

\$~5 & 6

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of Decision: 09th May, 2018

5

+ FAO 280/2016

M/S UTILITY POWERTECH LIMITED Appellant
Through: Mr. Tarkeshwar Nath and Mr.
Saurabh Kumar Tuteja, Advocates

versus

VIJAY BAHADUR THR LRS & ORS Respondents
Through: Mr. Sandeep Prabhakar and Mr. Vikas
Mehta, Advocates for respondent
No.2/BSESYPL
Mr. Raj Kumar, Advocate for
respondent No.3/Sanjay

6

+ FAO 290/2016

B S E S YAMUNA POWER LTD Appellant
Through: Mr. Sandeep Prabhakar and Mr. Vikas
Mehta, Advocates

versus

RAMVATI & ORS Respondents
Through: Mr. Raj Kumar, Advocate for
respondent No.3/Sanjay
Mr. Tarkeshwar Nath and Mr.
Saurabh Kumar Tuteja, Advocates for
respondent No.4

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

1. The appellants have challenged the order dated 11th March, 2016, whereby the Commissioner, Employees' Compensation held BSES Yamuna Power Ltd. and M/s Utility PowerTech Limited jointly and severely liable to

pay the compensation of Rs. 4,36,940/- along with interest @ 12% per annum and funeral expenses of Rs.5,000/- on account of death of Amit Kumar @ Avnesh.

2. On 16th May, 2006, Amit Kumar, working as lineman on a project of BSES Yamuna Power Ltd., fell down from an electricity pole while carrying out a rectification work and suffered fatal injuries. The police registered FIR No. 341/2006 under Section 304A Indian Penal Code at P.S. Gokal Puri, Delhi. The deceased was 24 years at the time of his death and was survived by his parents who filed an application for compensation before the Commissioner, Employees' Compensation against the BSES Yamuna Power Ltd. as well as the contractors.

3. The Commissioner, Employees' Compensation held BSES Yamuna Power Ltd. to be the principal employer and M/s Utility PowerTech Limited to be the contractor and passed an award holding them jointly and severely liable to pay the compensation to the legal representatives of the deceased.

4. BSES Yamuna Power Ltd. has challenged the impugned order on the ground that liberty has not been given to recover the compensation amount from the contractor as provided in section 12 of the Commissioner, Employees' Compensation Act whereas M/s Utility PowerTech Limited has challenged the impugned order on the ground that they were not contractor at the relevant time.

5. Section 12 of the Employees Compensation Act empowers the Commissioner, Employees' Compensation to pass an award against the principal employer with liberty to recover the award amount from the contractor. Section 12 of the Employee's Compensation Act is reproduced hereunder:

“Section 12. Contracting.-

(1) Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any employee employed in the execution of the work any compensation which he would have been liable to pay if that employee had been immediately employed by him; and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the employee under the employer by whom he is immediately employed.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor, or any other person from whom the employee could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the employee could have recovered compensation and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.

(3) Nothing in this section shall be construed as preventing an employee from recovering compensation from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken or usually undertakes, as the case may be, to execute the work or which are otherwise under his control or management.”

(Emphasis supplied)

6. This Court is satisfied that the ingredients of Section 12 are satisfied in the present case and BSES Yamuna Power Ltd., being the principal

employer, is liable to pay the compensation to the claimants in the first instance, with the right to recover the same from the contractor(s). Reference is made to the recent judgment of this Court in **Krishan v. Jasoda Devi**, 2017 SCC OnLine Del 11137 in which this Court has interpreted Section 12 of the Employees' Compensation Act. This case is squarely covered by the principles laid down in **Krishan v. Jasoda Devi** (*supra*).

7. Applying the principles laid down by this Court in **Krishan v. Jasoda Devi** (*supra*), BSES Yamuna Power Ltd. is liable as the principal employer under Section 12 of the Employees' Compensation Act with right to recover the compensation amount and penalty from the contractor(s).

