IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

FAO No.282 of 2012

Reserved on: 28.11.2023

Date of Decision: 29.12.2023

National Insurance Company Limited

....Appellant

Versus

Swarna Devi & others

…Respondents

Coram

Hon'ble Mr. Justice Sushil Kukreja, Judge

Whether approved for reporting?[1]

For the appellant	:	Mr. Jagdish Thakur, Advocate.
For the respondents	:	Mr. C.N. Singh, Advocate, for respondents No.1& 2. Mr. Ajay Sharma, Senior Advocate with Mr. Athrav Sharma, Advocate, for respondent No.3.

Sushil Kukreja, Judge

By way of instant appeal filed under Section 30 of the Employee's Compensation Act (for short 'the Act'), challenge has been laid to the order dated 07.03.2012 passed by the learned Commissioner, Employee's Compensation, Court No.1, Dehra, District Kangra, H.P. in WCA No.8/2011/08, titled *Smt. Sawarna*

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[1] Whether reporters of Local Papers may be allowed to see the judgment?

Devi & another Versus Smt. Sakuntala Devi & another, whereby claim petition filed by respondents No.1&2/ petitioners (hereinafter referred to as the petitioners) under Section 3 of the Act praying therein for compensation on account of death of their son Kikar Singh in an accident, was allowed and petitioner No.1 Sawarna Devi was awarded compensation to the tune of Rs.3,45,910/- alongwith interest @ 12% per annum w.e.f. 02.11.2004, i.e. one month after the date of accident till deposit of the amount.

2. Precisely, the facts as emerge from the record are that one Kikar Singh was an employee of respondent No.1 Shakuntla Devi (respondent No.3 herein), who was owner of tractor bearing registration No.HP-68-1002, and said Kikar Singh was working as driver in the said tractor. On 02.10.2004 at about 6.30 p.m., the aforesaid tractor met with an accident and Kikar Singh died on the spot, while discharging his duty as driver of the tractor. The petitioners were the parents of deceased and as per them, the monthly wages of the deceased, at the time of his death, were Rs.3,600/-. Earlier, the claimants filed a claim petition before the Motor Accidents Claims Tribunal, Kangra at Dharamshala, in which, interim compensation of Rs.50,000/- was

granted in favour the claimants and in the said claim petition, the respondents admitted that deceased Kikar Singh was driving the tractor at the time of the accident. However, due to the mistake in the FIR, the claimants had withdrawn the said claim petition with permission to file a fresh petition, as such, they filed a fresh petition before the Commissioner, Employee's Compensation, Court No.1, Dehra, District Kangra, HP, for compensation on account of death of their son while discharging his duty as a driver.

3. The aforesaid claim put-forth by claimants, came to be resisted by the respondents by way of filing separate replies. In her reply, respondent No.1 denied that the deceased died while discharging his duty and that the deceased was under the employment of the respondent.

4. In the reply filed by the respondent No.2-National Insurance Company, it has been averred that the deceased was neither workman, nor under the employment of owner/ respondent No.1 and as per FIR 130/04, one Ghasitu Ram was driving the ill-fated vehicle, hence, there was no liability of respondent No.1/owner or respondent No.2.

5. On the basis of pleadings adduced on record by the

respective parties, learned Commissioner below, vide order dated 08.08.2011, framed following issues:-

1. ***Whether deceased Kikar Singh s/o petitioners was workman employed with respondent No.1 as driver of her tractor ?..OPP***
2. ***Whether the petitioners are entitled for compensation? ..OPP***
3. ***Whether the petition of the petitioners is not maintainable in the present form?..OPR-2.***
4. ***Whether the petitioners have no locus standi to file the present petition? ..OPR-2.***
5. ***Whether notice or information as required under Workman Compensation Act was not given to respondent No.2?..OPR-2.***
6. ***Relief.***

6. Consequently, vide order dated 07.03.2012, the Commissioner below, while allowing the claim petition held the respondents liable to pay the compensation to petitioner No.1-claimant No.1 assessed at Rs.3,45,910/- with interest @ 12% per annum w.e.f. 02.11.2004 i.e. one month after the date of accident till the deposit of amount and respondent No.2, being insurer of tractor No.HP-68-1002, was directed to deposit the awarded amount. In the aforesaid background, appellant-National Insurance Company has approached this Court by way of instant appeal, praying therein to quash and set aside the aforesaid impugned order dated 07.03.2012 passed by learned

Commissioner below.

