

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
FIRST APPEAL NO.2021 OF 2010

01 Smt.Sangita Sharad Ahire,
age: 32 years, Occ: Household,

02 Ku.Shital Sharad Ahire,
age: 8 years, Occ: Education,

03 Chi. Avinash Sharad Ahire,
age: 7 years, Occ: Education,

04 Ku.Priyanka Sharad Ahire,
age: 5 years, Occ: Education;

Applicant no.1 is for herself and
the Natural guardian of Nos.2 to
4;

All are R/o Talwade, Taluka
Malegaon, District Nasik.

Appellants

Versus

01 Dharma Ganpat Shirode,
age: major, Occ: Business,
R/o Talwade, Taluka Malegaon,
District Nasik.

02 The New India Assurance Company
Ltd., Manbhawan, Mahesh Nagar,
Shivaji Circle, Old Agra Road,
Malegaon, District Nasik, through
Branch Manager,
the New India Assurance Company
Ltd., Branch Office – Khandesh Mill
Complex, Jalgaon.

Respondents

Mr.M.M.Bhokarikar, advocate for appellants.
Mr.N.N.Desale, advocate for Respondent No.1.
Mr.M.M.Ambhore, advocate for Respondent No.2.

CORAM : M.S.SONAK, J.

DATE : 14th February, 2018.

ORAL JUDGMENT :

1 This appeal was admitted on 25.10.2010. In the memo of appeal, following substantial questions of law have been stated, as arisen in the appeal:

(a) Whether the Hon. Commissioner for Workmen's Compensation and Judge, Labour Court or any other court has discretionary power under Section 4, 4A to change the rate of interest including the date of its application, the amount of compensation and penalty thereon of its own?

(b) Whether the ascertainment of the date of payment regarding the 'amount falls due' can be changed by the Hon. Court and whether it is permissible as per the legislation?

(c) Whether the Hon. Commissioner for Workmen's Compensation and Judge, Labour Court can ignore the provisions of the Evidence Act, 1872 regarding the provision of admission while deciding the case under the Workmen's Compensation Act, 1923?

(d) Whether the Hon. Commissioner for Workmen's Compensation and Judge, Labour

Court may consider the provisions of the Motor Vehicles Act, 1988 considering the social approach and aspect of both the legislations, for the payment of higher amount of compensation in the accidental cases?

(e) Whether the decision is based on only surmises and conjuncture, whether it is against the statutory provisions of law and without jurisdiction?

2 Upon perusal of the impugned judgment and award as also the evidence on record, the Commissioner, for no apparent or valid reason, has restricted wages of the workman to Rs.2000/- per month and on the said basis, proceeded to determine the amount of compensation. In this case, widow of the deceased workman, had deposed that he was employed as a driver with respondent no.1 and was getting salary of Rs.4000/- per month and a *bhatta* of Rs.60/- per day. The employer i.e. respondent no.1 has himself stepped into witness box and admitted that he was paying the workman salary of Rs.4000/- per month and *bhatta* of Rs.60/- per day whenever the workman used to go outstation. On behalf of the Insurance Company, no doubt, certain suggestions were put, both to the widow as well as to the employer, in response to the suggestions, the employer had stated that he was not maintaining any accounts. Learned Counsel for the Insurance Company submits that from this, it is clear that there is no material on record in support of the claim that the workman was drawing salary of Rs.4000/- per month and *bhatta* of Rs.60/- per day.

However, this is not acceptable. There is ample evidence on record which establishes that the workman was drawing salary of Rs.4000/- per month.

3 Insofar as *bhatta* is concerned, the employer has stated that the same was payable to the workman only when he was on outstation duty. There is no material on record as to the frequency of such outstation duty. In any case, taking into consideration *Explanation II* to Section 4(1) of the Employee's Compensation Act, 1923, where the monthly wages of a workman exceed four thousand rupees, his monthly wages for the purposes of computation of compensation in terms of sub-clauses (a) and (b) of Section 4(1) is deemed to be Rs.4000/- only. Therefore, in this case, wages of the workman can be taken at Rs.4000/- per month.

4 On the basis of school leaving certificate, the Commissioner has correctly determined age of the workman as 37 and consequently, relevant factor at Rs.192.14. Since, 50% of the wages have to be taken into consideration for multiplication with relevant factor, the compensation will have to be determined at Rs.2000/- x Rs.192.14 = Rs.3,84,800/-.

