* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ FAO No. 125/2013

% **28th February, 2014**

THE ORIENTAL INSURANCE COMPANY LIMITED .....Appellant

Through: Mr. R.C.Mahajan, Adv.

VERSUS

PAPPU KUMAR @ PUSHAP KUMAR & ORS. ..... Respondents

Through: Ms. Pratima N. Chauhan, Adv. for R-1.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Section 30 of the Employee's Compensation Act, 1923 impugning the order of the Commissioner dated 24.12.2012 by which the Commissioner has imposed interest and penalty upon the appellant-insurance company as per Section 4(A) of the Act.

2. Learned counsel for the appellant contends that the appellant-insurance company could not have been fastened with the liability of the penalty.

3. I have recently had an occasion to examine this aspect in the case of ***Oriental Insurance Co. Ltd. Vs. Saroj Singh & ors.*** in FAO

51/2014 decided on 14.2.2014 in which I have held that unless the insurance company files the insurance policy and relies upon the terms in the policy that it is only liable to pay compensation under the Employee's Compensation Act, 1923, insurance company is liable to pay penalty inasmuch as an issue of coverage of liability or penalty is a contractual matter. In this case I have also distinguished the judgment in the case of ***Ved Prakash Garg Vs. Premi Devi and Ors. (1997) 8 SCC 1*** and which is also relied upon before me on behalf of the appellant.

4. The relevant paras of the judgment in the case of ***Oriental Insurance Co. Ltd. (supra)*** read as under:-

> 4.(i) Another argument which was urged on behalf of the appellant/insurance company is that the appellant/insurance company in view of the judgment of the Supreme Court in the case of ***Ved Prakash Garg Vs. Premi Devi and Ors. (1997) 8 SCC 1*** is not liable to pay penalty but is only liable to pay interest.
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> (ii) In my opinion, even this contention urged on behalf of the appellant is misconceived because in order to sustain this contention it is necessary that such a defence is first taken before the Commissioner and which has not been so done because the appellant did not appear before the Commissioner in the proceedings under Section 4A of the Act. In fact, after taking such a defence appellant had to file the insurance policy to show that the liability under the policy was only the liability undertaken under the Workmen's Compensation Act, 1923 and nothing more, but, the insurance policy is not even filed in this Court for this Court to find out whether the coverage given by the appellant/insurance company was a

comprehensive coverage or was only limited to the liability of the employee under the Workmen's Compensation Act, 1923.

5. In this regard reference can be made to para 18 of the judgment of the Supreme Court in the case of ***Ved Prakash Garg (supra)*** where the Supreme Court distinguished the judgment of learned Single Judge of the Rajasthan High Court in the case of ***United India Insurance Co. Ltd. Vs. Roop Kanwar & Ors. 1991 ACJ 74*** on the ground that the contractual coverage of liability of the insurance company in that case was towards all liabilities incurred under the Workmen's Compensation Act, 1923 and whereby the insurance company is also liable not only for payment of interest under Section 4A of the Act but also the penalty. This para 18 reads as under:-

> "18. We may now refer to the other set of judgments, on which reliance was placed by learned Counsel for the appellants. In the case of ***Oriental Fire and General Ins. Co. Ltd v. Nani Bala and Anr. (supra)*** a learned Single Judge B.L. Hansaria, J. (as he then was) speaking for the High Court of Judicature at Gauhati had to consider the question whether any liability could be imposed upon the insurer of the offending vehicle which had caused accidental injury to the employees of the insured employer. It was decided in the said case on a conjoint operation of the Motor Vehicles Act and the Compensation Act that the provisions of the Compensation Act cannot be viewed in isolation when the Motor Vehicles Act had specifically stated that a policy of insurance cannot exclude the liability arising under the Compensation Act and that the expression 'any person' has to cover insurer also. The aforesaid decision was rendered entirely in a different context and was not concerned with the question whether the insurance company would be liable to meet the claim of penalty amount and interest as awarded under Section4A(3) of the Compensation Act against the insured employer. It is, therefore, of no assistance in the present cases. However, the same learned Judge speaking on behalf of a Division Bench of the Orissa High Court in the case of ***Khirod Nayak v. Commissioner for Workmen's Compensation and Ors. (supra)*** has taken the view that