7. On 01.05.2013, the appeal was admitted for hearing on the following substantial questions of law:-

> ***"1. Whether the Commissioner has misconstrued and misinterpreted the evidence in holding that the deceased Kikar Singh was drawing wages Rs.3,600/- per month?***
>
> ***2. Whether petition is not maintainable for want of notice under Section 10 of the Employee's Compensation Act, 1923?***
>
> ***3. Whether the Commissioner has misconstrued and misinterpreted the pleadings and evidence in allowing the award?"***

8. I have heard the learned counsel for the appellant and learned counsel for the respondents No.1 & 2 as well as learned Senior Counsel for respondent No.3 and also carefully examined the entire record.

9. Learned counsel for the appellant first contended that the learned Commissioner below has erred in taking income of the deceased at Rs.3,600/- per month, which ought to have been taken in accordance with the minimum wages prevalent at the time of the accident. However, this contention of the learned counsel is devoid of any force as it has come on record that the accident had taken place in the year 2004 and the deceased was working as driver with respondent No.1-Shakuntla Devi. In

Chandra alias Chanda alias Chandraram and another Versus ***Mukesh Kumar Yadav and other , (2022) 1 SCC 198,*** the Hon'ble Supreme Court held that in absence of salary certificate, the minimum wage notification can be a yardstick but at the same time cannot be an absolute one to fix the income of the deceased. In absence of documentary evidence on record some amount of guesswork is required to be done. But at the same time the guesswork for assessing the income of the deceased should not be totally detached from reality. Paras 9 and 10 of the judgment reproduced as under:-

> *"9.It is the specific case of the claimants that the deceased was possessing heavy vehicle driving licence and was earning Rs.15,000 per month. Possessing such licence and driving of heavy vehicle on the date of accident is proved from the evidence on record. Though the wife of the deceased has categorically deposed as AW1 that her husband Shivpal was earning Rs.15,000 per month, same was not considered only on the ground that salary certificate was not filed. The Tribunal has fixed the monthly income of the deceased by adopting minimum wage notified for the skilled labour in the year 2016. In absence of salary certificate the minimum wage notification can be a yardstick but at the same time cannot be an absolute one to fix the income of the deceased. In absence of documentary evidence on record some amount of guesswork is required to be done. But at the same time the guesswork for assessing the income of the deceased should not be totally detached from reality. Merely because claimants were unable to produce documentary evidence to show the monthly income of Shivpal, same does not justify adoption of lowest tier of minimum wage while computing the income. There is no reason to discard the oral evidence of the wife of the deceased who has deposed that late Shivpal was earning around Rs.15,000 per month.*

> *10.In Minu Rout v. Satya Pradyumna Mohapatra this Court while dealing with the claim relating to an accident which occurred on 8.11.2004 has taken the salary of the driver of light motor vehicle at Rs.6,000 per month. In this case the accident was on 27.2.2016 and it is clearly proved that the deceased was in possession of heavy vehicle driving licence and was driving such vehicle on the day of accident. Keeping in mind the enormous growth of vehicle population and demand for good drivers and by considering oral evidence on record we may take the income of the deceased at Rs.8000 per month for the purpose of loss of dependency. Deceased was aged about 32 years on the date of the accident and as he was on fixed salary, 40% enhancement is to be made towards loss of future prospects. At the same time deduction of one-third is to be made from the income of the deceased towards his personal expenses. Accordingly the income of the deceased can be arrived at Rs.7467 per month. By applying the multiplier of '16' the claimants are entitled for compensation of Rs.14,33,664."*

10. In the case on hand also by taking the income of the deceased at Rs.3,600/-, the learned Commissioner below has not committed any illegality. The amount of Rs.3,600/- per month cannot be said to be on higher side keeping in view the facts and circumstances of the case as the deceased was working as driver at the time of the accident. There is nothing on record to show that the Commissioner below has misconstrued and misinterpreted the pleadings and evidence.

11. The learned counsel for the appellant next contended that the claim petition itself was not maintainable in absence of notice under Section 10 of the Act and the impugned award is, therefore liable to be set aside on this ground alone.

12. Before proceeding further it would be relevant to note Section 10 of the Employee's Compensation Act, 1923, which is quoted as under:-

> *"10.**Notice and claim**.-(1)No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years] of the occurrence of the accident or, in case of death, within two years from the date of death:*
>
> *Provided that, where the accident is the contracting of a disease in respect of which the provisions of sub- section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease:*
>
> *Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to absent himself from work, the period of two years shall be counted from the day the workman gives notice of the disablement to his employer:*
>
> *Provided further that if a workman who, having been employed in an employment for a continuous period, specified under sub- section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:]*
>
> *Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim]—*
>
> *(a) if the claim is preferred] in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or*

place where the accident occurred, or

(b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed] had knowledge of the accident from any other source at or about the time when it occurred:]

Provided further, that the Commissioner may entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred], in due time as provided in this sub- section, if he is satisfied that the failure so to give the notice or prefer] the claim, as the case may be, was due to sufficient cause."

