

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

**FIRST APPEAL NO. 913 OF 2002
WITH
CA/12305/2015 IN FA/913/2002**

- 1) The Divisional Controller,
Maharashtra State Road Transport
Corporation, Osmanabad Division,
Osmanabad.
- 2) Divisional Managar,
S. T. Depot, Osmanabad. ... Appellants
(Orig. Respondents)

VERSUS

Prabhakar s/o Vithalrao Kulkarni
Died, Through L.Rs.

- 1) Smt. Shalan w/o Prabhakar Kulkarni,
Age : 55 years, Occ. Household,
R/o, C/o Balaji Dhotrikar,
Farshi Galli, Osmanabad.
- 2) Kshma w/o Sanjay Kulkarni,
Age 33 years, Occ. Household,
R/o Gorobakaka Nagar,
Sanja Road, Osmanabad. ... Respondents
(LRs. of orig. petitioner)

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Advocate for Appellant : Mr. A. B. Dhongade
Advocate for Respondents : Mr. Santosh S. Jadhavar

...

WITH

FIRST APPEAL NO. 802 OF 2002

Prabhakar s/o Vithalrao Kulkarni
Died, Through L.Rs.

- 1) Smt. Shalan w/o Prabhakar Kulkarni,
Age : 55 years, Occ. Household,
R/o, C/o Balaji Dhotrikar,
Farshi Galli, Osmanabad,
District Osmanabad.
 - 2) Kshma w/o Sanjay Kulkarni,
Age 33 years, Occ. Household,
R/o Gorobakaka Nagar,
Sanja Road, Osmanabad,
District Osmanabad.
- ... Appellants
(LRs. of orig. petitioner)

Versus

- 1) Maharashtra State Road Transport
Corporation, Mumbai
Through Its General Manager,
Mah. Wahtuk Bhavan, Central Officer,
Biculla, Mumbai.
 - 2) Divisional Managar,
S. T. Depot, Osmanabad.
- ... Respondents
(Orig. Respondents)

...
Advocate for Appellants : Mr. Santosh S. Jadhavar
Advocate for Respondent 2 : Mr. A. B. Dhongade

...
CORAM : V.K. JADHAV, J.

Dated: May 04, 2016

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ORAL JUDGMENT :-

1. Being aggrieved by the Judgment and Award dated 9.11.2001 passed by learned Commissioner, Workman's Compensation Act, Osmanabad, in W.C.A. No.1/2001, the original claimant has preferred first appeal no.802/2002 to the extent of quantum, whereas the

original respondent MSRTC has also preferred first appeal no.913/2002.

2. Brief facts, giving rise to the present appeals, are as under :-

a] The claimant was working as driver in MSRTC, Aurangabad Division, and was attached to Osmanabad bus depot at the relevant time. He continued his service till 7.10.1994. On 7.10.1994, he was assigned with the duty on Osmanabad-Ter bus. Accordingly, on that day, he had driven the S.T. bus and reached at village Ter at about 10.00 p.m. and took a halt during the night time at said village. The claimant suspected leakage of air from the front right side wheel of the bus and thought it fit to replace the said tyre with a spare tyre which was on the top of the bus. Accordingly, claimant started climbing the top of the bus by using back side iron steps in order to get the spare tyre. Unfortunately, he could not control himself and due to slip of hands fell down on the ground and received serious injury to his wrist. He was immediately shifted to Civil Hospital, Osmanabad and then to Civil Hospital Solapur, where he was treated

as an indoor patient for a long term and has undergone operations on two occasions. Thereafter, the medical board, General Hospital, Solapur issued a medical certificate in favour of the claimant stating that he is unfit for driving heavy vehicles. Even though respondent MSRTC assured the claimant to continue him in service by changing his post from driver to peon, he was retired compulsorily and even no compensation was paid to him. Since the petitioner sustained injuries out of and in the course of his employment, the claimant preferred WCA No.1/2001 for grant of compensation as provided under the Workman's Compensation Act, 1923 (for short "the Act of 1923").

B] Respondent MSRTC has denied the liability to pay compensation on the ground that the injuries sustained by the claimant were on account of his own negligence. It has contended that, at the time of sustaining the alleged injuries, the vehicle was not in a moving position, nor the claimant was attending his scheduled work. It is further contended that there is no nexus between the injuries sustained by him and his duty. It

is further contended that, the claimant invited accident on his own risk and there was no need to replace the tyre of the bus. It is also contended that the proposal for giving appointment to the claimant was turned down by the head authorities. Learned Commissioner, W.C. Osmanabad, by its impugned Judgment and Award dated 9.11.2001, allowed the petition and thereby directed respondent MSRTC to pay an amount of Rs.1,71,216/- along with interest @ 12% p.a. from the date of petition till the date of realization of the amount along with interest. Hence, these two appeals as stated above.

3. Learned counsel for the appellant MSRTC submits that the appeal is preferred by MSRTC to the extent of quantum. The Commissioner has awarded exorbitant amount of compensation without adhering to the provisions of the Act of 1923 as were in force at the time of accident. The accident had taken place on 7.10.1994 and amendment in Section 4 was carried out with effect from 15.9.1995. Prior to said amendment, an amount equal to 50% of the monthly wages of the injured

employee multiplied by the relevant factor or an amount of Rs.60,000/-, whichever is more, would be the amount of compensation. In view of the explanation II to Section 4, where the monthly wages of a workman exceed Rs.1,000/-, his monthly wages for the purpose of clause (a) and clause (b) shall be deemed to be Rs.1,000/- i.e. as per the provisions prior to the amendment in the year 1995. In view of this, learned counsel submits that the claimants are entitled for amount of Rs.76,545/- alongwith interest as per Section 4A sub-section (3) clause (a). Learned counsel further submits that the Commissioner has wrongly considered the age of the claimant as 53 years instead of 50 years. Thus, in view of this, by considering the age of the claimant as 50 years, relevant multiplier is 153.90 and 50% of wages i.e. fifty percent of 1000 would be Rs.500/-. Hence, Rs.76,545/- would be the appropriate compensation.

