

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

**FIRST APPEAL NO.1747 OF 2016
WITH
CIVIL APPLICATION NO.16631 OF 2015
IN FA/1747/2016**

- 1 Jeev Urja Private Limited,
Manufacturers of Biomass Briquettes,
Through its Executive Director
Vasant Kulkarni,
Age 63 yrs., Occ. Business,
R/o E-2, M.I.D.C., Nanded – 431603.
- 2 Vasant Shankarrao Kulkarni,
Executive Director of
Jeev Urja Private Limited,
Age 63 yrs., Occ. Business,
R/o E-2, M.I.D.C., Nanded – 431603.

... **Appellants.**

... **Versus** ...

Smt. Sitabai w/o Madhav
@ Vitthal Nilpatrewar,
Age 35 yrs., Occ. Not known,
R/o Shiradhon, Tq. Loha,
Dist. Nanded.

... **Respondent.**

...

Mr. M.M. Patil, Advocate for the appellants

Mr. A.B. Shinde, Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 25th JULY, 2019

PRONOUNCED ON : 04th SEPTEMBER, 2019

JUDGMENT :

1 Present appeal has been filed by original respondent Nos.1 and 2 challenging the Judgment and Award passed by learned Commissioner for workmen's compensation Act and Judge, Labour Court, Nanded in W.C.N.F.A. No.16/2011 dated 24.02.2015, whereby on the basis of petition filed by present respondent, they were directed to pay compensation of Rs.5,63,795/- together with interest @ 12% from the expiry of one month from the date of accident till its realisation.

2 Original petitioner contended that she is a widow and was maintaining her minor children. She was employed as a skilled labour with respondent No.1. The nature of her job to insert raw material in the machine. Initially she was paid with the wage @ Rs.70/- per day, but since March, 2010 she has been given wages @ Rs.100/- per day i.e. Rs.3,000/- per month. The respondents had allowed her to reside in the factory premises and she was also doing other work as per the direction of the respondents. As usual she started her work on 05.09.2010, however, her saree was caught in the machine, as a result of which, she was caught in the

machine and her right leg was crushed. It is stated that the respondent Nos.1 and 2 had not followed the rules of Factory Act and therefore, the said accident had taken place. She was treated at Guru Govindsingh Memorial Government Hospital, Nanded. She was operated four times and her right leg from hip has been permanently disabled. She had stated about the accident to the Medical Officer, who had recorded the fact on 05.09.2010 and had issued letter to the Police Chowky. However, she was threatened by the respondents and restrained from making complaint with the police. After discharge she joined her duty and then she was paid Rs.3,000/- per month. But the respondents have not paid wages of further six months. Ultimately she lodged the report with the police and issued legal notice to the respondent No.1. It is stated that the respondent admitted the contents of the notice partly and denied the other. Since she has suffered 100% permanent disability, she has claimed compensation, so also, she has claimed 50% of the amount as penalty.

3 The respondent Nos.1 and 2 resisted the claim of the petitioner by filing written statement. They admitted the relationship between the petitioner and respondent No.1 as that of employee and employer. However, they denied that the petitioner was a skilled labour. They also admitted the accident and stated that it had occurred during the course of the

employment. It was contended that since the petitioner was unskilled labour, she was specifically instructed not to handle the machine. However, suo moto she had kept her leg in the machine to get compensation. It is also stated that the accident had taken place due to negligence on the part of the petitioner herself and therefore, she is not entitled to get compensation.

4 After the issues were framed, evidence was led by the petitioner. Evidence was also led by the respondents. After considering the evidence on record, the learned Trial Court has partly allowed the petition, as aforesaid. Hence, this appeal.