13. So far as the contention of learned counsel for the appellant that the claim petition was not maintainable in absence of notice under Section 10 of the Act is concerned, it would be pertinent to mention here that in Section 10(1)(b) a proviso has been added, whereby the Commissioner is empowered to entertain a claim petition and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause. In the instant case, the Commissioner below has held that no separate notice was required to be issued as insurance company was already impleaded as party before the learned Motor Accident Claims Tribunal. Since the Commissioner is

empowered to entertain and decide the claim to compensation and has recorded his satisfaction as to the existence of sufficient cause for not issuing the notice under Section 10 of the Act, therefore, it would be travesity of justice if the claim petition is dismissed on the ground of being not maintainable. This Court is of the opinion that in a case of beneficial legislation the requirement of the notice cannot be inferred in strict sense so as to hold a claim not maintainable in absence of notice under Section 10 of the Act.

14. Learned counsel for the appellant lastly contended that the insurance company would be liable only to make good the claim for compensation so far as the principal amount along with interest is concerned. But it could not have been made liable to pay the amount of penalty as ordered by the Workmen's Compensation Commissioner as the amount of penal nature was awarded against the insured/owner on account of her personal default as per Section 4-A(3) of the Workmen's Compensation Act and for such default on the part of the insured, the insurance company was not liable to indemnify the insured. At this stage, it would be appropriate to reproduce the relevant portion of order dated 07.03.2012, passed by the learned Commissioner below,

which reads as under:-

> *"(iii) The respondent No.2 being insurer of tractor No.A/F is directed to deposit the awarded amount including interest at the rate of 12% per annum w.e.f. 02.11.2004 i.e. one month after the date of accident in this Court by way of crossed bank draft payable to Commissioner within a month from today failing which penalty and interest would be liable to be paid by respondent No.2 on the awarded amount as per law."*

15. It is a settled law that the penalty imposed on the insured on account of his/her failure to make payment of amount payable under the Act is not to be paid by the insurer. In ***Ved Prakash Garg*** Versus ***Premi Devi and others, (1997) 8 SCC 1***, the Hon'ble Apex Court observed that the insurance company is liable to pay not only the principal amount of compensation payable by insured employer but also interest thereon, if ordered by the Commissioner to be paid by the insured employer. Insurance company is liable to meet claim for compensation along with interest as imposed on insured employer by the Act on conjoint operation of Section 3 and 4A(3)(a) of the Act. It was, however, held that it was the liability of the insured employer alone in respect of additional amount of compensation by way of penalty under section 4-A (3)(b) of the Act. Para-19 of the aforesaid judgment reads as under:-

> *"19. As a result of the aforesaid discussion it must be*

> *held that the question posed for our consideration must be answered partly in the affirmative and partly in the negative. In other words the insurance company will be liable to meet the claim for compensation alongwith interest as imposed on the insured employer by the Workmen's Commissioner under the Compensation Act on the conjoint operation of Section 3 and Section4-A sub-Section (3)(a) of the Compensation Act. So far as additional amount of compensation by way of penalty imposed on the insured employer by the Workmen's Commissioner under Section 4-A(3)(b) is concerned, however, the insurance company would not remain liable to reimburse the said claim and it would be the liability of the insured employer alone."*

16. In the instant case, the Commissioner below directed the appellant-insurance company to deposit the awarded amount including interest at the rate of 12% per annum w.e.f. 02.11.2004, i.e. one month after the date of accident by way of crossed bank draft payable to the Commissioner below within a month, failing which penalty and interest would be liable to be paid by the insurance company on the awarded amount as per law. However, in view of the law laid down by the Hon'ble Apex Court, the insurance company could not have been made liable to pay the amount of penalty and the same shall be paid by the owner of the offending vehicle (respondent No.3 herein). Therefore, direction issued by the Commissioner below against insurance company to pay the penalty is required to be set aside and insurance company is only liable to pay the amount of compensation of Rs.3,45,910/- to petitioner No.1 alongwith

interest. The substantial questions of law are answered accordingly.

17. Hence, in view of my aforesaid discussion, the appeal is partly allowed and the award of the Commissioner below in so far as it fastened the liability to pay the penalty on the insurance company is set aside. The appellant-insurance company is exonerated from paying the amount of penalty, which shall be paid by the owner of the offending vehicle (respondent No.3 herein) and she is directed to deposit such amount within a period of two months from today. Rest of the award remains intact.

18. In view of discussion hereinabove, the appeal is disposed of accordingly.

(Sushil Kukreja)
Judge

December 29, 2023
(*VH)*