

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

FIRST APPEAL NO.1476 OF 2015

The Managing Director,
Indapur Co-operative Sugar
Factory Ltd., now known as
Karmyogi Shankarrao Patil
Co-operative Sugar Factory Ltd.,
Mahatma Phule Nagar, Indapur,
Taluka Indapur, District Pune
Through its Law Officer
Shri Ramdas s/o Mahadeo Narute,
Age 51 years, Occu. Service,
R/o Indapur, Taluka Indapur,
District Pune

..Appellant
(Original Resp.No.1)

Versus

1. Vimal w/o Sarjerao Narwade,
Age 40 years, Occu. Agri.,
2. Mahadeo s/o Sarjerao Narwade,
Age 18 years, Occu. Education
3. Komal d/o Sarjerao Narwade,
Age 18 years, Occu. Education
4. Shamal d/o Sarjerao Narwade,
Age 13 years, Occu. Education
U/guardianship of her mother
Vimal w/o Sarjerao Narwade,

All R/o Beed Sangavi, Taluka Ashti,
District Beed
5. Navnath s/o Tukaram Moharkar,
Age 55 years, Occu. Labour
Contractor, R/o Beed Sangavi,
Taluka Ashti, District Beed

..Respondents
(Resp.No.1 to 4
original claimants)

Mr Y.S. Choudhari, Adv. for appellant
Mr D.R. Jaybhar, Adv. for Resp.1 to 4

CORAM : N.W. SAMBRE, J.

DATE : 10th August 2015

PER COURT

1. This appeal is by an employer under the provisions of Section 30 of the Workmens' Compensation Act, 1923 (hereinafter referred to as 'the Act' for brevity).
2. The appellant, a sugar factory, principal employer of deceased Sarjerao, has preferred present appeal questioning the legality of the award delivered by the Commissioner, Workmens' Compensation and Civil Judge, Senior Division, Beed on 13th August 2014 whereby the Commissioner has ordered compensation of Rs.4,23,600/- along with simple interest at the rate of 12% per annum and has also ordered payment of penalty of Rs.2,11,800/-.
3. The accident in question has occurred pursuant to death of one Sarjerao on 28th November 2012, when he fell from a bullock-cart which was loaded with sugarcane and was transported to the sugar factory of the appellant.
4. It is claimed in the claim petition that deceased Sarjerao, at the time of his death was 45 years of age and was drawing monthly salary of Rs.8,000/- per month and as such, entitled for the compensation of Rs.7 lacs with penalty to the extent of 50%.
5. In response to the claim, which was brought before the learned Commissioner for Workmen's Compensation, the appellant herein filed

their written statement admitting the accident in question, however, set up a defence that deceased Sarjerao, at the relevant time was under influence of liquor and as such, according to appellant the claim was liable to be rejected under the proviso to Section 3 of the Act, as the employer was not liable to pay the compensation.

6. In the light of pleadings of the parties, issues were framed and taking into consideration the evidence that was brought on record, particularly by the claimants, the compensation came to be awarded. While doing so, the learned Commissioner has considered the legal notice and the postal receipts thereof at Exhibits 22, 22/1, 22/2 and reply given by the appellant at Exh.28. In addition to above, the papers out of investigation carried out by the Police Officer upon complaint registered in the matter of accident of deceased Sarjerao, the copy of F.I.R. Exhibit 20/1, crime details Exh.20/2, inquest panchnama Exh.20/3, post mortem report at Exh.20/4, sugarcane weight slip at Exh.21 were placed on record. The claimants have entered into witness box to establish their claim whereas the present appellant examined one Ramdas O.W.1 who was working as a Law Officer.

7. The present appellant in appeal has sought to raise two questions of law :

(a) Whether from the pleadings and the evidence that is brought on record, the age of the deceased Sarjerao which is considered to be 45 years was rightly appreciated,

particularly in the background of the cross-examination of the claimants' witness ?

(b) Whether the order of penalty should have been passed under Section 4A of the Act, as the compensation was disputed pursuant to the provisions of Section 3 of the Act ?

8. Mr Choudhari, learned Counsel for the appellant, so as to substantiate the above referred issue, has relied upon the provisions of Section 3, 4 and 4A of the Act so as to canvass that the appreciation of evidence particularly as regards determining the age of the deceased was required to be interpreted with. He would urge that the perusal of the provisions of Section 4A of the Act contemplates a notice before passing an order of penalty against the appellant and as such, according to him, the order of awarding penalty needs to be interfered with.