8. Section 4A(3) of the Employees' Compensation Act provides for penalty upto 50% of the compensation amount if the compensation due under the Act is not paid within one month it fell due. Section 4A(3) of the Employees' Compensation Act is reproduced hereunder:-

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

(1)

(2)

(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.”

9. In **Rajan v. P.M. Subramonian**, 1994 ACJ 25, the Division Bench of Kerala High Court examined the scope of proviso to Section 4A(3)(b) of Employee's Compensation Act and adjudicated the issue of penalty instead of remanding back the matter. The relevant portion of the judgment is as under: -

“15. Now, we come to the main question raised in this appeal, whether the imposition of penalty, and that too at the maximum rate, without framing an issue, or without affording the appellant an opportunity to be heard regarding imposition of the penalty or its quantum is valid in law. The question of framing an issue or putting the appellant on notice of the proposal are really matters of fairplay and fair procedure related to the principles of natural justice. Section 4-A(3) on its terms does not contain any provision for framing an issue or for hearing an employer before imposing penalty, or regarding its quantum, but that is a requirement of natural justice. It was held in A.K. Kraipak v. Union of India AIR 1970 SC 150, and reiterated in Union of India v. J.N. Sinha 1970-II-LLJ-284 that while the rules of natural justice do not supplant the law but supplement it, if a statutory provision can be read consistently with the principles of natural justice, Courts should do so because it must be presumed that the Legislature and the statutory authorities intend to act in accordance with the principles of natural justice. These rules being rules of fairness should therefore be followed and read into every provision unless their application is excluded either expressly or by necessary implication. Section 4-A(3) does not expressly exclude the application of the principles of natural justice, nor is there anything therein excluding their application by implication. In fact, as a quasi-judicial authority exercising statutory powers involving determination of rights of parties, it is elementary that the Commissioner should observe the rules of natural justice in the performance of his functions. Though

the Act or the Rules do not envisage a full-fledged trial, as in a civil court, a regular hearing and determination of rights is contemplated therein. In fact, Rule 28 of the Rules framed under the Act requires the Commissioner to frame and record the issues upon which the right decision of the case appears to depend. This is evidently intended to put the parties on notice of the points arising for consideration and on which they are expected to adduce evidence. It is a matter for the Commissioner to decide whether penalty should be imposed or not. Therefore, the question of imposition of penalty may arise for consideration even without a specific plea in that behalf by the workman, as held by the High Court of Punjab and Haryana in Dalip Kaur v. Northern Railway 1992-I-LLJ-762. Since the question of imposition of penalty is thus a matter which will necessarily arise for consideration while passing an award, it will be prudent and advisable for the Commissioner to frame an issue as to whether penalty is imposable under Section 4-A(3) and, if so, the quantum thereof to enable the parties to address themselves on these aspects as well at the hearing.

16. In Mathura Prasad v. Saiyed Khursheed Ahmad, (1981) 59 FJR 168, the High Court of Allahabad held that the Commissioner should normally pass an order regarding penalty also while disposing of the case, a proposition with which we agree. In Vijay Ram v. Janak Raj (1981) ACJ 84, the High Court of Jammu and Kashmir took the view that an order imposing penalty may be passed by the Commissioner after he has awarded the compensation, depending on the facts of a given case. The learned Judge then proceeded to observe:

"But, in no case shall he impose a penalty under Section 4-A, unless he has given to the employer a prior reasonable notice of his intention to do so, and thereby provided him an opportunity of showing cause for delayed payment of the compensation. Obligation on the part of the Commissioner to hear the party to be adversely affected is implicit in Sub-section (3), for what was the reason for not making the payment without delay, can be known to that person alone who is required to make the payment, and to none else. Unless, therefore, he is called upon to show cause for the delayed payment, it is not reasonably possible for the Commissioner to come to a conclusion whether or not there

was any justification for the delay. He cannot be allowed to reach his satisfaction at his whim and caprice simpliciter. In what form such a notice may be given will further depend upon the facts of each case. In one case an issue on the plea of penalty may constitute such a notice, whereas in another case such a notice may be reasonably inferred even from the pleadings of the parties coupled with their conduct during the trial,"

