

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

**FIRST APPEAL NO. 2022 OF 2012
WITH CA/12981/2012 IN FA/2022/2012 WITH CA/1227/2013 IN
FA/2022/2012**

**M/S THE ORIENTAL INSURANCE CO. LTD THR SR.DIVISIONAL
MANAGER
VERSUS
SHARDA RAMESH JADHAV AND ORS**

...
Advocate for Appellant : Mr. Upadhye Vinayak Narayan
Advocate for respondent No.1 and 4: Mr. D. K.Dagadkhair
Advocate for Respondent No.6 : Mr. Amol S. Gandhi, Mr. P. P. Mandlik

...
CORAM : S. V. GANGAPURWALA, J.

DATE : 19th August, 2015

PER COURT :

1. The present respondents 1 to 5 have filed Workmen's Compensation Application seeking compensation on account of death of deceased Ramesh. The Commissioner for Workmen's Compensation accepted that the deceased Ramesh was working as Driver with respondent No.6 and awarded compensation of Rs.4,33,820/- to the claimants with interest @ 12% per annum from 12.11.2001.

2. This being an appeal under the Employees' Compensation Act, the same can be considered only on substantial question of law.

3. Mr. Upadhye, learned counsel for the appellant submits that relationship of employer and employee between Ramesh and respondent No.6 was not established at all. The owner had also disputed the

relationship. No record was placed to prove the said relationship of employer and employee between deceased Ramesh and Respondent No.6. Learned counsel also submits that penalty is also imposed upon the Insurance Company which is not admissible under Section 4-A (3)(b) of the Workmen's Compensation Act. Learned counsel submits that the penalty could not have been imposed upon the present appellant Insurance company in view of section 4-A (3)(b) of the Workmen's Compensation Act.

4. Learned counsel for the claimants states that the Insurance company would be jointly and severally liable to pay penalty amount also. The Relationship is established, evidence is led. Respondent no.6 come with specific case that he had employed other person as driver and deceased Ramesh was employed with one Sayyed. The same is not proved.

5. Mr. Gandhi, the learned counsel for respondent No.6 submits that respondent No.6 had specifically pleaded that deceased Ramesh was not his driver and had also specifically pleaded that deceased Ramesh was driver of Mr. Sayyed. Learned counsel submits that the claimants could not prove the factum of the deceased Ramesh being in employment of Respondent no.6. As such, respondent No.6 could not have been saddled with any responsibility or liability.

6. We have considered the submissions canvassed by the learned

counsel for the respective parties.

7. As far as relationship of employer employee is concerned, respondent No.6 has not filed any appeal against the judgment of the Commissioner for Workmen's Compensation dated 28.08.2012. Almost three years have lapsed. The second appeal can be considered only on substantial question of law.

8. The finding of the Commissioner for Workmen' Compensation with regard to the relation of an employer employee between deceased Ramesh and Respondent No.6 is based on appreciation of evidence. A plausible view has been taken on the basis of pleadings and the appreciation of evidence. Even otherwise, the respondent No.6 could not produce on record nor any documents to prove that some other persons was his driver.

9. Considering the above, the findings with regard to employer employee relation needs no interference.

10. Section 4-A (3)(b) of the Employees Compensation Act reads as under:

"4-A: Compensation to be paid when due and penalty for default-

(1)....

(2).....

(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).....

(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."

11. The penalty can only be imposed against owner upon satisfaction of the conditions enumerated in the said provisions. The insurance company could not be made liable to pay penalty amount. That part of the order, saddling insurance company with liability of penalty is not in consonance of Section 4(A)(3)(b)) of the Employees' Compensation Act.

12. Mr. Gandhi, learned counsel submits that no notice has been issued to the owner with regard to the payment of penalty.

13. The contention of the respondent No.6 can be considered in view of the judgment of the learned Single Judge of this Court in the case of **Uddhav Rangnath Pawar Vs. Sheshrao Ramji Jogdand & another**, reported in 2009 (5) Bom. C.R.523.

14. In the light of that, the appeal is partly allowed.

15. The matter is remitted to the Commissioner for Workmen's

Compensation, Aurangbad to the extent of determination of the liability of respondent No.6 to pay penalty. The order with regard to payment of penalty is set aside.

16. Judgment and order, to the extent holding the present appellant Insurance Company jointly and severally liable to pay penalty is quashed and set aside.

17. The parties shall appear before the Commissioner for Workmen's Compensation, Aurangabad on 14th September, 2015.

18. In view of the fact that specific directions are given to the parties to appear before the Commissioner for Workmen's Compensation, no separate notice is necessary. Respondent No.6 now knows that the matter is remitted to the extent of penalty only. As such, the respondent No.6 is not entitled for any separate notice to that effect also.

19. The Commissioner shall, after giving opportunity to the claimants and respondent No.6, decide about the liability of payment of penalty by respondent no.6 on its own merits.

20. Rest of the judgment is upheld.

21. The Appeal is accordingly disposed of. Pending Civil Applications also stand disposed of. No costs.

(S. V. GANGAPURWALA, J.)