5 Heard learned Advocate Mr. M.M. Patil for appellants and learned Advocate Mr. A.B. Shinde for sole respondent.

6 It has been vehemently submitted on behalf of the appellants that the learned Trial Court was not justified in holding that there is total loss of income for the petitioner. Though the petitioner cannot do work with right leg, yet, with the help of Jaipur Foot she could have done the work. The disability ought not to have been taken @ 100%, but it ought to have been taken @ 50% only. Further, no reasons have been assigned by the learned Trial Court for imposing 50% penalty i.e. maximum. When in fact, discretion has been given and specific words, “..... sum not exceeding 50%

.....: are used in Section 4A (3) (b) proviso of the Employees Compensation Act, it ought to have been considered as to whether maximum amount should be awarded or not. Further, the learned Trial Court had not given any prior show cause notice as the Proviso to Section 4A (3) (b) of the Act makes it mandatory. The Proviso prescribes that an order of 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. Further, the learned Trial Court was not justified in imposing interest on the amount awarded as penalty. He relied on the decision of this Court in Nanda wd/o Pandhari Gatade and others vs. Bhikaji Ghanshyam Shingane, 2009(1) Mh.L.J., 422, wherein it has been held that -

“The provisions of sub-clause (3)(a) do not cover amount of penalty at all, because the penalty is leviable under sub-clause (b), if the arrears of compensation are found to be withheld by the employer without any justifiable reason. Language in sub-clause (b) shows that in that event the Commissioner may in addition to the amount of those arrears and interest awarded under sub-clause (a) award further sum not exceeding 50% of “such amount” by way of penalty. Thus statute contemplates the compensation as arrears. The amount of interest under sub-clause (a) is distinct grant and amount of penalty grant is a distinct grant. The amount of penalty contemplated by sub-clause (b) is a distinct head and hence law does not contemplate grant of interest on penalty. The penalty to be granted, therefore, has to be 50% of the amount of arrears and according, the

same has been granted. The demand for grant of interest on amount of penalty, is therefore not supported by this provision.”

7 Per contra, the learned Advocate appearing for the respondent submitted that the petitioner had issued notice to the respondents at Exh.U-16 and it was even replied by the respondents vide Exh.U-17. Yet, there was no compliance as contemplated under Section 4A(1) and since there was a default, Section 4A(3) was resorted to, of the Act. Under such circumstance, imposition of 50% of the penalty was justified. Reasons have been assigned stating that there was no justification given by the respondent for not making any payment of compensation. There was no whisper about that explanation in the testimony of RW Vasant Kulkarni. Further, it was also taken that the petitioner is a poor widow having minor kids. These reasons assigned for imposition of 50% penalty were justified.

8 At the outset, note has to be taken that the manner of accident or of the magnitude of the accident has not been denied by the respondent. The employer-employee relationship is not denied. It is also not denied that the accident had taken place during the course of employment of the petitioner. Though she had come with a case that she was a skilled labour, the respondents disputed that yet, the relationship is not denied. Except the bare words of respondents' witness Vasant Kulkarni there is no evidence adduced

by the respondents to show that the accident had taken place due to her negligence. If we see the cross of RW Vasant Kulkarni, he was not present when the accident took place. He reached the spot 10 minutes after the accident and at that time the leg of the petitioner was still in the machine. If the respondents intended to seriously canvas that the accident had taken place due to the negligence of the petitioner herself, then they ought to have examined any eye witness. Now, it has come on record that the right leg of the petitioner has been totally crushed. The certificate form 'B' at Exh.U-35 shows that she has sustained traumatic amputation right thigh 60% permanent disability. Admittedly, the petitioner is labour. Even as per the testimony of RW Vasant Kulkarni, she was supposed to do the work in the nature of cleaning the machine as well as area around the same, collect the garbage etc.. He has also stated that he had given Jaipur Foot to the petitioner and then he says that thereafter he had offered her job with the factory and liberty was given to her to choose any work which she would be able to. But then it is stated that she did not listen to him and went with her mother-in-law. Whatever may be the reason later on that would have happened, yet, the fact remains is, that even with the Jaipur Foot at the most she would be able to walk, the work as before is not possible and the amputation is from the thigh. Therefore, the learned Trial Court was justified in calculating the amount of compensation on the basis of 100% disability.

