rao that in paragraph 1 of the claim petition the deceased was described as Helper. In the body of the claim petition nothing has been stated about the liability of the Insurance Company except indicating in the cause title the number of policy said to be valid from 30.01.2007. Placing reliance on proviso (i) (a) & (b) to Section147 (1) (b) of the M.V. Act, it is submitted that Helper is not covered under the statutory liability or under contractual liability. Mr. Rao relying on the judgment of the Hon'ble Supreme Court in the case of *Ramashray Singh vs. New India Assurance Co. Ltd. and others, 2003 ACJ 1550 (SC)* submitted that policy is required to cover only those who are specified in the policy. The expression "any person" mentioned in Section 147 of the M.V. Act does not cover the employees other than those mentioned in the proviso. Placing reliance upon the judgment of the Karnataka High Court in the case of *Branch Manager, United India Insurance Co. Ltd. vs. Prabhudas*

*and another*, *2007 ACJ 526 (Kant)*, Mr. Rao submitted that a maxi-cab cleaner is not covered under the Insurance Policy.

8. Further placing reliance in the case of *Oriental Insurance Co. Ltd. vs. Ananda and another, 2007 ACJ 1459 (Kant),* it is submitted that cleaner in a bus is not covered. Payment of basic premium would cover the liability for driver and conductor only. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. vs. Prembai Patel and others, (2005) 2 T.A.C. 289 (SC)*, Mr. Rao submitted that the effect of proviso to Section 147 is only to cover the liabilities as are there under the Workmen's Compensation Act in respect of the workmen covered under clauses (a), (b) and (c) of proviso to Sec. 147 (1)(b) of the M.V. Act. The Insurance Policy being a contract, it is permissible for an Insurer to take liability to cover the entire liability under clauses (a), (b) and (c) of proviso to Section 147 (1)(b) of the M.V. Act or even the entire liability under an award and in order to cover extra liability the insured must take a policy by making extra premium. Referring to a decision of this Court in the case of *New India Assurance Co. Ltd. vs. Suresh Chandra Patra and others, 1994 (1) OLR 300 (Ori) (DB),* it was submitted that the presumption of taking wider liability would depend on the defence by the owner as to whether he asserted that he has taken an insurance policy with higher risk and in terms of the policy the insurer is liable to indemnify him for any amount beyond the limit prescribed under the statute.

9. Further, placing reliance on the judgment of this Court in *Udayanath Pani vs. Basanti Dalai & Others,* 72 (1991) CLT 495, Mr. Rao

submitted that this Court while analyzing the decision of Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. Vs. Jugal Kishore and others,* 1988 ACJ 270 has categorically held that unless positive assertion is made in the claim application or in the objection of the insured, the insurer's taking defence that its liability is not unlimited does not arise. With regard to liability of the insurer, Mr. Rao also placed reliance on the decision of this Court in the case of *Harapriya Nayak and others (supra)*.

10. Further, Mr. Rao also relying upon the judgments of the Hon'ble Supreme Court in the cases of *National Insurance Co. Ltd. vs. Anadi Charan Sahu and others,* 2006 ACJ 1996*;* and *Shaym Gopal Bindal and others vs. Land Acquisition Officer and another,* 2010 (1) OLR (SC) 296 submitted that policy of insurance is a vital document for proper adjudication of the case and therefore it should be accepted as additional evidence. The document that has crucial bearing on the merit of the claim put forward by the parties needs to be accepted. Further, referring to the decisions in the cases of P.J. Narayan (supra) and Harapriya Nayak and others (supra), Mr. Rao submitted that insurer is not liable to pay interest and the order of paying interest in the event of default that too retrospectively is without any jurisdiction.

11. Mr. B. Mohanty, learned counsel appearing on behalf of claimant-respondent No.1 placing reliance on the judgments of this Court in the cases of *Oriental Insurance Co. Ltd., Berhampur vs. Bhaiga Pradhan and others*, 2004 (1) TAC 670 (Ori); *National Insurance Co. Ltd. vs. Smt. Gini Sahu and others*, 2005 (1) TAC 360 (Ori) submitted that since the

insurer neither pleaded nor produced any evidence regarding policy condition in the trial court so, in absence of pleadings insurer is estopped and cannot be permitted to raise such plea at appeal stage. Further, referring to Order 41, Rule 27, CPC Mr.Mohanty submitted that since any of the conditions mentioned in Order 41, Rule 27 is not satisfied, the misc. case filed by the appellant for acceptance of additional evidence is liable to be rejected.

