

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

+ **FAO No.168/2014 & CM No. 10296/2014(Stay)**

% **2nd July , 2014**

M/S FOCUS ENERGY LIMITED Appellant
Through: Mr. Anil Mittal, Advocate.

VERSUS

NEELAM DEVI & ORS. Respondents
Through:

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(aa) of the Employee's Compensation Act, 1923 (in short 'the Act') against the impugned orders of the Commissioner dated 23.4.2014 and 15.5.2014. By the order dated 23.4.2014, the Commissioner directed the appellant/employer to pay penalty of 25% of the principal amount. By the order dated 15.5.2014, the application of the appellant/employer for setting aside the ex parte order dated 23.4.2014 imposing penalty of 25% of the principal amount was dismissed, and which application was filed on the ground that the

representative of the appellant could not reach on 23.4.2014 till 12.00 PM on account of a traffic jam.

2. Firstly, it requires to be noted that as per the provision of Section 4A(3)(b) of the Act, an employer is liable to pay, in addition to the principal amount of compensation which is determined under Section 4, penalty upto 50% of the amount of compensation payable, if the amount of compensation is not paid to the affected employee within a period of one month from the date of the accident.

3. It is then required to be noted that before issuing of a penalty order, the proviso to Section 4A(3) of the Act mandates that a show cause notice should be issued against the employer providing the employer an opportunity to give explanation as to why the principal amount of compensation was not paid to the employee within one month and consequently why penalty be not imposed for not paying the employee compensation within one month of the accident. Supreme Court in the judgment in the case of *The Oriental Insurance Company Ltd. Vs. Siby George & Ors. (2012) 12 SCC 540* has held that proceedings under the proviso to Section 4A of the Act with respect to imposition of penalty are consequent proceedings which arise post passing of the main order of

compensation i.e in the main order awarding compensation, an order of imposition of penalty cannot automatically be passed in view of the proviso to Section 4A(3) of the Act because an employer is entitled to a specific show cause under the proviso and thereafter give explanation as to why the employer had failed to pay/ deposit the principal amount of compensation in one month. In case the explanation of employer is accepted, the Commissioner has power to waive the penalty or reduce the penalty. Para 8 of the said judgment in the case of *Siby George(supra)* is relevant and the same reads as under:-

"8. It is, thus, to be seen that Sub-section (3) of Section 4A is in two parts, separately dealing with interest and penalty in Clauses (a) and (b) respectively. Clause (a) makes the levy of interest, with no option, in case of default in payment of compensation, without going into the question regarding the reasons for the default. Clause (b) provides for imposition of penalty in case, in the opinion of the Commissioner, there was no justification for the delay. Before imposing penalty, however, the Commissioner is required to give the employer a reasonable opportunity to show cause. On a plain reading of the provisions of Sub-section (3) it becomes clear that payment of interest is a consequence of default in payment without going into the reasons for the delay and it is only in case where the delay is without justification, the employer might also be held liable to penalty after giving him a show cause. Therefore, a finding to the effect that the delay in payment of the amount due was unjustified is required to be recorded only in case of imposition of penalty and no such finding is required in case of interest which is to be levied on default *per se*."

4. Learned counsel for the appellant argued that in the main compensation claim petition appellant had claimed compensation, but when the main order of compensation was passed on 13.11.2013 no penalty was ordered to be paid, and consequently, Commissioner thereafter cannot start

fresh proceedings for payment of penalty. It is further argued in continuation of this argument that once the claim of penalty was declined by the principal order awarding compensation, the aggrieved employee actually had to file against the main order awarding compensation, an appeal under Section 30 of the Act for claiming the penalty which was not granted and it is not permissible for the Commissioner to initiate fresh proceedings for imposition of penalty.

5. I am unable to agree with the aforesaid argument urged on behalf of the appellant because the Supreme Court in the case of ***Siby George (supra)*** has clarified that penalty proceedings cannot take place simultaneously alongwith adjudication of compensation to be awarded to the employee, and penalty proceedings are only post/subsequent to awarding of compensation and after giving a specific show cause notice for the penalty aspect. The observations of the Supreme Court in ***Siby George's case (supra)*** in view of the language of the proviso to Section 4A(3) of the Act which requires a specific show cause notice on the aspect of penalty upto 50% if the penalty is proposed to be imposed. Therefore, the contention of the appellant is misconceived that since the original order of compensation dated 13.11.2013 did not award penalty, in spite of the same having been

prayed in the main petition, there could hence not take place subsequent proceedings for imposition of penalty post the passing of the main order of compensation on 13.11.2013.

6. So far as the argument that the appellant's representative could not appear before the Commissioner in the proceedings for imposition of compensation on 23.4.2014 pursuant to the show cause notice dated 3.4.2014 on account of a traffic jam is concerned, I find the stand of the appellant is incorrect because if the appellant could not appear due to traffic jam on 23.4.2014, the application for setting aside the ex parte order would have been moved on the same date i.e 23.4.2014, however, for setting aside the order dated 23.4.2014 the application was filed only two days later on 25.4.2014. Obviously, the appellant was hoping that on 23.4.2014 the case would be adjourned though the appellant had chosen not to appear, and that no penalty order would be passed, but once the penalty order passed on 23.4.2014, the appellant on subsequently coming to know of the same filed the application for setting aside the ex parte order dated 23.4.2014 on the false ground of a traffic jam. I may note that in the application for setting aside the ex parte proceedings, the appellant has not stated as to where the traffic jam was in which the representative of the appellant got held up.

7. Be that as it may, I have further heard the counsel for the appellant on merits as to whether the appellant has any explanation for not depositing of the principal amount of compensation within one month as required by Section 4A(3) of the Act. Counsel for the appellant conceded that even in the present appeal no reason has been given for not paying/ depositing of the complete statutorily required compensation amount within a period of one month after the date of the accident as calculated in terms of Section 4 of the Act. It is however argued that the appellant had already paid part of the compensation amount of Rs.2,80,000/-, and consequently, this fact furnishes sufficient reason for not imposition of penalty i.e it is argued that since the employer had paid an amount of Rs.2,80,000/- out of the total compensation amount payable under the Act of Rs.7,88,240/-, consequently, penalty should not be imposed.

8. In my opinion, the argument urged on behalf of the appellant is misconceived because payment/deposit has to be of the entire compensation amount calculated in terms of Section 4 of the Act and merely because part of the amount of compensation is paid is not a ground for not passing an order of penalty under Section 4A(3)(b). In fact the Commissioner has noted the aspect of part payment and has not imposed maximum penalty of 50% as

per Section 4A(3) of the Act but has imposed penalty of only 25%. Once admittedly the statutory amount of compensation of Rs.7,88,240 was not paid to the employee, and only an amount of Rs.2,80,000/- was paid, the Commissioner was entitled to impose penalty.

9. In view of the above, I do not find any merit in the appeal and the same is therefore dismissed, leaving the parties to bear their own costs.

JULY 02, 2014
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VALMIKI J. MEHTA, J.