9 Now, turning towards imposition of penalty under Section 4A(3) (b) of the Act; in the petition itself the prayer was made by the petitioner for recovery of penalty. As per the said provision, when any employer has committed default in paying the compensation due under the act, within one month from the date it fell due, the Commissioner shall put in his opinion there is no justification for the delay directing employer to pay further sum not exceeding 50% in addition to the amount of arrears and interest thereon, by way of penalty. No doubt, the proviso says that a prior notice, before any order in respect of penalty is passed, is required to be issued to the employer to make such payment. How much penalty should be imposed is left to the discretion of the Court. Para No.12 of the impugned Judgment gives reason, as to why penalty is imposed and that to the maximum that has been awarded. Petitioner had given notice to the respondent No.1 and reply was given by respondent No.1. In spite of that no arrangement for the payment of compensation appears to have been made within one month from the date of the accident. Though RW Vasant Kulkarni was in the witness box, it was not tried to be extracted from him as to why compensation was not paid within one month of accident or/ and immediately after receipt of notice. He states that he had incurred all the expenditure, gave Jaipur Foot and even offered the job. This cannot be said to be a good ground for not giving the due compensation, which by law the petitioner was entitled to get. Under such

circumstance, the reasons assigned by the learned Trial Court for imposing penalty @ 50% of the arrears and interest thereon is required to be upheld here.

10 It will not be out of place to mention here that on the point of prior notice this Court in Lalitraj Brijlal Khurana vs. Shriram Ruprao Ghuge and another in First Appeal No.612 of 2012 dated 04.07.2013, wherein after considering the ratio laid down in Ved Prakash Garg vs. Premi Devi and others, [(1997) 8 SCC 1] has observed -

“Reading of all the authorities would show that the salient principle of audi alteram partem i.e. no adverse order be passed unless the affecting party is heard, is to be followed, is the spirit of the proviso to the sub-clause (b) of sub-section (3) of section 4-A of the Workmen's Compensation Act. Technicality of issuing separate notice or filing separate proceeding is neither contemplated by law nor emphasized in any of the authorities on which reliance is placed.”

Those observations in the Lalitraj Brijlal Khurana's case have been followed in Prabhakar Ambadas Dongare and another vs. Sow. Shanubai w/o Ashok Suryawanshi and others in First Appeal No.1477 of 2018 decided on 09.07.2019, wherein it is observed that “*merely because a separate written notice was not given by the learned Commissioner before pronouncement of Judgment, will not make the order regarding payment of penalty illegal.*” Therefore, there is no substance in the point raised by the

appellant that since no show cause notice was issued prior to passing of order of penalty the said order is not sustainable in the eyes of law.

11 Now, turning towards interest, that has been awarded on the penalty also, in view of the said decision in **Nanda Gatade** (supra) and especially the interpretation of the word “such amount” from the said provision it can be said that the learned Trial Court was not justified in awarding interest on the amount of penalty. The amount of penalty is Rs.1,89,431/-. Therefore, that part of the Award only deserves to be corrected, and there is no merit in the other points raised by the appellants. Hence, at the end the appeal deserves to be partly allowed and following order is, therefore, passed.

ORDER

1 The appeal is hereby partly allowed.

2 The Judgment and order passed by learned Commissioner for Workmen's Compensation Act and Judge, Labour Court, Nanded on 24.02.2015 in W.C.N.FA. No.16/2011 is hereby set aside to the extent of interest awarded on the penalty and for that purpose sub-clause (2) of the operative order of the impugned Judgment is hereby modified :

“The respondent Nos.1 and 2 shall pay, jointly and severally,

compensation of Rs.5,63,795 to the petitioner.

They are also pay the interest @ 12% per annum on amount of Rs.3,74,364/- from the expiry of one month's period from the date of accident till its realisation.”

3 No order as to costs.

4 Civil Application stands disposed of.

5 Claimant/ respondent is entitled to withdraw the amount deposited by appellant before the learned Commissioner as per the modified award.

6 Excess amount, if any, be returned to appellants.

(Smt. Vibha Kankanwadi, J.)

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