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

FIRST APPEAL NO. 399 OF 2007

1. Navnath s/o Kishanrao Nakhate,
Age : 50 years, Occu.: Labour,
R/o.: Awargaon, Tal. Dharur,
District : Beed.

2. Padminbai w/o Navnath Nakhate,
Age : 45 years, Occu.: Household,
R/o.: As above. **Appellants**.
(Ori. Petitioners)

Versus

1. Ganesh s/o Shivaji Ghodke,
Age : Major, Occu.: Agriculture,
R/o.: Kasba at Post : Dharur,
Tal.: Dharur, District : Beed.
District Aurangabad.

2. The Oriental Insurance Company Ltd.
Through : Divisional Manager,
Ofice at Chati Gali, Solapur,
Tal.: Solapur, District : Solapur. **Respondents**.
(Ori. Respondents)

***

Mr. S. G. Chapalgaonkar, Advocate for the appellants.
Mr. L. L. Thorat, Advocate for respondent No.1- absent.
Mr. V. N. Upadhye, Advocate for respondent No.2.

***

CORAM : SUNIL K.KOTWAL, J.

Judgment reserved on : 6th December, 2018.
Judgment pronounced on : 14th December, 2018.

JUDGMENT.

1. This appeal is directed by original claimants against the judgment and award passed by Commissioner under Workmen's Compensation, Ambajogai (hereinafter referred as to 'the Commissioner') in W. M. C. 10 of 2005.

2. Respondent No.1 is the employer of deceased and respondent No.2 is the insurer of offending jeep bearing No. Mh-23-E-3946 involved in the motor vehicular accident, in which deceased Pradeep s/o Navnath Nakhate died. The learned Commissioner awarded compensation of Rs.3,20,355/- and saddled joint and several liability on respondent Nos. 1 and 2. However, prayer for penalty of 50% of amount of compensation was rejected.

3. This appeal is only for enhancement of the compensation. No cross appeal or cross-objection is filed by respondent Nos. 1 & 2. Therefore, at this appellate stage admitted facts in between the parties are that the deceased Pradeep was employee of respondent No.1 and he was 27 years old at the time of his death. Even it is not disputed that the deceased died during the course of employment as driver of

respondent No.1 on offending Jeep. The accidental death of deceased Pradeep occurred on 03.11.2005 due to dash given to the Jeep by S.T. bus, is also undisputed fact in the appeal.

4. Shri. S. G. Chapalgaonkar, learned counsel for the appellants submits that the deceased used to draw salary of Rs.4,000/- per month. However, the Commissioner considered the salary at the rate of Rs.3,000/- per month only on the basis of claim submitted by respondent No.1 to respondent No.2, after the accidental death of the deceased. He submits that the income of the deceased being skilled driver, cannot be less than Rs.4,000/- per month.

5. Next contention of the learned counsel for the appellants is that the learned Commissioner rejected the claim of claimants for 50% penalty, though under Section 4 A (1)(3)(b)of the Employees Compensation Act, 1923, the claimants are entitled for such penalty. He submits that if the compensation is not deposited within 30 days when it falls due, the employer is liable to pay 50% of the amount of compensation as penalty. He submits that the notice of this claim petition is sufficient opportunity, which is to be awarded to the employer.

6. Respondent No.1 employer though represented by his counsel, has not countered the submissions of learned counsel for the appellants. Only Shri V. N. Upadhye, learned counsel for respondent No.2-Insurance Company replied the arguments, on the ground that in the claim submitted by employer to the Insurance Company Exh.44, the employer specifically mentioned that monthly salary of the deceased was Rs.2,000/- per month with additional Bhata of Rs.1,000/- per month. Thus, he submitted that the monthly wages considered by the Commissioner at the rate of Rs.3,000/- per month, are appropriate and needs no interference.

7. Initially, I will consider as to what would be the proper wages of the deceased at the relevant time of his death. No doubt in the year, 1995 i.e. prior to amendment effected in the year, 2010 in Employees Compensation Act, under explanation-II of Section 4 of the Employees Compensation Act, the maximum monthly wages of workman cannot be more than Rs.4,000/- per month. As claim of the claimants is up to this maximum limit, the explanation-II of Section 4 of the Employees Compensation Act cannot create legal impediment.

8. No doubt, after going through the claim submitted by the employer to respondent No.2 -Insurance Company after the accident (Exh.44), it becomes clear that the employer has admitted monthly salary of deceased at the rate of Rs.2,000/- per month and Bhatta at the rate of Rs.1,000/- per month i.e. total salary of Rs.3,000/- per month. Bhatta being part of the monthly wages, is to be included in the monthly salary of the deceased. However, it must be noted that though respondent No.1 employer denied the claim of the claimants regarding monthly salary of the deceased at the rate of Rs.4,000/-, he has not brought on record salary slip of the deceased or any receipt issued by the deceased or his account book to show that he used to pay monthly salary to the deceased at the rate of Rs.3,000/- including Bhatta. In view of Section 106 of Evidence Act, the salary of the deceased is within knowledge of respondent No.1 employer. Therefore, burden lies on respondent No.1 to prove the exact monthly salary paid to the deceased before his death. As employer did not produce any documentary evidence regarding payment of salary to the deceased at the rate of Rs.3,000/- per month including Bhatta, adverse inference is to be drawn that monthly salary of the deceased was Rs.4,000/-, as contended by the claimants.