Placing reliance on the judgments of the Hon'ble Supreme Court in the cases of *National Insurance Co. Ltd. vs. Prembai Patel and others*; 2005 (2) TAC 289 (SC), National Insurance Company Limited Vs. Lilu Rani Majumdar and others, 2005 (1) TAC 56 (Gau.) and the *Divisional Manager, Oriental Insurance Co. Ltd. vs. Minka Munda and two others*, 2009 (II) OLR 982 (Ori), Mr. Mohanty submitted that Driver and conductor of a passenger bus are automatically covered under the expression "any person" mentioned under Section 147 of the M.V. Act and no extra premium is required to be paid to cover them, any premium, if taken to cover workman's liability that covers other contractual employee. Referring to section 2(5) of the M.V. Act, Mr. Mohanty submitted that 'Conductor' in relation to a stage carriage, means a person engaged in collecting fares from passengers, regulating their entrance into or exit from the stage carriage and performing such other function as may be prescribed. However in the instant case, insurer has not taken any plea or produced any document to prove the nature and use of the offending vehicle as a stage carriage requiring employment of a conductor so the reservation claimed through

additional evidence that the employees covered are driver and conductor and not driver and Helper is an afterthought and therefore the same is liable to be rejected.

12. Mr. Mohanty relying upon the judgment of the Hon'ble Supreme Court in the case of *Oriental Insurance Co. Ltd. V. Mohd. Nasir and another,* 2009(3) TAC 598 (SC), further submitted that W.C. Act does not prohibit for grant of interest at a reasonable rate from the date of filing of the claim application till the order/judgment is passed and thereafter at the statutory rate as per Section 4-A (3) of the said Act. This Court in a judgment dated 3.9.2009 passed in FAO No. 519 of 2008 has also granted interest under W.C. Act.

13. On the rival contentions of the learned counsel for both parties, the following questions fall for consideration by this Court:

(i) Whether the liability to pay compensation on the death of Helper is covered under the Insurance Policy issued by the Insurance Company?

(ii) Whether the Commissioner is justified directing the appellant-Insurance Company to pay compensation of Rs.3,25,365/- to the claimant who is the legal heir of the deceased?

(iii) Whether in absence of any pleading or any evidence regarding policy condition before the Tribunal the insurer is estopped and cannot raise any plea at the appellate stage that in the insurance policy the liability of the Helper is not covered?

(iv) Whether the Commissioner is justified to direct payment of interest @ 9% per annum from the date of filing of the

> case in the event of failure on the part of the Insurance Company to deposit the amount of compensation within 30 days from the date of pronouncement of the order?

14. Question nos. (i) and (ii) being inter-linked, they are dealt with together. There is no dispute that the claimant's son Jadab Indrajit Singh while working as a Helper in a bus bearing Registration No.OR-05-R/7796 met with an accident and died while discharging his duty. The Commissioner framed as many as four issues and issue no.(4) is " whether opposite parties are liable to pay such compensation as is due , if so, by whom payable?

While dealing with issue no.4, learned commissioner has held as under:

> "The applicant/petitioner claimed compensation from the employer O.P.No.1 and O.P.No.2 the insurer. In the claim petition it has been mentioned that the bus of O.P.No.1 bearing Regd. No. OR-05-R/7796 was duly insured with O.P.No.2. The certified copy of zimanama Ext.5 confirms that the R.C.Book of vehicle No.OR-05-R/7796 stood in the name of O.P.No.1. Thus it is established that the O.P.No.1 was the employer of the deceased Helper. The zimanama (Ext.5) also confirms that the offending bus of O.P.No.1 was insured under O.P. No.2 vide Policy No. 550303/31/06/01/00002047 valid till 29.1.2008 covering the date of accident. The O.No.2 has not led evidence to the contrary. Hence, I hold that the O.P.No.1 the employer who is primarily liable to pay the compensation in terms of Section 3 of the W.C. Act, 1923 is liable to be indemnified by O.P.No.2 the insurer. In the matter of payment of compensation already assessed at Rs.3,25,365/- (Rupees three lakhs twenty five thousand three hundred sixty five) only and issue no.4 is answered accordingly."

15. Relying on various decisions stated hereinbefore, Mr. Rao submitted that "any person" mentioned in Section 147 of the M.V. Act does not cover the employees other than those mentioned in the proviso. Policy is required to cover only those who are specified in the policy. A further stand of the appellant is that cleaner in a maxi-cab or a bus is not covered. Basic premium paid would cover the liability for driver and conductor only. There is no dispute over the above legal proposition.

