

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/FIRST APPEAL NO. 2073 of 2013**  
**With**  
**CIVIL APPLICATION (FOR ORDERS) NO. 1 of 2015**  
**In**  
**R/FIRST APPEAL NO. 2073 of 2013**

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IFFCO TOKIO GEN. INS. CO LTD

Versus

RAJUBHAI KALUBHAI DIDOR & 3 other(s)

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Appearance:

MR. ALKESH N SHAH(3749) for the Appellant(s) No. 1

MR DJ BHATT(164) for the Defendant(s) No. 2,3

MR R.K.MANSURI(3205) for the Defendant(s) No. 1

NOTICE SERVED for the Defendant(s) No. 4

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**CORAM: HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

**Date : 07/07/2023**

**ORAL ORDER**

1. Heard learned advocate Mr. Alkesh Shah for the appellant and learned advocate Mr. R.K.Mansuri for defendant No.1.
2. This First Appeal is filed challenging the Judgement and Award dated 31.05.2012 passed by the Commissioner of Workmen Compensation, Labour Court, Himmatnagar in Workman Compensation (Fatal) Case No. 7 of 2008 whereby, an award is passed for Rs. 59,773/- together with simple interest @12% from the date of accident and 50% penalty

payable by the appellant- respondent no.4-Insurance Company.

3. So far as the quantum of compensation awarded, learned advocate Mr. Alkesh Shah for the Insurance Company submitted that the insurance company has not raised any issue with regard thereto but the only challenge is made with regard to the liability fastened upon the insurance company to pay simple interest @12% p.a. and amount of 50% penalty of Rs. 29,886/-.

4. Learned advocate Mr. Shah invited the attention of the Court to the provision of section 4A of the Employee's Compensation Act, 1923 (for short 'the Act') to submit that the appellant -Insurance Company is not liable to pay the interest and penalty in view of the Condition No. 10 of the insurance policy read with the other stipulations in the policy.

4.1 It was submitted that in view of the terms of the policy, the Court below could not have fasten liability of payment of interest and penalty upon the insurance company.

4.2 It was submitted that the copy of the policy is produced on record by way of application under Order 41 Rule 27 of the Code of Civil procedure, 1908 (for short 'the Code') in Civil Application No. 1 of 2015 as the said document was not produced on record before the Court below. It was therefore submitted that considering the insurance policy, the matter may be remanded back to the Workmen's Commissioner under the Act.

5. On the other hand, learned advocate Mr. Mansuri appearing for the original applicant-respondent No.1 submitted that the employer has informed the Insurance Company about the accident in time but the insurance company did not pay the amount of compensation which was covered by the insurance policy nor it was deposited in the Court and therefore, it is the liability of the insurance company to pay interest and penalty to the claimant.

4.1 Learned advocate Mr. Mansuri in support of his submissions referred to and relied upon the decision in case of **Kamla Chaturvedi Vs. National Insurance Company Limited** reported in 2009 (1) SCC 487.

6. It would be germane to refer to the provision of section 4A of the Employee's Compensation Act, 1923 which reads as under:

**“4A. Compensation to be paid when due and penalty for default.—**

(1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the [employee], as the case may be, without prejudice to the right of the 2 [employee] to make any further claim.

[(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall—

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher, rate not exceeding the maximum of the lending rates of any

scheduled bank as may be specified by the Central Government by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount by way of penalty: Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.—For the purposes of this sub-section, “scheduled bank” means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934.

[(3A) The interest and the penalty payable under sub-section (3) shall be paid to the 2 [employee] or his dependant, as the case may be.”

7. The issue with regard to liability of the Insurance Company to pay interest and penalty is not *res integra* in view of the decision of the Hon’ble Apex Court in case of **New India Assurance Company Limited vs. Harshadbhai Amrutbhai Modhiya** reported in **2006 Lawsuit (SC) 357** which reads as under:

"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.”