Therefore, though in presence of Navnath Nakhate (PW-1) and Ganesh Sawant (PW-2) the agreement regarding monthly salary of the deceased with employer did not take place, considering the occupation of the deceased as a skilled Jeep driver, his monthly salary cannot be less than Rs.4,000/-. I hold that monthly salary of the deceased at the time of his death was Rs.4,000/-.

9. Therefore, under section 4 (1)(a) for determining the compensation, if the half of the monthly salary of the deceased is multiplied by relevant factor 213.57, applicable to the deceased, who was 27 years old, the compensation amount comes to Rs.2000 X 213.57 = Rs.4,27,140/-.

10. Now question arises in respect of penalty payable to the claimants by employer under Section 4-A(1)(3)(b) of the Employees Compensation Act. Section 4-A(1)(3)(b) of the Employees Compensation Act reads as under :

> Section 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.
>
> (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,-
>
> (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. After going through the above provisions, it becomes clear that the compensation under Section 4-A of the Employees Compensation Act shall be paid by employer as soon as it falls due. If employer commits default in payment of compensation within one month from the date it fell due, the Commissioner is bound to impose penalty of the amount of 50% of such compensation amount, in addition to the amount of arrears and interest at the rate of Rs.12% p.a. on such compensation amount. However, such penalty cannot be imposed unless reasonable opportunity to show-cause why penalty should not be passed, is given to the employer. In the case at hand, prior to the filing of the petition before the Commissioner, no separate notice is served

to the employer demanding the compensation amount.

12. However, in **United Insurance Co. Ltd. Vs. Sarsabai w/o Kishanrao Sontakke and others, { (2006) 5 Mh. L. J. 630**, this Court had already taken a view that the term "opportunity to show-cause" does not contemplate a separate notice. The prayer in the claim petition for penalty itself is sufficient notice to the employer.

13. In the case at hand, in the claim petition, the claimants have specifically claimed penalty under Section 4-A of the Employees Compensation Act to the extent of 50% of compensation amount. By filing written statement, respondent No.1 has denied this claim. Thus, it can be said that respondent No.1-employer had sufficient notice and opportunity to show-cause as to why penalty should not be imposed on him. Despite this sufficient notice, no explanation is submitted by employer as to why penalty should be imposed on him.

14. The above provision also shows that it is a responsibility of employer to pay the compensation within one month when it falls due. While considering when the compensation falls due under the provisions of Employees

Compensation Act, the Apex Court in **Oriental Insurance Company Limited Vs. Siby George and others, (AIR 2012 SC 3144)** ruled that the compensation under this provision falls due as soon as personal injury was caused to the workman during the course of employment.

15. Thus, in the case at hand, the payment of compensation to the claimants by employer falls due on 03.11.2005 when the deceased died in motor vehicular accident during the course of employment. Thereafter, despite due notice to the employer and full opportunity to give explanation, neither respondent No.1 deposited the compensation amount nor he furnished suitable explanation as to why penalty should not be imposed on him. Thus, respondent No.1 is liable to pay penalty of 50% of the compensation payable to the claimants. As observed above, the claimants are entitled to compensation of Rs.4,27,140/-. Thus, in addition to this compensation amount, the claimants are also entitled to penalty of Rs.2,13,570/- from the respondent No.1 employer.

16. Apex Court in **New India Assurance Co. Ltd. Vs. Bhogender Jha and another (2013 ACJ 2003)** held that the

Insurance Company is liable to pay principal amount of compensation payable by employer and also interest thereon, if directed by Commissioner. In this case the Apex Court also held that Insurance Company is not liable to pay amount of penalty and it is the liability of employer alone. In view of this legal position, this appeal deserves to be allowed and award passed by the Commissioner in W.M.C. No. 10 of 2005 needs to be modified to enhance the compensation and to award penalty at the rate of 50% of the amount of compensation. Accordingly, First Appeal No. 399 of 2007 is allowed. The award passed by the Commissioner, Ambajogai under Employees' Compensation Act, 1923 in W.M.C. No. 10 of 2005 is modified as under :

> "(i) W. M.C. No. 10 of 2005 is allowed.
>
> (ii) Respondent Nos. 1 & 2 do jointly and severally pay compensation of Rs.4,27,140/- (Rs. Four lakh twenty seven thousand one hundred forty only) to the appellants-original petitioners, with interest thereon at the rate of 12% p.a., on the compensation amount from 04.05.2005 i.e. after 30 days from the date of death of deceased, till its realization.

(iii) In addition to compensation, the respondent No.1 shall also pay penalty of Rs.2,13,570/- (Rs. Two lakh thirteen thousand five hundred seventy only) to the claimants, within one month from the date of this order.

(iv) The award be drawn up accordingly”.

17. The appellants / original petitioners are permitted to withdraw the compensation amount, if deposited before the Commissioner, Workmen's Compensation, Ambajogai.

18. Parties to bear their respective costs of the appeal. The appeal is disposed of in above-said terms.

(SUNIL K. KOTWAL)
JUDGE

vsm/