17. The Karnataka High Court dealt with the same question in their decision in Oriental Insurance Co. v. Jevaramma, (1988) ACT 671. The Division Bench followed an earlier decision of the same High Court in N.A.K. Pathan v. Julekabi Pathan, (1987) 70 FJR 40, in which it was held that what was necessary under Section 4-A(3) was that the employer should know the case he is required to meet and he was afforded a reasonable opportunity of meeting the case. The subsequent Bench observed that penalty cannot be imposed merely as a matter of course, and the discretion to levy penalty must be exercised judicially after due consideration of the relevant circumstances. This presupposes an opportunity to be given to explain the circumstances for the delay which entails material consequences.

18. Section 4-A(3) is a penal provision imposing a penalty on the employer. The satisfaction of the Commissioner contemplated therein should be based on materials. It has to be reached on a conspectus of all the facts and circumstances of the case. There may be umpteen reasons why the employer is not liable for the penalty. There can be various reasons for nonpayment of the amount of compensation on the due date, or for its delayed payment. The employer may be able to point out justifiable reasons for the delay or the non-payment. In any case, he may also be able to make out sufficient reasons why the penalty should either be waived, or be fixed at a low amount. In fact, the section vests a discretion in the Commissioner in the matter of penalty, the prescription being only of the maximum. The reasons made out by the employer may have an impact not only on the question of imposition of penalty, but also on its quantum. All this cannot be effectively decided unless the attention of the parties is focussed on the question of imposition of penalty and the exercise of the discretion, in which event the

employer can place his materials in justification of the delay or at least plead in mitigation for a lesser amount of penalty. This he will not be able to do unless he is given an opportunity to be heard in the matter.

19. The hearing to be afforded need not necessarily have the trappings of a regular trial or hearing. The framing of an issue under Rule 28 will suffice, but that may not be obligatory, though desirable. The Commissioner may even in the course of the hearing draw the attention of the parties to the question of penalty and hear them. If such an opportunity to produce their materials and to be heard, is afforded, that will be sufficient to meet the requirements of natural justice. What is essential and what is required is compliance with the rules of natural justice, so that the affected party, namely, the employer, gets an opportunity to produce his materials and to plead that there was justification for the delay or for imposition of a lesser amount than the maximum prescribed. Essentially, it is a question of complying with the rules of natural justice.

20. The Law Commission of India had in its sixty-second Report rendered in October, 1974, on the Workmen's Compensation Act, suggested the addition of a proviso to Section 4A(3) to provide for a reasonable opportunity to the employer to show cause why an order for payment of penalty should not be passed. The Act has not been amended pursuant thereto, but we are of the view that the recommendation of the Law Commission was only to make explicit what otherwise was implicit in the section.

21. So far as this case is concerned, there was no issue framed on the point. There is also no case that the Commissioner heard the parties on the question of penalty after apprising them of his proposal to impose the same or about the quantum. The order impugned therefore suffers from the vice of violation of the principles of natural justice in so far as it relates to the imposition of penalty. This would normally require a remit to the Commissioner but for the fact that the parties are agreed that this question may be decided here itself to avoid further protracted proceedings before the Commissioner.

22. Counsel for the appellant pleads that the appellant had acted bona fide. He had a plea of non-liability. That found acceptance with the Commissioner in the first instance, though not with this Court. In

such a case, it cannot be said that his conduct was so contumacious or unreasonable as to require being penalised under Section 4-A(3). A parallel case in the High Court of Punjab and Haryana in Shiv Lal v. Punjab State Electricity Board, (1991) ACJ 443, is relied on. It is also stated that the respondent is now employed elsewhere, a fact which is referred to in the appeal memorandum, though no evidence was tendered about it before the Commissioner. Counsel submits, on these premises, that the penalty, if at all it is to be sustained, should be minimal.