5 In this case, the Commissioner has awarded interest @ 6% p.a. and that too from the date of the impugned award. In terms of provisions of Section 4-A of the Employee's Compensation Act, 1923, the compensation in terms of Section 4 is required to be paid as soon as it falls due. The compensation was due within one month from the date of accident. Since, in this case, the employer had knowledge of the accident, therefore, the compensation fell due

on 11.03.2003 since the accident took place on 11.02.2003. This provision direct payment of simple interest @ 12% p.a. or at such higher rate, as may be specified by the Central Government, by notification in the Official Gazette. In this case, therefore, the Commissioner was not right in awarding 6% p.a. interest in place of 12% p.a. Such interest was required to be awarded not from the date of the award but from 11.03.2003, which was the date on which compensation fell due. This is consistent with the law laid down by this Court in the case of **Oriental Insurance Co. Ltd., Akola Branch Vs. Smt. Sunita wd/o Gajanan Kale and others**, 2013 (5) ABR 831. Even the Hon'ble Supreme Court, in the case of **Oriental Insurance Co.Ltd. Vs. Mohd. Nasir & another**, AIR 2009 SC (Supp) 1619, has held that starting point for computing interest under the Workmen's Compensation Act is not the date of the award, but when the amount fell due.

6 On the aspect of penalty, Section 4-A (3)(b) provides that 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, 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. The proviso states that the order 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.

7 Since, the Commissioner has not even adverted to the provisions of Section 4-A (3)(b) and failed to impose any penalty

upon the employer, the omission is required to be corrected in this appeal. In **Dattatraya Layappa Koli & others Vs. Maharashtra State Electricity Distribution Company, through Executive Engineer**, 2010 (2) Bom.C.R. 51, this Court has held that grant of interest and penalty are statutory requirements and, therefore, omission to grant the same, can be corrected in the appeal under this Act.

8 Taking into consideration the proviso to Section 4-A (3) (b), learned Counsel for the employer was afforded an opportunity to show cause as to why penalty should not be imposed on the employer. He submits that the vehicle in question was insured and, therefore, he was dependent upon the Insurance Company to assume the liability. He submits that in utmost good faith, he deposed in the proceedings and stated true and correct particulars as regards income of the deceased workman. It is submitted that even the employer is an agriculturist and is not in a best financial position. He submits that taking into consideration all these factors, no penalty may be imposed upon the employer. The factors stated by the learned Counsel for the employer are no doubt factors which are required to be taken into consideration by way of mitigation. Accordingly, in the facts and circumstances of the present case, it will be appropriate that the employer is required to pay an amount of Rs.25,000/- by way of penalty. The penalty amount will have to be paid by the employer himself. The Hon'ble Supreme Court, in the case of **Ved Prakash Garg Vs. Premi Devi and others** (1997) 8 SCC 1, has made it clear that the liability to pay the penalty cannot be placed upon the Insurance Company.

9 This appeal is, therefore, partly allowed and disposed of by the following order:-

(A) The compensation amount is now determined at Rs.3,84,800/- and the Insurance Company is directed to pay the said amount after excluding the amount already paid, within a period of eight weeks from today, to the appellants;

(B) On the aforesaid amount, Insurance Company is also directed to pay interest @ 12% p.a. commencing from 11.03.2003 till the date of actual payment. In computing interest component, the Insurance Company can take proportionate credit for the amount already paid, however, since the amount, already paid, was on the basis that interest was @ 6% p.a., the Insurance Company is directed to pay the difference within eight weeks, since, now it is held that interest is to be levied @ 12% p.a.;

(C) The employer i.e. Respondent No.1 is directed to pay penalty of Rs.25,000/- (Rs.Twenty five thousand), within a period of eight weeks from today to the appellant. In case, such amount is not paid/deposited within a period of eight weeks from today, the same will carry interest @ 12% p.a.;

(D) The Insurance Company may either directly pay to the appellants or deposit the amount before the Commissioner, within eight weeks from today. If deposited, the appellants are permitted to withdraw the said amount unconditionally. Similarly, liberty is granted to Respondent No.1-employer to deposit the amount of penalty before the Commissioner.

10 Appeal is disposed of in aforesaid terms.

11 Pending Civil Applications, if any, do not survive and
stand disposed of accordingly.

M.S.SONAK
JUDGE

adb