

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

FIRST APPEAL NO. 2348 OF 2012

1. Lata wd/o Arvind Kambale
Age 23 years, Occu: Household
 2. Nikhil s/o Arvind Kamble
Age 4 years, Occu: Nil
through his mother and natural guardian
Lata wd/o Arvind Kamble
- R/o Warvanti, Taluka & District: Latur
- ... **Appellants**

VERSUS

1. M/s Kavita Agro Industries
MIDC , Plot No.E-53, Latur
Through its Proprietor
Shri Ramgopal Pandurang Loya
 2. The United India Insurance Compay
Through Branch Manager, Latur Branch
 3. Baliram s/o Raghu Kamble
Age 60 years, Occupation: Labour
 4. Sulochan w/o Baliram kamble
Age 55 years, Occupation: Household
 5. Shridhar s/o Baliram Kamble
Age 23 years, Occupation: Labour
 6. Lakhan /o Baliram Kamble
Age 22 years, Occupation: Labour
- Respondents 3 to 6 r/o Warvanti
Taluka and District Latur.
- ... **Respondents.**

Mr. B. R. Kedear, Advocate for the appellants.
 Mr. B. R. Loya, Advocate for Respondent No.1
 Mr. S. G. Chapalgaonkar, Advocate for Respondent No.2
 Mr. V. R. Jain, Advocate for respondents 3 to 6

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CORAM : S. V. GANGAPURWALA, J.

DATE : 19th August, 2015

PER COURT :

1. Mr. Kedar- learned counsel for the appellant submits that while computing compensation amount, the Commissioner for Workmen's Compensation has not properly considered the income which was earned by the deceased Arvind at the time of his death. Deceased was earning Rs.150/- per day. The present appellant No.1 has led evidence to show that the deceased was earning Rs.150/- per day. Even mother of deceased has also led the evidence substantiating the case that the deceased was earning Rs.150/- per day. According to the learned counsel the Commissioner has relied upon Xerox copy of the details submitted by the employer to the insurance company. The said xerox copy is inadmissible in evidence. The employer has not filed any written statement denying the contention of the appellants. According to the learned counsel the finding to that extent is perverse.

Learned counsel for the appellants further submits that even apportionment has not been properly done. The mother and father have been awarded equal compensation to that of the present appellants which is erroneous. There are two other sons of the present respondents 3 and 4

i.e. respondents 5 and 6 who can take care of them and who are doing presently labour work.

2. Learned counsel further submit that even the aspect of penalty has not been considered by the Commissioner as is required under section 4-A (3)(b) of the Employees Compensation Act. According to the learned counsel, the amount is not deposited by the employer within one month of the accident. Notice was also served on the employer, still the amount amount is not deposited. As such, the employer is liable to pay the penalty amount.

3. Mr. Chapalgaonkar, the learned counsel for the insurance company submits that the record was submitted by the employer to the insurance company regrading each and every employee as insurance was done of these employees and the details of the wages paid to each employees were also submitted. It shows that Rs.75/- per day was paid to the deceased Arvind. In contradistinction to the said documentary evidence, there is no other documentary evidence on record. The commissioner has rightly considered the same.

4. Mr. Chaudhari, the learned counsel for respondent No.1 submits that wages of the deceased are rightly considered by the Commissioner. As far as penalty is concerned, the employer is not liable to pay the same as it was for the Insurance company to pay the amount within one month of the accident. It was also notified to the insurance company.

5. Mr. Jain, learned counsel for respondents 3 to 6 submits that respondents 3 and 4 are also the dependents of the deceased. The apportionment has been rightly done. Equal amount of compensation is to be paid to respondents 3 and 4 also.

6. I have considered the submissions canvassed by the learned counsel for the respective parties, record and proceedings and the evidence adduced.

7. The commissioner has appreciated the oral as well as documentary evidence on record and has found that the documents produced by the Insurance company regarding wages paid to the employees of the respondent No.1 to be reliable and trustworthy. The plausible view has been taken by the Commissioner for Workmen's Compensation in that regard. The said document unequivocally goes to show that the deceased Arvind was paid Rs.75/- per day. and accordingly the amount of compensation is rightly paid.

8. As far as penalty is concerned, no issue has been framed by the Commissioner for Workmen's Compensation. The Commissioner has to frame an issue and has to call for the say from the owner and after hearing the owner, has to decide the said issue of penalty. In absence of issue being framed with regard to penalty, this court, in its appellate jurisdiction would not pass any orders with regard to the payment of penalty.

9. In the result, I pass following order:
10. Judgment and order to the extent of quantum of compensation is concerned, the same is upheld.
11. The matter is relegated before the Commissioner, to the extent of deciding the aspect of penalty as is required under Section 4-A (3)(b) of the Employees Compensation Act. The party shall appear before the Commissioner for Workmen's Compensation on 15th September, 2015. Thereafter the Commissioner for Workmen's Compensation shall frame issue with regard to the payment of penalty and shall decide the same on its own merits.
12. If, in case the Commissioner is inclined to award penalty, then, in that case, the Commissioner shall also consider apportionment of the amount of penalty considering the dependency so also the factum that the parents have two children living.
13. The first appeal is accordingly disposed of. No costs.

(S. V. GANGAPURWALA, J.)

JPC