16. The Hon'ble Supreme Court in the case of *Ramashray Singh* (supra) held as under: "Any person" mentioned in Sec. 147 of the M.V. Act does not cover the employees other than those mentioned in the proviso." Thus, policy is required to cover only those who are specified in the policy.

17. The Hon'ble Supreme Court in the case of ***National Insurance Company Co. Ltd. Vs. Prembai Patel and others***, (2005) 2 TAC 289 (SC) held as under :

> "13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (*a*) or (*b*) or (*c*) of proviso (*i*) to Section 147(1)(*b*) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy."

18. The Hon'ble Supreme Court in the case of ***Sanjeev Kumar Samrat Vs. National Insurance Company Ltd. and others*** [Civil Appeal No.8925 of 2012 arising out of S.L.P. (Civil) No.17272 of 2006 decided on 12.11.2012] held as under:-

> "The other principle that has been stated is that the insurer's liability as regards employee is restricted to the compensation payable under the 1923 Act. In this context, the question that has been posed in the beginning to the effect whether the employees of the owner of goods would come within the ambit and sweep of the term "employee" as used in Section 147(1), is to be answered. In this context, the proviso to Section 147(1)(b) gains significance. The categories of employees which have been enumerated in the sub-clauses (a), (b) and (c) of the proviso (i) to Section 147(1) are the driver of a vehicle, or the conductor of the vehicle if it is a public service vehicle or in examining tickets on the vehicle, if it is a goods carriage, being carried in the vehicle.
>
> xxx xxx xxx
>
> 20. It is the settled principle of law that the liability of an insurer for payment of compensation either could be statutory or contractual. On a reading of the proviso to Sub-Section (1) of Section 147 of the Act, it is demonstrable that the insurer is required to cover the risk of certain categories of employees of the insured stated therein. The insurance company is not under statutory obligation to cover all kinds of employees of the insurer as the statute does not show command. That apart, the liability of the insurer in respect of the said covered category of employees is limited to the extent of the liability that arises under the 1923 Act. There is also a stipulation in Section 147 that the owner of the vehicle is free to secure a policy of insurance providing wider coverage. In that event, needless to say, the liability would travel beyond the requirement of Section 147 of the Act, regard being had to its contractual nature. But, a pregnant one, the amount of premium would be different."

19. Thus, the categories of employees who have been enumerated in Sub-clauses (a), (b) and (c) of proviso (i) to Section 147 (1) of the Act, are the driver of a vehicle or if it is a public service vehicle engaged as a conductor of the vehicle or in examining ticket on the vehicle or if it is a goods carriage being carried in the vehicle. Proviso (ii) to Section 147 (1) of the Act covers any contractual liability. Under Section 147, owner of the vehicle is also free to secure a policy of insurance providing wider coverage. In that event, the liability would cover beyond the requirement of Section 147 of the Act, regard being had to its contractual nature.

20. The appellant has filed a copy of the policy issued by it in respect of the offending vehicle as Annexure-1 to the Misc. Case No. 260 of 2012. On perusal of such annexure, it reveals that the owner has paid the following premium.

| | |
|---|---|
| O.D. basic | Rs. 4,404.00 |
| T.P.basic | Rs. 3,160.00 |
| Addl. premium towards liable to Passenger -16 | Rs. 3,760.00 |
| W.C. to employee - 2 | Rs. 50.00 |
| | ========== |
| Total | Rs.11,374.00 |

Thus, the T.P. (Third Party) basic premium of Rs.3160/- has been paid to cover all statutory liabilities which include Driver and Conductor of the vehicle. The expression “Third Party” has not been exhaustively defined in the Act, 1988. Section 145(g) provides inclusive definition of “Third Party”. As per Section 145(g) “Third Party” includes the Government. The true meaning and import of the term “third party” necessarily referred to a party other than those who are parties to the

contract of insurance. In a contract of insurance, the insurer is one party to the contract and the policy holder is other party. The claim made by others in respect of negligent use of motor vehicle may be described as claim by third party. Premium has also been paid to cover 16 passengers.

Apart from the above, additional premium of Rs.50/- has been paid to cover the liability of W.C. to two employees. Hence, liability of the Insurance Company in the instant case also covers the other two employees besides the statutory liability of driver and conductor.

