

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2018

CORAM

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN

C.M.A No. 695 of 2015

Mr.G. Ramu

..Appellant/Applicant

Vs.

1. Mr.J. Gurumurthy
(R1 set ex parte before the Lower Court)
2. ICICI Lombard General Insurance Co. Ltd.
Chottabhai Center, No. 140,
Nungambakkam High Road,
Chennai - 34. ..Respondents/Respondents

Prayer:

Civil Miscellaneous Appeal as against the order dated 18.06.2014 made in W.C. No.105 of 2011 on the file of the Commissioner for Workmen's Compensation -II (Deputy Commissioner of Labour -II) at Chennai.

For Appellant :: Mr.B. Naveen Raja

For Respondents:: Mrs.R. Sreevidya for R2

J U D G M E N T

This Civil Miscellaneous Appeal has been preferred by the injured victim, aged about 44 years employed as a driver under the 1st respondent. The appellant sustained injury in the accident, which occurred on 17.02.2010 while he was driving the tipper lorry belonging to the 1st respondent insured with the 2nd respondent leading to amputation of his right leg below knee. Hence, the claim petition was filed.

2. The appellant contended before the Commissioner for Workmen's Compensation that he was drawing a sum of Rs. 7500/- per month and Rs.100/- per day as batta. Eventhough the said fact was admitted by the 1st respondent/owner, the Commissioner for Workmen's Compensation, in the absence of any documentary evidence, followed the Government Order issued under the Minimum Wages Act and determined Rs.4734/- as monthly income and as per

the age of the appellant, namely, 44 years, adopted the relevant factor 172.52 and awarded Rs. 4,90,026/- towards "Loss of Earning Capacity". The said award is being challenged by the appellant.

3. The following substantial question of law arises for consideration in this appeal:

"Whether the Commissioner for Workmen's Compensation -II ought not to have awarded interest @ 12% p.a. from the date of accident under Section 4A(3) of W.C. Act when the award was passed on merit?"

4. In addition to the above question of law, on going through the facts, this Court frames the following question of law:

"Whether the Commissioner for Workmen's Compensation II, ought to have taken Rs. 7500/- as monthly income and Rs.100/- as batta per day, in the absence of any rebuttal evidence on the side of the 2nd respondent when the 1st respondent has admitted the said contention of the appellant?"

5. It is proved before the Commissioner for Workmen's Compensation that the claimant sustained injuries in the accident that occurred on 17.02.2010 while he was working as a driver under the employment of the 1st respondent. On account of the injuries, the appellant got his right leg amputated below his knee. Since the appellant was a driver, as per the evidence of P.W.1 as well as P.W.2, medical expert, the disability was rightly determined at 100%.

6. As far as monthly income is concerned, the claimant claimed that he was earning a sum of Rs.7500/- per month and Rs.100/- per day as batta. However, in the absence of any documentary proof, the Workmen's Compensation Commissioner fixed Rs.4,734/- as monthly salary as per the Government Order issued under The Minimum Wages Act by the State of Tamil Nadu. As rightly pointed out by the learned counsel for the appellant, the 1st respondent/owner has already admitted the amount paid by him to the appellant as an employer and there is no rebuttal evidence on the side of the 2nd respondent. When the oral evidence of P.W.1 coupled with the evidence of the 1st respondent is to the effect that the appellant was earning a sum of Rs.7500/- per month, in the absence of any rebuttal evidence, the Workmen's Compensation Commissioner should have determined the monthly income at Rs.7500/- together with Rs.100/- per day as batta, which would come to Rs.10,000/-.

7. The Workmen's Compensation Act, 1928 speaks about Rs. 4000/- as the highest salary as per the Act before amendment on

18.01.2010 and thereafter, it has been made as Rs.8000/- per month, as per the notification issued by the Central Government on 31.05.2010 as per Section 4(1B) of Workmen's Compensation Act. Since there is no notification holding the field between 18.01.2010 and 31.05.2010, this Court has to go by the fact proved before the Workmen's Compensation Commissioner and therefore, the monthly income of the deceased is fixed as Rs.10,500/-.