when any penalty is imposed on the insured employer under Section 4A(3) of the Compensation Act along with interest the insurance company would be liable to make good the entire claim. In the light of the scheme of both the relevant Acts as discussed by us earlier it has to be held that the aforesaid view of the Division Bench of the Orissa High Court in so far as it holds that the insurance company would be liable to meet the claim of penalty to the tune of 50% of the amount of compensation as imposed on tile insured employer is not correct. But so far as it is held that the insurance company would be liable to meet the claim of interest at the rate of 6% per annum as granted under Section 4A(3) of the Compensation Act, the same is justified on the scheme of the Act. Aforesaid decision of the Orissa High Court has to be partly overruled to the aforesaid extent. We may now turn to a decision of the Madhya Pradesh High Court in the case of ***New India Assurance Co. Ltd. v. Guddi and Ors. (supra).*** A learned Single Judge in the said case took view that on the scheme of Section 4A(3) of the Compensation Act the insurance company will have to make good the claim of interest and penalty as imposed upon the insured employer. In the light of what we have discussed earlier it must be held that the said view is partly correct in so far as it is held that the insurance company would be liable to pay the amount of interest imposed upon the insured employer by the Workmen's Commissioner under Section 4-A(3). But to the extent it seeks to cover even the penalty amount and makes obligatory on the insurer to meet the said claim of penalty imposed upon the insured employer it must be held that the same is not correct and is not borne out from the scheme of the Acts discussed by us. To that extent the said decision of the learned Single Judge would stand partly overruled. In the case of ***United India Insurance Co. Ltd. v. Roop Kanwar and Ors. (supra)*** a learned Single Judge of the Rajasthan High Court had to consider a situation where on payment of additional premium the insurance company had agreed in the light of endorsement No. 16 of the Policy to cover all liabilities incurred by the insured under Workmen's Compensation

Act. In view of this contractual coverage of liability the insurance company in that case was held liable to meet the claim for penalty and interest as imposed upon the insured under Section 4-A(3) of the Compensation Act. This judgment proceeds on its own facts and was concerned with a situation converse to the one as was examined by the Karnataka High Court in ***Oriental Insurance Co. Ltd v. Raju and Ors. (supra)***. In the case decided by the Karnataka High Court, as seen earlier, there was an express exclusion of such liability of the insurance company. In the aforesaid case decided by the Rajasthan High Court there was an express inclusion of such liability for the insurance company which had taken additional premium. This judgment also, therefore, is of on assistance to either side."

(underlining added)

6. Supreme Court in its recent judgment in the case of ***New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and Anr. (2006) 5 SCC 192*** has held that the liability which an insurer undertakes under the Act is a contractual liability whereby it can include or exclude any particular liability and to determine the liability which is undertaken the terms of contract of insurance/policy would be relevant. For example, an insurance company can contract out of payment of interest (or for that matter penalty) if the insurance company so provides while insuring the insured for the liability under the Employee's Compensation Act. This has been held in the judgments of both learned Single Judges who delivered judgments in the said cases. These paras which hold that whether or not coverage of interest or penalty is a purely contractual matter and it would depend upon the terms of the contract of the insurance policy are paras 19 and 20 (S.B. SINHA, J) and 23 and 24 (P.K. BALASUBRAMANYAN, J.) which reads as under:-

"19. As indicated hereinbefore, a contract of insurance is governed by the provisions of the Insurance Act. Unless the said contract is governed by the provisions of a statute, the parties are free to enter into a contract as for their own volition. The Act does not contain a provision like Section 147 of the Motor

Vehicles Act. Where a statute does not provide for a compulsory insurance or the extent thereof, it will bear repetition to state, the parties are free to choose their own terms of contract. In that view of the matter, contracting out, so far as reimbursement of amount of interest is concerned, in our opinion, is not prohibited by a statute.

20. The views taken by us find support from a recent judgment of this Court in ***P.J. Narayan v. Union of India and Ors.*** wherein it was held:

"This writ petition is for the purpose of directing Insurance Company to delete the clause in the Insurance Policy which provides that in case of compensation under the Workmen's Compensation Act, 1923, the Insurance Company will not be liable to pay interest. We see no substance in the writ petition. There is no statutory liability on the Insurance Company. The statutory liability under the Workmen's Compensation Act is on the employer. An insurance is a matter of contract between the Insurance Company and the insured. It is always open to the Insurance Company to refuse to insure. Similarly they are entitled to provide by contract that they will not take on liability for inter est. In the absence of any statute to that effect, insurance Company cannot be forced by Courts to take on liabilities which they do not want to take on. The Writ Petition is dismissed. No order as to costs."

