

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

FAO(WCA) No. 160 of 2009.

Date of decision: August 31, 2016.

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The Oriental Insurance Company. ....Appellant.

Versus

Smt. Deeno & ors. ....Respondents.

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*Coram*

The Hon'ble Mr. Justice Dharam Chand Chaudhary, *Judge.*

*Whether approved for reporting?*<sup>1</sup> Yes.

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For the appellant : Mr. J.S. Bagga, Advocate,

For the respondents : Mr. Vivek Singh Thakur, Advocate,  
for respondents No. 1 and 2.

Ms. Jamuna, Advocate, vice counsel  
for respondent No. 3.

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Dharam Chand Chaudhary, J. (Oral)

In this appeal award dated 30.9.2008 passed by learned Commissioner under the Workmen's Compensation Act, Chamba is under challenge. The commissioner after holding full trial has assessed the compensation amounting to ₹5,52,366/- together with interest @12% per annum payable to respondents No. 1 and 2-claimants herein against the Insurer respondent No. 2 (appellant in the present appeal). Besides on

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<sup>1</sup> *Whether the reporters of the local papers may be allowed to see the Judgment?*  
yes.

the failure of the deposit of the amount of compensation within 30 days, the appellant-Insurer was also held liable to pay the penalty @25% of the total amount i.e. ₹5,52,366/-. The complaint, therefore, is that the amount of penalty i.e. 25% of the awarded amount should have not been imposed upon the Insurer-respondent No. 2 and rather on the employer who is respondent No. 1 Kamlesh Kumar before learned Commissioner whereas respondent No. 3 in this appeal. The further grouse of respondent No. 2-Insurer is that the monthly wages of the deceased workman i.e. ₹4500/- have been erroneously determined as cogent and reliable evidence was not produced to substantiate the same by the petitioners-claimants.

2. The appeal has been admitted on the following substantial question of law:-

1. Whether the findings of the Court below are result of misreading, misinterpretation of the evidence on record and against settled position of law?

3. Pawan Kumar son of the petitioners has died in an accident occurred on 4.11.2006. He was working as labourer with respondent No. 1 Kamlesh Kumar. On the fateful day Pawan Kumar was on duty at Urie to Ghator road in district Chamba. He while on duty met with an accident which resulted in his death on the same day. The claimants are his parents. Their claim that the wages of deceased Pawan Kumar was as ₹4500/- in the

claim petition, has been denied by his employer-respondent No. 1 being incorrect as according to him the deceased was being paid his wages @2400/- per month. On behalf of respondent No. 2-Insurer there is however, denial simplicitor qua this aspect of the matter.

3. Petitioner No. 2 Gizo while in the witness box as PW4 has stated that the wages of the deceased were ₹4500/- per month. The suggestion given to him on behalf of respondent No. 2 that he was being paid ₹2400/- per month as wages has been denied being wrong. PW2 Vido Ram while in the witness box has also stated that the wages of the deceased at the time of his death were ₹150/- per day. In his cross-examination he has also denied the suggestion that the wages of the deceased at the time of accident was ₹2400/- per month.

4. The employer respondent No. 1 no doubt has claimed that wages were being paid to deceased Pawan Kumar @ ₹2400/- per month, however, has not stepped into the witness box. Therefore, in view of the evidence produced by the petitioner learned Commissioner below has rightly taken the monthly wages of the deceased as ₹4500/- per month. Therefore, no case qua interference by this Court qua this aspect of the award is made out and rather learned Commissioner has assessed the monthly wages of the deceased on appreciation of the evidence in its right perspective.

5. Now, if coming to the second ground of challenge, it would not be improper to conclude that the penalty to the extent of 25% of the awarded amount could have not been imposed upon the Insurer-respondent No. 2 for the reason that Section 4-A(3) of the Act provides that if employer fails to pay the compensation within one month from the date it fall due, he shall have to pay a further sum not exceeding 50% of such amount by way of penalty.