8. The Honourable Supreme Court, in similar circumstances, in *Jaya Biswal and Others V.Iffko Tokio General Insurance Company Limited and others* reported in 2016 1 TN MAC 289 determined the monthly income of the deceased in the said case, who was employed as a tractor driver at Rs. 10,000/-, namely, Rs.4000/- as monthly income and Rs.6000/- as batta. The accident in that case occurred on 19.07.2011 after the amendment. In this case also, the accident had occurred after the amendment i.e, on 17.02.2010. Therefore, the monthly income of the deceased fixed at Rs.4734/- by the Commissioner is set aside and instead, Rs.10,500/- is fixed as monthly income.

8. The age of the claimant is 44years as per the driving licence Ex-P7 and the relevant factor is 172.52. Therefore, "Loss of Earning Capacity" is,

Loss of Earning Capacity :: Rs.10,500x60/100x 172.52 x100/100
::Rs.10,86,876/-

The Workmen's Compensation Commissioner, as per Ex-P12 Medical Bills, had awarded Rs. 47,929/- and the same is confirmed. Totally, a sum of Rs. 11,34,805/- is payable as compensation to the appellant.

9. In view of the above, the additional question of law framed is answered in favour of the appellant.

10. As regards the question of law, whether the Commissioner was right in awarding only 12% interest if the 2nd respondent Insurance Company failed to deposit the compensation amount within 30 days from the date of receipt of a copy of that order, in fact, Section 4-A of Employees' Compensation Act, 1923, reads as follows:

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 of liability

which he accepts, and such payment shall be deposited with the Commissioner or made to the [employee], as the case may be, without prejudice to the right of the [employee] 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..."

From the above, the following are clear:

- (i) the employer has to pay compensation within 30 days of the accident as per Section 4-A(3) of the Act;
- (ii) If the said amount is not paid within one month from the date on which it fell due, the employer shall pay 12% interest per annum on the amount due;
- (iii) As per Section 4-A(3) (b), penalty not exceeding 50% of the total compensation could be imposed on the employer for not paying the compensation along with interest.

11. Moreover, the Honourable Supreme Court, in Pratap Narain Singh Deo V. Srinivas Sabata reported in 1976 (1) SCC 289 has categorically stated that the injured or victim/worker is entitled to interest and penalty. Paragraph Nos. 7 & 8 are extracted as follows:

"7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to

pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due with after the Commissioner's order dated May 6, 1969 under section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of a agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under section 3, in respect of the injury, was suspended until after the settlement contemplated by section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.

8. It was the duty of the appellant, under section 4A(1) of the Act, to pay the compensation at the rate provided by section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement setting the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty."

In view of the categorical declaration made by the Honourable Supreme Court as early as in the year 1976, the liability to pay compensation along with interest @ 12% is not from the date of default in the payment of compensation as per the award but after expiry of 30 days from the date of the accident. In this case, admittedly, the accident had occurred

on 07.02.2010 and the liability to pay the award amount arises from 07.03.2010 and therefore, the claimant is entitled to interest @ 12% per annum from 07.03.2010 till date of payment. Therefore, the question of law raised, in this regard, is answered in favour of the appellant.