9. In support of his contention, learned Counsel for the appellant has placed reliance upon the judgment of this Court in the matter of **Udhav Rangnathrao Pawar Vs. Sheshrao Ramji Jogdand & Anr.**, reported in **2009 (6) ALL MR 117** so as to canvass that reasonable opportunity has to be given to the employer to show cause before imposing penalty. According to him, the appeal is liable to be allowed to the extent of remanding the matter to the Commissioner for deciding the issue of penalty afresh, after giving reasonable opportunity to the appellant.

10. Learned Counsel for the respondents/claimants Mr Jaybhar has

supported the judgment delivered by the Commissioner for Workmen's Compensation. According to him, the issue of determination of age of the deceased Sarjerao, as is sought to be raised herein was never raised or canvassed before the Commissioner and as such, the Commissioner had no occasion to consider the said submissions. According to him, once through post mortem report, which is exhibited before the Commissioner, the age of the deceased Sarjerao was established to be 45 years and the same was not rebutted by the present appellant by bringing on record any contrary evidence, the Commissioner was right in relying upon the age as mentioned in the post mortem report.

11. Apart from above, Mr Jaybhar would urge that the order of penalty is just and proper and is in tune with the provisions of Section 3, 4 and 4A of the Act. He would urge that even if the plea of denial of liability was raised, the very conduct of the present appellant during the course of the proceedings before the Commissioner are required to be appreciated. He would urge that in the notice, so also in the written statement once it is admitted before the Commissioner the incident of accident, the partial liability or the admissible liability should have been discharged then and there only. According to him, the appellant was well within the notice about the claim petition, particularly in the above referred background and as such, grant of penalty is just and proper. He would urge that this Court may not remand the matter to the Commissioner for deciding the issue afresh as regards payment of penalty. Since the appeal is continuation of the

original proceedings, this Court is equally empowered under Section 4A of the Act to call upon the appellant as to why the penalty should not be imposed on appellant and upon consideration the submissions of the appellant decide the same. He prayed for dismissal of the appeal.

12. With an intention to analyse contentions, the first issue as regards the age of deceased Sarjerao is concerned, it is very much brought on record by the claimants through their pleadings so also the investigation papers that deceased Sarjerao, at the time of accident was 45 years of age. It is further required to be noted that the claimant being wife of deceased Sarjerao has mentioned her age as 40 years. Claimants No.2, 3 and 4 are son and daughters of the deceased Sarjerao. If we evaluate the age of claimant-wife with that of deceased Sarjerao, the age of deceased Sarjerao which is taken into account to be 45 years, particularly as mentioned in post mortem report, which is already exhibited before the learned Commissioner, in my opinion, was rightly accepted by the Commissioner.

13. Once it is brought on record by the claimants that the claim petition is arising out of an accident in which the victim was of a particular age, having regard to the object with which legislation is enacted, the burden shifts on the appellant – employer to rebut the said presumption by bringing on record the evidence to the effect that the age of the deceased was not correctly mentioned. Such piece of evidence should be subject to further scrutiny by the Commissioner and the Commissioner then of course, is duty bound to record the

findings on the said issue, as was

14. What is noticed in the present case is, the appellant though has admitted the accident in question, has not brought on record any evidence to discharge the said burden so as to establish the correct age of the victim Sarjerao, particularly in the background of assertions made by the claimant about age of the victim

15. Learned Counsel for the appellant though has sought to rely upon certain admissions given by the claimant during the cross-examination, however, the same will be of hardly any assistance to the appellant, as that won't release the burden of the appellant so as to bring on record the correct age of the victim.

16. In view of above referred background, In my opinion, the said contention which was neither raised nor canvassed before the Commissioner, as such, was not dealt with by the Commissioner and this Court is of the opinion that the Commissioner has not committed any error of law by reaching to a conclusion that the age of the victim was 45 years, particularly in the background of pleadings and evidence brought on record by the claimants. As such, the said submission of the appellant is rejected.

17. So far as the next contention as regards imposing penalty is concerned, it is required to be noted here that the appellant herein has tried to deny its liability on the ground that the victim was under the influence of liquor. Of course, the said defence is very much available to the appellant pursuant to the proviso to Sub-section (1) of

Section 3, however, said stand is required to be established by the appellant by bringing on record evidence to that effect. As burden to prove the said issue shift on appellant, once appellant asserts so.