23. The law relating to contracts of insurance is part of the general law of contract. So said Roskill Lord Justice in **Cehave** v. **Bremer** [1976] Q.B. 44. This view was approved by Lord Wilberforce in **Reardon Smith** v. **Hanson-Tangen** 1976 1 WLR 989, wherein he said:

"it is desirable that the same legal principles should apply to the law of contract as a whole and that different principles should not apply to the different branches of that law".

A contract of insurance is to be construed in the first place from the terms used in it, which terms are themselves to be understood in their primary, natural, ordinary and popular sense. (See Colinvaux's Law of Insurance 7th Edition paragraph 2-01). A policy of insurance has therefore to be construed like any other contract. On a construction

of the contract in question it is clear that the insurer had not undertaken the liability for interest and penalty, but had undertaken to indemnify the employer only to reimburse the compensation the employer was liable to pay among other things under the Workmen's Compensation Act. Unless one is in a position to void the exclusion clause concerning liability for interest and penalty imposed on the insured on account of his failure to comply with the requirements of the Workmen's Compensation Act of 1923, the insurer cannot be made liable to the insured for those amounts.

24. Section 17 of the Workmen's Compensation Act voids only a contract or agreement whereby a workman relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment and insofar as it purports to remove or reduce the liability of any person to pay compensation under the Act. As my learned brother has noticed, in the Workmen's Compensation Act, there are no provisions corresponding to those in the Motor Vehicles Act, insisting on the insurer covering the entire liability arising out of an award towards compensation to a third party arising out of a motor accident. It is not brought to our notice that there is any other law enacted which stands in the way of an insurance company and the insured entering into a contract confining the obligation of the insurance company to indemnify to a particular head or to a particular amount when it relates to a claim for compensation to a third party arising under the Workmen's Compensation Act, In this situation, the obligation of the insurance company clearly stands limited and the relevant proviso providing for exclusion of liability for interest or penalty has to be given effect to. Unlike the scheme of the Motor Vehicles Act the Workmen's Compensation Act, does not confer a right on the claimant for compensation under that Act to claim the payment of compensation in its entirety from the insurer himself. The entitlement of the claimant under the Workmen's Compensation Act is to claim the compensation from the employer. As between the employer and the insurer, the rights and obligations would depend upon the terms of the insurance contract. Construing the contract involved here it is clear that the insurer has specifically excluded any liability for interest or penalty under the Workmen's Compensation Act and confined its liability to indemnify the employer only against the amount of compensation ordered to be paid under the Workmen's Compensation Act. The High Court was, therefore, not correct in holding that the appellant--insurance company, is also liable

to pay the interest on the amount of compensation awarded by the Commissioner. The workman has to recover it from the employer."

(underlining added)

7. Therefore, the appellant/insurance company not having appeared before the Commissioner in spite of being served, no application being moved for review/recall of the impugned order on the ground that appellant was not served and that due service of the appellant is recorded in para 3 of the impugned order, no insurance policy is filed which would show that liability which was undertaken by the appellant/insurance company was only for coverage under the Act in terms of the judgment in the case of ***Ved Prakash Garg (surpa)*** and finally that liability under the insurance policy can or cannot include interest and penalty depending upon its terms on which the insurance policy has to be seen but which policy is not filed, there is no reason for this Court to in any manner interfere with the impugned order which awards interest and penalty under Section 4A of the Act against the appellant/insurance company."

5. I may state that in the present case though the insurance company had appeared before the Commissioner, it had not filed any policy to show that its liability is restricted to only the compensation to be awarded under the Employee's Compensation Act i.e its liability is only towards the principal compensation amount and the interest. In fact, even in the grounds of appeal before this Court no such ground is taken up and the only three grounds which are pleaded read as under:-

"A. That the order passed by the Commissioner i.e. THE IMPUGNED ORDER/AWARD DATED 24.12.2012 is contrary to the facts on record and the law.

B. That the Ld. Commissioner has committed an error by Awarding interest @ 12% from the date of accident till payment of the compensation amount.

C. That the Ld. Commissioner has committed gross error by imposing the penalty upon the Appellant."

6. In view of the above, applying the ratio in the case of ***Oriental Insurance Co. Ltd. (supra)*** and the fact that the appellant- insurance company has not filed its policy that it was contractually not liable to pay penalty, it is held that the appellant was liable to pay penalty, and the appeal is therefore dismissed, leaving the parties to bear their own costs.

FEBRUARY 28, 2014 **VALMIKI J. MEHTA, J.**
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