12. As far as penalty is concerned, there is a statutory prescription under Section 4A of Employees' Compensation Act and further declared by the Honourable Supreme Court in the judgment rendered in Praveenbhai S. Khambhayata V. United India Insurance Co. Ltd and Others reported in 2015 (1) TN MAC 331 (SC) that the injured workman is entitled to 15% penalty. The statutory interest @ 12% per annum has been given in the said case and 15% statutory penalty has been awarded over and above the statutory interest. Paragraph Nos. 13 to 15 are extracted as follows:

"13. In a situation of this nature for doing complete justice between the parties, this Court has always exercised the jurisdiction under Article 142 of the Constitution of India. In Oriental Insurance Co. Ltd V. Brij Mohan and Ors., 2007 (7) SCC 56, this Court has held as under:

"13. However, Respondent 1 is a poor labourer. He had suffered grievous injuries. He had become disabled to a great extent. The amount of compensation awarded in his favour appears to be on a lower side. In the aforementioned situation, although we reject the other contentions of Ms. Indu Malhotra, we are inclined to exercise our extraordinary jurisdiction under Article 142 of the Constitution of India so as to direct that the award may be satisfied by the appellant but it would be entitled to realise the same from the owner of the tractor and the trolley where for it would not be necessary for it to initiate any separate proceedings for recovery of the amount as provided for under the Motor Vehicles Act.

14. It is well settled that in a situation of this nature this Court in exercise of its jurisdiction under Article 142 of the Constitution of India read with Article 136 thereof can issue Suit directions for doing complete justice to the parties."

14. In Deddappa and Ors V. National Insurance Co. Ltd., 2008 (1) TN MAC 138(SC) : 2008 (2) SCC 595, it was observed as under:

"26. However, as the Appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our Extraordinary jurisdiction under Article 142 of the Constitution of India, direct Respondent 1 to pay the amount of claim to the Appellants herein and recover the same from the owner of the vehicle viz. Respondent 2, particularly in view of the fact that no Appeal was preferred by him. We direct accordingly."

15. Labour Court awarded compensation of Rs.6,42,921/- along with 10% penalty and 6% interest per annum. As per Section 4-A(3)(a) of the Workmen's Compensation Act, where any employer commits default in paying the compensation due under the Act within one month from the date it fell due, the Commissioner shall direct the employer to pay simple interest thereon at the rate of 12% per annum or at such higher rate not exceeding maximum of the lending rates of any scheduled Bank as may be specified by the Central Government. As per Section 4-A(3)(b), in addition to the amount of arrears and the interest thereon, the Commissioner shall direct the employer to pay further sum not exceeding 50% of such amount by way of penalty. The Legal Representatives of the deceased employee are thus entitled to the statutory interest at the rate of 12% and penalty not exceeding 50% of the amount of compensation. The Commissioner for Workmen's Compensation has awarded only 6% interest and 10% penalty as against the statutory entitlement of the dependents of the deceased employee in terms of Section 4-A(3) of the Act. Having regard to the passage of time and in the interest of justice, in our considered view, statutory rate of penalty i.e, 15% is to be ordered in addition to the statutory interest payable at the rate of 12% per annum."

Therefore, apart from 12% interest, 15% penalty, in addition to the said interest, is also awarded as per the aforecited judgment of the Honourable Supreme Court.

13. The Civil Miscellaneous Appeal is allowed. No costs.

14. It is stated that the 2nd respondent Insurance Company had already deposited the amount awarded by the Commissioner. Hence, the 2nd respondent is directed to deposit the balance amount, as per the modified award passed by this Court, along

with interest and costs, as well as penalty, which would operate only till the date of deposit of the amount and not thereafter, before the Commissioner, within a period of eight weeks from the date of receipt of a copy of this order. On such deposit being made, the Workmen's Compensation Commissioner is directed to transfer the same directly to the appellant's bank account, through RTGS, within one week thereafter. However, it is made clear that the appellant would not be entitled to any interest for the period of delay in preferring the appeal.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

nv

To

1. The Commissioner for Workmen's Compensation -II
(Deputy Commissioner of Labour -II), Chennai

+1cc to Mr.B. Naveen Raja, Advocate, S.R.No.18726

+1cc to Mrs.R. Sreevidya, Advocate, S.R.No.19633

C.M.A. No. 695 of 2015

PA(CO)
CS/27/06/18



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