4. Learned counsel submits that, the Commissioner has awarded compensation by considering the amendment carried out in the year 1995 and ignored the fact that the accident had taken place prior to the

said amendment. In view of the provisions of subsection (3) of Section 4A, clause (a) and (b), the Commissioner has rightly awarded interest and there is no question of imposing penalty.

5. Learned counsel appearing for the respondents-claimants submits that the Commissioner has not correctly assessed the compensation. The Commissioner has not awarded compensation by considering the salary of claimant which he was drawing at the time of accident. The Commissioner has not awarded penalty. The claimant is thus entitled for enhanced compensation as per the provisions of Section 4 read with Section 4A of the Act of 1923.

6. The accident had taken place on 7.10.1994. So far as the amendment to Section 4 is concerned, the same is with effect from 15.9.1995. It is thus clear that, prior to the said amendment, where monthly wages of a Workman exceed Rs.1,000/-, his monthly wages in the clause (a) and clause (b) shall be deemed to be Rs.1,000/- only. In view of this, even though monthly

wages of the claimant exceeds Rs.1,000/-, his monthly wages in view of the clause (a) and (b) of Section 4 for determining the amount of compensation shall be deemed to be Rs.1,000/- only. Thus, an amount equal to 50% of monthly wages of the claimant, multiplied by the relevant factor or an amount of Rs.60,000/- which ever is more, would be an appropriate compensation.

7. Learned counsel appearing for the MSRTC conceded that the Commissioner has committed mistake in considering the age of the claimant. In view of age of the claimant as on the date of accident, the relevant factor is 153.09. If amount equal to 50% of the monthly wages of the claimant i.e. Rs.500/- multiplied by the relevant factor, the total compensation comes to Rs.76,545/-. Since the same exceeds to the amount of Rs.60,000/-, the claimant is entitled for the same with interest @ 12% as per the provisions of Sub Section (3) Section 4(A) clause (a) of the Act.

8. So far as the question of penalty is concerned, it is well settled that the burden of payment of penalty is to

be borne by the employer. It is well settled that in a case ***Ved Prakash Garg Vs. Premi Devi and others***, reported in ***AIR 1997 SC 3854***, the Supreme Court held that, penalty is required to be levied under the provisions of said Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause that on account of some justification on his part, there is delay in making payment of compensation and thus, he is not liable to pay the penalty. The Supreme Court has further observed that, if ultimately, the Commissioner, after giving reasonable opportunity to the employer to show cause, takes a view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his personal fault, he is held responsible for the delay, then penalty would be imposed on him. The learned Single Judge of this Court in a case of ***Udhav Rangnathao Pawar Vs. Sheshrao Ramjo Jogdand and another***, reported in ***2009 (5) Bom.C.R. 523*** relying upon ***Ved Prakash Garg's*** case, made similar observations.

9. In view of this, to that extent, the matter is required to be referred back to the Commissioner for issuance of notice to MSRTC/employer and to take an appropriate decision in the matter for imposition of the penalty. Learned counsel for the claimant submits that in response to the award passed by the Commissioner, the MSRTC has deposited entire amount before the Commissioner. Learned counsel submits that, till the issue of imposition of penalty is determined by the Commissioner in terms of modification of the Award by this Court, the MSRTC shall not be permitted to get the refund of the compensation already deposited before the Commissioner.

10 The learned Commissioner has wrongly concluded that since the interest is awarded, there is no question of considering the aspect of penalty. In view of the provisions of sub-section (3) of Section 4-A, clause (a) and (b), in addition to the interest, if the employer, without any justification, failed to deposit the compensation amount after one month from the date of accident, the employer shall be liable to pay the penalty.

11. Considering the above, following order is passed.

O R D E R

I. First Appeal No. 913 of 2002 The Divisional Controller MSRTC Vs. Prabhakar Vitthalrao Kulkarni and First appeal No.802/2002 Prabhakar Vitthalrao Kulkarni Vs.Maharashtra State Road Transport Corporation and another are hereby partly allowed with following directions :-

a]. The Judgment and Award dated 9.11.2001 passed by the Commissioner Workmen's, Osmanabad in WCA No.1/2001 is modified in the following manner :-

“The Respondent shall pay an amount of Rs.76,545/-(Rs. Seventy Six Thousand Five hundred forty five only) to the claimants alongwith 12% interest from the date of the petition till the date of realization of the entire amount.

b] Matter is referred back to the Commissioner of WCA, Osmanabad to extent of imposition of penalty with the following directions.

c] The Commissioner shall issue show cause notice to the Respondent - MSRTC calling upon its explanation as to why penalty should not be imposed and after considering the explanation

and after giving an opportunity of being heard to both sides, take an appropriate decision in the matter about imposition of penalty.

d. In both the first appeals parties to bear their own costs.

II. Award be drawn up in tune with the modifications. Rest of the Judgment and Award stands confirmed.

III. MSRTC is not permitted to get the refund the of the amount till the issue of penalty is decided by the Commissioner.

IV. The Commissioner to take appropriate decision in the final disbursement of the compensation amount in tune with the issue of imposition of penalty.

V. Both the appeals accordingly disposed of.
Civil application disposed of.

sd/-

(V.K. JADHAV, J.)

aaa/-

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