8. Recently, the Apex Court in case of **Shobha vs. Chairman, Vithalrao Shinde Sahakari Sakhar Karkhana Ltd** reported in **AIR 2022 SC 1410** has held as under:

“4. While holding that the claimants shall be entitled to interest @ 12% p.a. from the date after expiry of a period of one month from 25.01.2017, the High Court has considered Section 4A(3)(b) only which deals with imposition of penalty. However, the High Court has not noted and/or considered Section 4A(3)(a) of the Act, 1923, which deals with award of interest when the employer is in default. Section 4A reads as under:-

“4A. Compensation to be paid when due and penalty for default.-

(1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may be, without prejudice to the right of the employee to make any further claim.

(3) Where any employer is in default in paying the compensation due under this Act within one month

from the date it fell due, the Commissioner shall-

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed." Explanation.- For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

(3A) The interest and the penalty payable under sub-section (3) shall be paid to the employee or his dependant, as the case may be."

4.1 Thus, from Section 4A of the Act, 1923, compensation under Section 4 shall be paid as soon as it falls due. It can be seen that the liability to pay the interest on the amount of compensation due and payable would be under Section 4A(3)(a) and the penalty would be leviable under Section 4A(3)(b). As per Section 4A(3) (a), the employer shall pay, in addition to the amount of the arrears, simple interest thereon @ 12% p.a. or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified on the



amount due. As per Section 4A(1) compensation under section 4 shall be paid as soon as it falls due. Therefore, on the death of the employee/deceased immediately, the amount of compensation can be said to be falling due. Therefore, the liability to pay the compensation would arise immediately on the death of the deceased. Even as per Section 4A(2), in cases, where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may be, without prejudice to the right of the employee to make any further claim. Therefore, the liability to pay the compensation would arise from the date on which the deceased died for which he is entitled to the compensation and therefore, the liability to pay the interest on the amount of arrears/compensation shall be from the date of accident and not from the date of the order passed by the Commissioner. As per Section 4A(3) (b), if the Commissioner is satisfied that there is no justification for the delay, it can direct the employer, in addition to the amount of the arrears and interest thereon, to pay a further sum not exceeding 50% of such amount by way of penalty. Thus, provision for interest and provision for penalty are different. As observed hereinabove, the provision for levy of interest would be under Section 4A(3)(a) and the provision for levy of penalty would be under Section 4A(3)(b). While directing the employer to pay the interest from the date of the order passed by the Commissioner, the High Court has not at all considered Section 4A(3)(a) and has considered Section 4A(3)(b) only, which is the penalty provision.

5. Under the circumstances, the impugned judgment and order passed by the High Court directing the employee to

pay the interest on the amount of compensation as leviable under Section 4A(3)(a) from the date of the order passed by the Commissioner, i.e., 25.01.2017 is unsustainable.

6. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court insofar as awarding the interest @ 12% p.a. after the period of expiry of one month from 25.01.2017, is hereby quashed and set aside and it is observed and held that the appellants herein – original claimants shall be entitled to the interest @ 12% p.a. on the amount of compensation as awarded by the Commissioner from the date of the incident i.e., 29.11.2009.”

9. In view of the above facts, application for additional evidence being Civil Application No. 1 of 2015 is allowed. Insurance Policy is permitted to be placed on record. Clause 10 of the insurance policy reads as under:

“10. It is hereby understood and agreed that the cover provided under this Policy shall not extend to indemnify the Insured/Insureds in respect of any interest and/or penalty which may be imposed on him/them on account of his/their failure to comply with the requirements laid down under the Workmen’s Compensation Act, 1923 and subsequent amendments of the said Act.”

- 10.** This clause is to be read with the preamble of the policy which reads as under:

“NOW THIS POLICY WITNESSETH that if any time during the period of insurance any employee in the insured’s immediate service shall sustain personal injury by accident or disease arising out of and in the course of his employment by the insured in the Business and if the insured shall be liable to pay compensation for such inquiry either under: The Law(s) set out in the Schedule or at Common law then subject to the terms exceptions and conditions contained herein or endorsed hereon the Company will indemnify the insured against all sums for which the insured shall be so liable and will in addition be responsible for all costs and expenses incurred with its consent in defending any claim for such compensation.”

