

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**FAO No.1838 of 2014 (O&M)
Decided on : 05.04.2017**

Rajwinder Kaur and others

... Appellants

Versus

Sawarn Singh and another

... Respondents

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA

Present : Ms. Monika Jalota, Advocate
for the appellants.

Respondent No.1 ex parte.

Mr. M.B. Jain, Advocate
for respondent No.2.

G.S. Sandhawalia, J.

CM-6416-CII-2014

The application for condonation of delay of 129 days in filing the present appeal has been filed. In view of the averments made, duly supported by the affidavit of Rajwinder Kaur-appellant No.1, the application is allowed. The delay of 129 days in filing the appeal is condoned.

CM stands disposed of.

Main case

The present appeal has been filed by the appellants, under Section 30 of the Employee's Compensation Act, 1923 (hereinafter referred to as ' 1923 Act') who are legal representatives of deceased Jasbir Singh @ Jasvir Singh. They are aggrieved against the amount of compensation granted by the Commissioner, Patiala vide order dated 28.05.2013 under the

1923 Act and the non-initiation of the penalty proceedings against the employer and funeral expenses were not granted under Section 4 (4) of the 1923 Act.

Counsel for the appellants has also argued that since on the date of adjudication, the amount of monthly wages @ ₹8,000/- had been fixed by the Central Government under sub-Section 1 (B) of Section 4 of the 1923 Act, the Commissioner was in error in assessing the wages @ ₹4,000/- per month and, therefore, claims enhancement on that account.

A perusal of the record would go on to show that the deceased was employed as a driver on Vehicle No.PB-11-AF-9576 owned by respondent No.1 who had been proceeded against ex parte on 25.05.2015 on account of non-appearance despite service and the vehicle was insured with respondent No.2. On 20.04.2010, the deceased was proceeded from Gobindgarh to Faridabad and while they were going a group of 'Nil Gais' came from the fields and the vehicle went off road and the sand, iron rods loaded in the vehicle fell on the cabin of the vehicle and driver alongwith the conductor received multiple injuries. He expired on 23.04.2010 in Government Hospital, Sector-32, Chandigarh. On account of his death, which arose in an accident arising out of and during the course of the employment and he being only 38 years old, the petition was filed claiming that more than ₹50,000/- had been spent on the transportation, funeral and last rites of the deceased and the claimants were dependent upon the deceased and were entitled to recover compensation.

A legal notice dated 07.07.2010 had also been served upon the respondents through registered post and despite that payment had not been made. Resultantly, a claim of ₹15 lakhs was made alongwith interest from the date of accident by placing reliance upon the photocopies of the postmortem report, DDR and Insurance Policy and legal notice etc.

The employer admitted the factum of employment and the insurance with the respondent No.2, but the salary was stated to be ₹5,000/- only and the compensation was liable to be paid by the Insurance Company. The factum of service of the legal notice was denied.

The insurance Company in its reply took the plea that the driver was not having effective and valid driving licence and the vehicle was being plied without valid route permit and accident had taken place in the jurisdiction of the Commissioner at Narwana and no notice had been served. The factum of employment was also denied and the scale of wages and the accident in the course of employment etc.

Taking into consideration, the statement of Rajwinder Kaur, who is the wife of the deceased and that there was a policy/cover note, which was valid from 06.03.2010 till 05.03.2011 and keeping in view the postmortem report (Ex.C-2), DDR (Ex.C-3), Legal Notice dated 07.07.2010 (Ex.C-4) alongwith Postal Receipts (Ex.C-5 & Ex.C-6), it was held that the workman had met with an accident arising out of and during the course of his employment with respondent No.1, which caused

his death. The driving licence of the deceased (Ex.C-7) and the statement of PW-2 Joginder Singh, the conductor, who was also travelling in vehicle and that the deceased was having a valid and effective driving licence, which was valid upto 07.11.2011 was kept in mind. Resultantly, under issue No.3, compensation was assessed. keeping in view the fact that there was an admission by the employer regarding the factum of employment and wages @ ₹5,000/-.

However, keeping in view the explanation II to Section 4 (1) of the 1923 Act, the wages were restricted to ₹4,000/- per month and by applying the relevant factor of 189.56 and keeping in view the age of the deceased being 38 years, the compensation was assessed at ₹3,79,120/-. The interest was also granted @ 12% per annum from the date of accident till its actual realization.

Thus, in the above circumstances, the argument which has now been raised by raising the substantial question of law that the wages should have been taken on the date of adjudication i.e. 28.05.2013 and, accordingly, the benefit granted by the notification dated 31.05.2010, whereby the wages were fixed at ₹8,000/- per month by the Central Government, on account of the amendment, which has been made in Section 4, whereby explanation II was omitted w.e.f. 08.01.2010, it has been contended that the Commissioner was in error in not taking the amount of wages ₹8,000/- per month as claimed. By pegging it down at ₹4,000/- per month the Commissioner had faulted. The argument cannot be accepted, keeping in view the fact that the law has been settled

under the 1923 Act by a Four Judges Bench of the Apex Court in **Pratap Narain Singh Deo Vs. Srinivas Sabata (1976) 1 SCC 289**. In the said case, it was held that compensation is payable from the date of accident and not from the date of the award and the relevant date under the 1923 Act would be the date of accident.

