

310 (3 cases)

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

Date of Decision : 30.01.2018

1) FAO-4341-2011 (O&M)

Rajiv Mahajan

..... Appellant

Versus

Smt. Bhartho Devi and others

.... Respondents

2) FAO-5062-2011 (O&M)

Smt. Bhartho Devi and another

..... Appellants

Versus

Rajiv Mahajan and another

.... Respondents

3) CM-23856-CII-2011 in/and FAO-6138-2011 (O&M)

ICICI Lombard General Insurance Company Limited

..... Appellant

Versus

Smt. Bhartho Devi and others

.... Respondents

CORAM : HON'BLE MR.JUSTICE AJAY TEWARI

Present : Mr. Vivek Suri, Advocate
for the appellant-owner (in FAO-4341-2011)
for the respondent No.1 (in FAO-5062-2011)
for the respondent No.3 (in FAO-6138-2011).

Mr. Pawan Kumar Sharma, Advocate
for the appellants-claimants (in FAO-5062-2011)
for respondents No.1 and 2 (in FAO-4341 & 6138-2011).

Mr. Mrigank Sharma, Advocate
for the appellant-insurance company (in FAO-6138-2011)
for the respondent No.3 (in FAO-4341-2011)
for the respondent No.2 (in FAO-5062-2011).

AJAY TEWARI, J. (ORAL)

CM No.23856-CII-2011

This is an application for condoning the delay of 63 days in filing the appeal.

For the reasons recorded, the application is allowed. Delay condoned.

FAO-4341, 5062 and 6138-2011(O&M)

Since a common issue is involved these appeals are decided by this common order. These are three appeals. The appeal bearing FAO No.4341 of 2011 has been filed by the employer/owner, the appeal bearing FAO No.5062 of 2011 has been filed by the claimants and the appeal bearing FAO No.6138 of 2011 has been filed by the insurance company.

The case set up in the claim petition was that Sanjiv Kumar, the son of the claimants was employed as a driver with the appellant-owner and died as a result of an accident on 15.07.2009 during the course of his employment. It is not disputed that the death did take place in the accident in question. The case of the appellant-owner on the other hand was that Sanjiv Kumar was not an employee but merely a friend of his brother who was accompanying his brother on the ill-fated day. The Commissioner held

that the relationship of employer and employee was there and quantified the salary as Rs.4000/- p.m. and ordered compensation and further held that since the appellant-owner had denied the relationship of employer and employee, he was liable to pay penalty at 50% of the amount awarded.

Counsel for the appellant-owner and the insurance company have reiterated their objection that the relationship of employer and employee was not established. The Commissioner noticed that the mother of the deceased had come and deposed about the employment and the salary and at one stage the appellant-owner had been proceeded against ex-parte and had then chosen to appear as the witness of the insurance company and chose to believe the version of the claimants that the deceased was in fact employed with him rather than his version that the deceased was a friend of his brother. I find no reason to doubt the view taken by the Commissioner because the relationship between the deceased and the brother of the appellant-owner could have best been proved by the brother and not by the appellant-owner. In the circumstances, I have no hesitation in upholding the finding regarding relationship of employee and employer.

The second argument raised by the counsel for the appellant-owner is that under the proviso to Section 4(a)(b) of the Employees Compensation Act, it was incumbent upon the Commissioner to have given to him a reasonable opportunity to show cause against the order of penalty and in this case no notice was ever served. I find merit in this argument. Consequently, I set aside the order of penalty and remand it back to the Commissioner, Workmen Compensation to decide it afresh after hearing the appellant-owner. For this purpose, the parties through counsel are directed

to appear before the Commissioner on 27.03.2018.

Coming to the appeal of the insurance company, the solitary argument raised by the counsel for the appellant-insurance company is that the interest could not have been levied from the date of the accident but only from the date of the order in view of the judgment of the Hon'ble Supreme Court in the matter of National Insurance Company Limited vs. Mubasir Ahmed and another, (2007) 2 SCC 349 which was followed in the matter of Kamla Chaturvedi vs. National Insurance Company and others, (2009) 1 SCC 487. In the matter of Kamla Chaturvedi (supra), the Supreme Court noticed as follows:-

“7. The further question arises as to from which date it would be paid.

8. In National Insurance co. Ltd. v. Mubasir Ahmed & Anr. [2007(2) SCC 349] it was, inter alia, held as follows:

"Interest is payable under Section 4-A(3) if there is default in paying the compensation due under this Act within one month from the date it fell due. The question of liability under Section 4-A was dealt with by this Court in Maghar Singh v. Jashwant Singh [(1998) 9 SCC 134]. By amending Act 30 of 1995, Section 4-A of the Act was amended, inter alia, fixing the minimum rate of interest to be simple interest @ 12%. In the instant case, the accident took place after the amendment and, therefore, the rate of 12% as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The starting point is on completion of one month from the date on which it fell due. Obviously it cannot be the date of accident. Since no indication is there as to when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because Section 4-A(1) prescribes that compensation under

Section 4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication under Section 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of sub- section (2) of Section 4-A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is "falls due". Significantly, legislature has not used the expression "from the date of accident".

Unless there is an adjudication, the question of an amount falling due does not arise.”

In my opinion, their Lordships have held that where the determination of compensation involves making an assessment like loss of earning capacity etc., the due date would be the date of its adjudication but where, as in the present case a person died, the only relevant factors are the age and salary and no discussion has been conferred upon the Commissioner the due date has to be the date of accident. Consequently, the contention of the counsel for the appellant-insurance company is rejected.

As regards the appeal of the appellants, the counsel for the appellants-claimants has argued that the Commissioner erred in taking the salary as Rs.4000/- p.m. because he relied upon the judgment of the Supreme Court in the matter of United India Insurance Company Ltd. Vs. Kaushalaya Devi and Others, III (2006) ACC 285. As per the counsel in that case the accident had taken place much prior to the date of accident in

the present case and the claims set forth by the claimants of the salary being Rs.5000/- p.m. in the year 2009 cannot be taken to be exaggerated in any manner. He has further argued that interest has wrongly been granted from the date of application whereas it should have been one month of the date of the accident.

I find merit in both the arguments and consequently it is directed that the salary would be taken as Rs.5000/- p.m. and the interest would have to be granted from one month after the date of the accident. As mentioned above, the matter regarding penalty has been remanded back.

Consequently, the appeal of the insurance company bearing FAO No.6138 of 2011 is dismissed and appeal of the owner and the claimants bearing FAO Nos.4341 & 5062 of 2011 are partly allowed in the above terms.

Since the main cases has been decided, the pending Civil Misc. Application, if any, also stands disposed of.

(**AJAY TEWARI**)
JUDGE

January 30, 2018
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Whether speaking/reasoned - Yes/No

Whether reportable - Yes/No