- 11.** Considering the above stipulations made in the insurance policy which is a workmen’s compensation insurance policy and not a motor vehicle insurance policy, the decision in case of New India Assurance Company Limited vs. Harshadbhai Amrutbhai Modhiya (supra) would squarely apply and the insurance company cannot be made liable to pay interest and the penalty to the claimant and it is only the employer who would be liable, therefore, the impugned judgement and award is modified to the extent that the liability to pay interest

and penalty levied upon by the Commissioner shall be upon the original defendant No.1-employer and not upon the respondent No.4- appellant-Insurance Company.

12. The Apex Court in case of Kamla Chaturvedi vs. National Insurance Company Ltd (supra) considering the facts of that case has held in Para no. 6 that the accident in question arose on account of vehicular accident and the provisions of MV Act are clearly applicable, as under:

"6. In Ved Prakash Garg v. Premi Devi and others [1997(8) SCC 1] this court observed that the Insurance Company is liable to pay not only the principal amount of compensation payable by the insurer employer but also interest thereon if ordered by the Commissioner to be paid by the insured, employee. Insurance company is liable to meet claim for compensation along with interest as imposed on insurer employer by the Act on conjoint operation of Section 3 and 4(A)(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. In New India Assurance Co.'s case (supra) and Ved Prakash Garg's case (supra) was distinguished on facts. It was observed that in the said case the court was not concerned with a case where an accident had occurred by use of motor vehicle in respect whereof the Contract of Insurance will be

governed by the provisions of the Motor Vehicles Act, 1988 (in short the 'M.V. Act'). A contract of Insurance is governed by the provisions of the Insurance Act, 1938 (in short 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 per their own volition. The Act does not contain a provision like Section 148 of the MV Act where a statute does not provide for a compulsory insurance or accident thereof. The parties are free to choose their terms of contract. In that view of the matter contracting out so far as the reimbursement of amount of interest is concerned is not prohibited by a statute. This position have been reiterated in P.J. Narayan v. Union of India and others [2006 (5) SCC 200]. In the instant case the position is different. The accident in question arose on account of vehicular accident and provisions of MV Act are clearly applicable. We have gone through the policy of insurance and we find that no such exception as was the case in New India Assurance Co.'s case was stipulated in the policy of insurance. Therefore, the Insurance Company is liable to pay the interest.

13. As in the facts of the present case the deceased succumbed to the injury while he was working for construction of a shed of defendant No.1 and died due to fall of the wall and not by the vehicular accident, therefore, the terms of the contract of Insurance would be governed by the provisions of the Insurance Act, 1938 (in short the 'Insurance Act') and not by the provisions of the Motor Vehicle Act, 1988

(for short 'the MV Act'). Meaning thereby said contract is not governed by the provisions of a statute. The parties are free to enter into a contract as per their own volition. The Act does not contain a provision like Section 148 of the MV Act where a statute does not provide for a compulsory insurance or accident thereof. Hence, contracting out so far as the reimbursement of amount of interest is concerned is not prohibited by a statute. The Hon'ble Apex Court has also reiterated the same in case of P.J. Narayan v. Union of India and others [2006 (5) SCC 200].

- 14.** In view of the foregoing reasons, the appeal is allowed in aforesaid terms and impugned Judgement and Award stands modified to the above extent and respondent No.1 would be liable to pay the interest and penalty to the claimant and not the appellant – Insurance Company. The respondent no.1 – employer is directed to deposit the amount of interest and penalty within a period of eight weeks from the date of receipt of copy of this order before the Commissioner of Workmen Compensation, Labour Court, Himmatnagar, if not deposited.

**15.** Civil Application is disposed of in view of disposal of First Appeal.

JYOTI V. JANI

**(BHARGAV D. KARIA, J)**