21. In view of the above, the appellant-Insurance Company is liable to pay the compensation awarded by the Commissioner to the legal heir of the deceased-Helper.

22. Question No.(iii) whether in absence of any pleading or any evidence regarding policy condition before the Tribunal the insurer is estopped and cannot raise any plea at the appellate stage that in the insurance policy the liability of the Helper is not covered.

It may be worth noting that even though in the cause title of the claim petition Respondent no.1-claimant impleaded the Insurance Company as a party and gave Policy number, the Insurer neither pleaded nor produced any evidence regarding policy condition before the Tribunal. In absence of any pleading, the insurer is estopped and cannot be allowed to raise any plea at the appeal stage that in the Insurance Policy the liability of Helper is not covered.

23. This Court in the case of ***Bhaiga Pradhan and others*** (supra) has held that the Insurance Company had never pleaded that there was

collusion between the claimants and the owner. No evidence was led before the Tribunal regarding the collusion. No suggestion was given to P.W.1 during his cross-examination that there was a collusion. In absence of any pleading by the appellant-Insurance Company with regard to the collusion, it cannot be permitted to raise such a plea at the time of appeal. [Also see *Smt. Gini Sahu and others (supra]*

24. In any event, in view of the reasons given in the preceding paragraphs, the learned Commissioner is justified to fasten the liability on the Insurance Company to pay the compensation of Rs.3,25,365/- to the respondent no.1-claimant for death of the Helper Jadab Indrajit Singh.

25. Question no.(iv) is with regard to payment of interest. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Ramashray Singh* (supra) and in the case of *Harapriya Nayak and others* (supra), Mr. Rao submitted that the insurer is not liable to pay interest in the event of default that too with retrospective effect. There is no appeal filed by the claimant-respondents.

26. The Hon'ble Supreme Court in the case of ***Oriental Insurance Co. Ltd. vs. Mohd. Nasir and another***, 2009 (3) TAC 598 (SC), upon which the respondent-claimants relies has held as under:-

> "The said provision, as it appears from a plain reading, is penal in nature. It, however, does not take into consideration the chargeability of interest on various other grounds including the amount which the claimant would have earned if the amount of compensation would have been determined as on the date of filing of the claim petition. Workmen Compensation Act does not prohibit grant of interest at a reasonable rate from the date of filing of the claim

> petition till an order is passed. Only when sub-section (3) of Section 4-A would be attracted, a higher rate of interest would be payable where for a finding of fact as envisaged therein has to be arrived at. Only because in a given case, penalty may not be held to be leviable, by itself may not be a ground not to award reasonable not be held to be leviable, by itself may not be a ground not to award reasonable interest."

27. In view of the ratio of the above cited case, it is clear that clause (3) of Section 4-A of the W.C. Act, 1923 can be attracted, where a default occurs in paying the compensation within one month from the date it fell due. If the awarded amount is not paid within one month from the date of the award, interest at the rate of 12% is leviable on the amount of compensation.

28. In the instant case, the learned Commissioner for Workmen's Compensation vide order dated 01.03.2011 has directed that if the amount awarded is not paid within thirty days from the date of the order, 9% interest per annum shall be paid on the compensation amount from the date of filing of the case till the actual payment. The amount of compensation was deposited before the Commissioner by the appellant-insurer on 28.04.2011.

29. In the case of *Mohd. Nasir (supra)*, the Supreme Court further held that section 4-A(3) does not take into consideration the chargeability of interest on various other grounds including the amount which the claimant would have earned if the amount of compensation would have been determined as on the date of filing of the claim petition. The Workmen's Compensation Act does not prohibit grant of interest at a reasonable rate

from the date of filing of the claim petition till the order is passed. Considering the above, the Supreme Court in the said case directed payment of interest at the rate of 7½ % per annum from the date of filing of the application till the date of award and, thereafter, as per the impugned award in the said case.

30. This Court, therefore, applying the ratio of the aforesaid case, directs that the Insurance Company shall pay simple interest on the amount of compensation @ 7.5% per annum from the date of filing of the application till the date of passing of the award and interest at the rate of 12% per annum thereafter till the compensation amount is deposited before the W.C. Commissioner within eight weeks from today before the Commissioner. On such deposit being made the same shall also be disbursed along with amount of compensation in favour of the claimants.

31. In the ultimate analysis, the appellant-Insurance Company is not entitled to the relief claimed in the appeal.

.....

***B.N.Mahapatra, J.***

*Orissa High Court, Cuttack*
*Dated 10th May, 2013/ssd*