6. The apex Court in *(1997) 8 Supreme Court Cases 1*, titled *Ved Prakash Garg versus Premi Devi and Others* qua this aspect of the matter has held as follows:

*.....But so far as the amount of penalty imposed on the insured employer under contingencies contemplated by Section 4-A(3)(b) 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 thereof if imposed by the Workmen's Commissioner.*

20. *In view of the aforesaid conclusion of ours the present appeals will have to be partly allowed. The impugned judgments of the High Court will stand confirmed to the extent they exonerate the respondent-insurance companies of the liability to pay the penalty imposed on the insured employers*

by the Workmen's Commissioner under Section 4A(3) of the Compensation Act. But the impugned judgments will be set aside to the extent to which they seek to exonerate insurance companies for meeting the claims of interest awarded on the principal compensation amounts by the Workmen's Commissioner on account of default of the insured in paying up the compensation amount within the period contemplated by Section 4A(3) of the Compensation Act. Accordingly it must be held that the respondent insurance company will be liable to meet the claim of the appellant- insured in Appeals Nos. 15698-15699 of 1996 to the extent of Rs. 88,548/- in Claim Case No.2 of 1992 with interest thereon at the rate of 6% per annum of from the date of accident till the date of payment. But the respondent- insurance company will not be liable to meet the claim of penalty of Rs.44,274/- imposed on the appellant-insured along with the interest of 6% per annum on the said amount of Rs. 44,274/. To that extent the award of the Commissioner will stand modified. So far as the Claim No.3 of 1992 is concerned the respondent-insurance company will be liable to reimburse the compensation amount of Rs. 88,968/- with interest at the rate of 6% p.a. thereon from the date of the accident till the date of payment. But it will stand exonerated of its liability of reimbursement so far as the penalty amount of Rs.41,984/- and amount of interest at 6% p.a. thereon are concerned. To that extent the award of the Workmen's Commissioner in Claim Case No.3 of 1992 will stand modified. Similarly in Civil Appeal No.

*15700 of 1996 the impugned judgment of the High Court will stand partly set aside so far as the claim for interest as imposed on appellant-insured is concerned and the award of the Workmen's Commissioner in so far as his award of Rs. 81,540/- as compensation along with interest will stand confirmed. But the further part of the award to the extent it directs that in the event of failure to pay the said amount within one month a penalty of 30% p.a. shall be payable by the insurance company, will stand set aside. Consequently the respondent-insurance company in this case will be liable to pay Rs.81,540/- by way of compensation with interest at 6% per annum thereon from the date of the accident till the date of payment to the claimants. The awards of the Commissioner will stand modified accordingly. They will obviously remain untouched so far as they are against the employers. It will be open to the claimants to enforce their claims of penalty amounts with proportionate interest thereon against employers concerned."*

7. Similar is the view of the matter even taken by this Court also in a recent judgment delivered on 11.7.2016 in FAO No. 177 of 2006 titled ***Nirmala and others Vs. Kaushalaya Devi & another.*** Being so, the Insurer-respondent No. 2 is not liable to pay the penalty as imposed i.e. 25% of the awarded amount. The petitioners-claimants had therefore, to recover the amount

of penalty @ 25% of the total compensation i.e. ₹ 5,52,366 from the employer-respondent No. 1 in the claim petition.

8. In view of what has been said hereinabove, this appeal is partly allowed. Consequently, the award will stand modified to the extent that the liability of respondent No. 2-Insufer shall be restricted only to the tune of ₹5,52,366/- whereas the amount of penalty i.e. 25% of this amount, the petitioners are at liberty to recover the same from the employer-respondent Kamlesh Kumar.

9. The appeal is accordingly disposed of. Pending application(s), if any, also stands disposed of.

(Dharam Chand Chaudhary),  
Judge.

August 31, 2016,  
(*vs*)