23. On the other hand, counsel for the respondent points out that the appellant had taken a totally false plea that the respondent was not his workman at all. He succeeded in the first instance on an irrelevant ground not raised in the written statement, which was perversely accepted by the Commissioner when the poor toddy tapper could not give the number of the tree from which he fell down. He also refers to the fact that the appellant behaved in a most cruel manner in that he did not even arrange for the proper treatment of the respondent in the hospital and he had to fend his way all alone. His right hand has been amputated and he is disabled for life. But he has been delayed in getting the compensation-even the pittance provided by the Act for thirteen years.

24. Exercise of the discretion regarding imposition of penalty has to be related to all these circumstances. Normally the exercise of discretion has to be done by the authority who is vested with that power. We have however thought it proper to deal with the matter in this Court having regard to the request made by the parties and the fact that we are exercising an appellate power. The exercise of the discretion depends upon the facts and circumstances of each case. Precedents like the decision of the Punjab and Haryana High Court relied on by the appellant rendered on their own facts cannot furnish any true guidance for the exercise of the discretion in this case. The facts in this case are clear. The accident took place on November 19, 1979. The appellant did not deposit the whole or any portion of the amount of compensation due to the respondent till the order impugned was passed. On the other hand, he took up every conceivable plea to defeat the claim of the respondent. He could not sustain any of them eventually. By this contumacious conduct, the respondent who has lost a valuable limb, was deprived of the

compensation due for well over twelve years. The compensation is payable on the very date on which the accident occurs though the employer is given one month's time to make deposit of the amount. On the facts above stated we are satisfied that there was no justification for the delay in the payment of the compensation. The Commissioner has imposed the penalty at 50 per cent. of the amount of compensation. But, having regard to the fact that the Commissioner himself contributed in part to the delay by his first illegal order, we feel that a penalty of 75 per cent. of the amount fixed by the Commissioner, namely, Rs. 10,080 will meet the ends of justice."

(Emphasis supplied)

10. Under Section 4A(3)(b), this Court is empowered to impose penalty of up to 50% of the compensation amount i.e. 50% of Rs.4,36,940/-. In the facts and circumstances, the penalty of Rs.1,50,000/- is imposed on BSES Yamuna Power Ltd.

11. In the facts and circumstances of this case, the award of the Commissioner, Employees' Compensation, whereby compensation of Rs.4,36,940/- along with interest @ 12% per annum w.e.f. 06th May, 2006 and funeral expenses of Rs.5,000/- have been awarded to respondents No.1 and 2, is upheld. M/s BSES Yamuna Power Ltd., being the principal employer, is held liable to pay the entire compensation amount along with penalty of Rs.1,50,000/- to the claimants with liberty to recover the same from the contractor(s).

12. M/s Utility Powertech Limited (appellant in FAO 280/2016) has deposited 50% of the award amount with interest whereas M/s BSES Yamuna Power Ltd. (appellant in FAO 290/2016) has deposited the balance 50% amount with interest with the Commissioner, Employees' Compensation and the said amount has already been disbursed to the

claimants. M/s BSES Yamuna Power Ltd. is directed to deposit the penalty of Rs.1,50,000/- with the Registrar General of this Court within four weeks. After deposit of the penalty amount, M/s BSES Yamuna Power Ltd. is at liberty to initiate appropriate legal proceedings to recover the compensation and the penalty amount from the contractor(s) liable in respect of the accidental death of Amit Kumar @ Avnesh on 16th May, 2006. M/s Utility Powertech Limited is also at liberty to initiate legal proceedings against M/s BSES Yamuna Power Ltd. and/or other contractor(s) to recover the amount already deposited by them before this Court.

13. Both the appeals are disposed of in the above terms. Pending applications are disposed of.

14. List for disbursement of the penalty amount on 30th May, 2018.

15. Respondent No.1 in FAO 290/2016 is directed to remain present in Court on the next date of hearing.

16. Copy of this judgment be sent to respondent No.1 in FAO 290/2016.

17. Copy of this judgment be given *dasti* to counsels for the parties under signatures of the Court Master.

MAY 09, 2018

rsk

J.R.MIDHA, J.