18. It is admitted position on the record that the appellant herein since admitted the incident in question and also about reporting of the incident in question to the Police authorities, it has to be presumed that the appellant was well aware of the post mortem report. Said post mortem report which was produced and exhibited in the proceedings does not speak of a certification by the medical expert that the deceased was under the influence of liquor at the relevant time. Apart from above, the appellant has not disputed the contents of the post mortem report. The blood and urine samples were not sent for analysis so as to ascertain the said fact. At least no such evidence was brought on record by the appellant.

Apart from above, the appellant has not brought on record any evidence to justify their defence before the Commissioner.

19. In view of above, the appellant herein since was duty bound to pay the compensation, as was admissible under the Act, when it was due and payable, has not paid the same.

20. Once it is noticed that the appellant has admitted about the accident in question and has tried to deny its liability, particularly by raising defence available under Section 3 of the Act and it was not established by the appellant through the documentary evidence that the deceased was not under the influence of liquor, the appellant –

employer was duty bound to pay the compensation, which is a statutory obligation, particularly in the light of provisions of Section 4A of the Act.

21. Once it is noted that the present appellant has not discharged its statutory obligation as regards payment of compensation under the Act, whether this Court can look into the aspect as regards issuance of show-cause notice to the appellant as obligated under Section 4A of the Act.

22. In my opinion, coupled with the facts as regards the knowledge of the present appellant about the death of the victim, who was not under the influence of liquor, the appellant should have discharged its liability then and their only. The above referred conduct of the appellant and the claim as sought to be canvassed before this Court about non issuance of show-cause notice before ordering payment of penalty, has prompted this Court to issue notice of penalty to the present appellant, particularly in the light of the principle that the appeal is in continuation of the original proceedings.

23. Mr Choudhari, learned Counsel for the appellant, having accepted the said notice has sought to draw support from judgment of this Court in the matter of Udhav Vs.Sheshrao (cited supra). He would urge that even if it is noticed by this Court that the payment of compensation was not made by the appellant, the matter should go back before the Commissioner so that the appellant gets an opportunity. In addition to above, he would urge that the

considerations for the penalty were not taken into account by the Commissioner as there is composite order passed ordering payment of compensation.

24. If the above referred submissions, particularly in the matter of payment of penalty are analysed, this Court has already given a finding that the appellant herein was duty bound to pay the compensation, having noted that the defence set up in the written statement was not correct. In the above background, the payment of compensation which fell due, in my opinion, particularly in the background of Section 4A (i) of the Act will be the date on which the appellant noticed about the incorrect defence set up by them once the post mortem report was brought to the notice of appellant.

25. As such, the payment of compensation, in my opinion, was due in any case prior to the delivery of award by the Commissioner, as by set of documentary evidence, the said fact was brought to the notice of appellant.

26. In view thereof, once it is noted that the compensation fell due even prior to passing of the award, in my opinion, the appellant herein was duty bound to pay the compensation and non-payment thereof has cast obligation on the appellant to pay the penalty.

27. In view of above, the order of penalty as is imposed by the Commissioner appears to be just and proper.

28. So far as the reliance placed on the judgment of this Court in the matter of Udhav Vs. Sheshrao (cited supra) is concerned, it is required

to be noted that this Court has already recorded finding that the present First Appeal before this Court is continuation of the original proceedings which were initiated before the Commissioner. Once it is noted that the present proceedings are continuation of the original proceedings, this Court is always empowered to take such recourse as provided under Section 4A of the Act before imposing or ordering payment of penalty under the Act. In view thereof, in my opinion, both the options i.e. either option of remand to the Commissioner to issue show-cause notice before ordering payment of penalty or the power of this Court to issue show-cause notice to the appellant so as to confirm the order of penalty, are always available.

29. As such, the support drawn by the present appellant on the above referred judgment will be of hardly any assistance to the appellant, particularly in the light of above referred findings recorded by this Court.

30. As such, the First Appeal which lacs merit, fails, stands dismissed.

31. At this stage, learned Counsel Mr Choudhari submits that the effect and operation of this order be stayed for a period of four weeks which is objected by Mr Jaybhar.

32. In view of the issue as is decided herein above, in my opinion, it will be appropriate to grant stay to the effect and operation of this

order for a period of four weeks from today. As such, the effect and operation of present order is stayed for a period of four weeks from today.

(N.W. SAMBRE, J.)

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