In **Ved Prakash Garg Vs. Premi Devi (1997) 8 SCC 1**, the liability of interest element, apart from the compensation, was also held to be that of the Insurance Company in cases of insurance contracts being in force. The said view was followed by the Apex Court in **Oriental Insurance Company Ltd. Vs. Siby George (2012) 12 SCC 540** and in **Saberbibi Yakubhai Shaikh Vs. National Insurance Co. Ltd. (2014) 2 SCC 298**.

In **Jaya Biswal Vs. Branch Manager, IFFCO Tokio General Insurance Company Ltd. & another 2016 (11) SCC 201**, the said view has further been reiterated, that the interest is liable to be paid from the date of the accident. Relevant portion reads as under:

“26. Further, an interest at the rate of 12% per annum from the date of accident, that is 19.07.2011, is also payable to the appellants over the above awarded amount. In light of the unnecessary litigation and the hardship of the appellants in spending litigation to get the compensation which was rightly due to them under the Act, we deem it fit to award the appellants costs as ₹25,000/-.”

In **New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya 2006 (5) SCC 192** it was clarified that in view of Section 12 of the Act, if there was a clause, as such, to contract out, the

insurer, as such, could move out of the reimbursement liability, which was not prohibited by the statute.

The said argument, though attractive on the ground that it is a beneficial piece of legislation, cannot be accepted, in view of the fact that a Three Judges Bench of the Apex Court in **Kerala State Electricity Board & another Vs. Valsala K. & another 1999 SCR 657** has held that the relevant date would be the date of accident when the personal injury, as such, had been caused to the workman, for determining the rate of compensation and not the date of adjudication of the claim. The argument that enhanced amount of compensation is payable on account of the amendment made in the year 1995, was rejected. The Full Bench of the Kerala High Court in **United India Insurance Co. Ltd. Vs. Alavi 1998 (1) Ker LT 951 (FB)** was approved as laying down the correct law. It is pertinent to mention that the judgment in **Alavi's case** (supra) had set aside the earlier view of the Division Bench of the Kerala High Court in **Oriental Insurance Company Ltd. Vs. Asokan 1998 ACJ 33**, taking a contrary view, which was overruled, wherein the date of adjudication was taken to be the date whereby the amount was to be quantified and would be the relevant date.

Resultantly, keeping in view the fact that the issue stands already decided by the Apex Court, the argument, as such, raised, in view of the judgment in **Pratap Narain Singh Deo (supra)** is to be repelled. Resultantly, there is no merit in the contention raised, that the date of adjudication is the relevant date.

On the issue of initiation of penalty proceedings, counsel is well justified that in spite of her notice dated 27.07.2010 (Ex.C-4) having been served upon the employer-respondent No.1, the provisional payment was not made by the employer, which was mandatory under Section 4-A of the 1923 Act. The said Section reads as under:-

“4-A. Compensation to be paid when due and penalty for default.

1. Compensation under section 4 shall be paid as soon as it falls due.

2. In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

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. direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

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.

Explanation.—For the purposes of this sub-section, “scheduled bank” means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

3A. The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependent, as the case may be.”

Thus, it is apparent from the above provisions that the amount of penalty, as such, is payable by the employer and for that, a separate show cause notice has been provided under the Proviso and without giving reasonable opportunity, the same cannot be imposed. The Commissioner would have to come to a categorical conclusion that there was no justification for the delay, since the provisional payment had to be given immediately after the accident. In the absence of provisional payment, within the prescribed period, the Commissioner could not come to a conclusion, as such, that there was any justification for the delay in the absence of any material. By the issuance of the show cause notice, the Commissioner would categorically, as such, deal with the said issue whether there was any justifiable ground for delay or not. Only where the provisional payment, as such, has been made, the Commissioner could come to a conclusion that there was some justification. In the absence of any provisional payment having been made, it would not be permissible, as such, for the Commissioner to come to such a conclusion and not to issue the show cause notice for payment of penalty proceedings, until there was sufficient material on record. The purpose of the said provision is that compensation must be paid as soon as it falls due, in order to ensure that the victim gets immediate relief and succor. The same is couched in a mandatory manner and cannot be held to be directory, as such. The wordings used are that the employer is bound to make the

provisional payment and the said provision has been incorporated, being a beneficial piece of legislation in favour of the employee and it is to deter the employer from not making such payment.

Under Section 4-A, once the amount was not paid and the employer refused to pay the compensation, the Commissioner was not justified, as such, at that stage not to issue the penalty notice. It has been held in *Ved Prakash Garg (supra)* that payment of the penalty is the liability of the employer and in such circumstances, on account of no reasoning, as such, having been given for the employer in not paying and not showing reasons as to why provisional payment was not made, the Commissioner was not justified in not initiating the penalty proceedings against the employer.

Similarly, under Section 4 (4) of the Act, it has been provided that where an injury results in death, the employer in addition shall deposit a sum of not less than ₹5,000/- towards the expenditure of funeral expenses. The said benefit has also not been granted by the Commissioner. Accordingly, the amount is payable by respondent No.2- Insurance Company.

Resultantly, the appeal is partly allowed to the extent that second substantial question of law that the penalty proceedings against the employer were not initiated without any basis and secondly the sum of ₹5,000/- should have been payable as funeral expenses under Section 4 (4) of the 1923 Act by respondent No.2-Insurance Company. The same will be paid within 2 months from the receipt of the certified copy of this

order.

The commissioner shall also initiate penalty proceedings against the employer for non-payment of the compensation.

The present appeal, accordingly, stands allowed, in the above-said terms.

APRIL 05, 2017
Naveen

(G.S. SANDHAWALIA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No