

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

First Appeal No. 0390 of 2019

District : Nanded

1. Jabeen Begum w/o. Rauf Khan,
Age : 32 years,
Occupation : Household.
2. Nagma Irram d/o. Rauf Khan,
Age : 18 years,
Occupation : Education.
3. Arbaz Khan s/o. Rauf Khan,
Age : 15 years,
Occupation : Education.

Petitioner no.03 is minor
under Guardianship of his
real Mother i.e.
petitioner no.03.

All appellants
R/o. Rehmat Nagar,
Degloor Naka, Nanded.
At present Resident in
Peer Burhan Nagar, Nanded.

.. Appellants
(Original
Claimants
no.01 to 03)

versus

1. Mohd. Shafi s/o. Mohd.
Burhan Bagwan,
Age : Major,
Occupation : Business,
R/o. Mehboob Colony,
Degloor Naka Road,
Nanded.
2. United India Insurance Co.
Ltd.,
Through its Manager,
Guru Complex, G.G. Road,
Nanded.

3. Ajjubee w/o. Jalil Khan,
Age : 68 years,
Occupation : Household,
R/o. Rahmat Nagar,
Degloor Naka, Nanded.

.. Respondents
(Nos.01 & 02 -
Original
respondents
& No.03 -
Original
claimant no.04)

.....

Mr. Zia-Ul-Mustafa, Advocate, for the appellants.

*Mr. Anifadil Z. Biyabani, Advocate, for
respondent no.01 (Absent).*

Mr. V.R. Mundada, Advocate, for respondent no.02.

*Mr. Uday D. Dalvi, Advocate, for respondent
no.03 (Absent).*

.....

CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 04th July 2019**

**Date of pronouncing
the judgment : 19th August 2019**

JUDGMENT :

01. Present appeal has been filed by the original claimants for enhancement in the compensation that has been granted by the learned Commissioner for Employees' Compensation and Judge, Labour Court, Nanded, in ECFA No. 23 of 2013, dated 11-08-2014.

02. The claimants are the legal heirs of one Rauf Khan s/o. Jalil Khan, who was serving as driver with respondent no.01. Respondent no.01 is the

owner of tempo bearing No. MH-17/AG-2564. Respondent no.01 used to give salary of Rs. 9,000/- per month and Bhatta of Rs. 100/- per day to deceased Rauf. The deceased was driving the said tempo from Purna to Nanded on 12-05-2013. However, due to technical fault, the said tempo dashed to a tree, as a result of which, Rauf had sustained severe injuries. He was shifted to Lotus Hospital, Nanded. However, he succumbed to injuries on 19-05-2013. Offence was registered against him but he was discharging duties for respondent no.01 at that time. Claimants had incurred amount of Rs. 1,32,000/- on the treatment of the deceased. The insurance was with respondent no.02. Since the respondents had not paid compensation, notice was issued under Section 10 of the Employees' Compensation Act on 10-06-2013. In spite of the notice, when compensation was not given, the petition was filed for getting compensation of Rs. 12,37,020/- under Section 4 and 4A of the Employees' Compensation Act [**For short, "E.C. Act"**].

03. Respondent no.01 filed say. He admitted that deceased Rauf was driver on the said tempo. It was denied that he was giving salary of Rs. 9,000/- per month, but stated that he was giving Rs. 8,000/- per month + Bhatta of Rs. 100/- per day. It was also admitted that while discharging the duty, Rauf met with the accident and later on succumbed to the

injuries.

04. Respondent no.02 - Insurance Company also filed written statement and denied all the averments in the petition. It was denied that Rauf was serving with respondent no.01 as driver and was getting salary. It was also denied that due to the mechanical defect, the tempo dashed tree, causing injury to deceased and then he succumbing to those injuries. It is stated that there is delay of 07 days in filing FIR with the police. The said delay has not been explained. The petition is filed in collusion by the claimants as well as respondent no.01.

05. Issues were framed. Claimants had adduced evidence to support their claim. Taking into consideration the evidence, the petition was partly allowed. The respondents were directed to pay jointly and severally an amount of Rs. 5,04,931/- together with interest at the rate of 12 % per annum from the date of accident till actual realization of entire amount. Further amount of Rs. 1,32,000/- was also granted to be recovered from the respondents jointly and severally towards medical expenses actually incurred by the claimants on the treatment of the deceased.

06. Present appeal has been filed by the

claimants challenging the quantum that has been awarded by the learned Commissioner. It has been contended that the learned Commissioner has wrongly taken the basis of Rs. 5,960/- equivalent to the basic pay of the skilled worker in 2013, stating that there is no evidence on record. It is stated that the Commissioner ought to have considered that the deceased was getting salary of Rs. 8,000/- per month. It is also contended that in view of Section 4A(3)(b) of the E.C. Act, the learned Commissioner has failed to grant 50 % of the penalty amount against respondent no.01.

07. Heard learned Advocate Mr. Zia-Ul-Mustafa for the appellants and learned Advocate Mr. V.R. Mundada for respondent no.02. Respondent no.01 and respondent no.03, though appeared through Advocates, respective Advocates were absent. In fact, respondent no.03 is the original claimant no.04.

08. It has been vehemently submitted on behalf of the appellants, that in specific words, respondent no.01 has admitted in the written statement, that he was giving salary of Rs. 8,000/- per month and Bhatta of Rs. 100/- per day. Under such circumstance, at least, the calculation ought to have been on the basis of Rs. 8,000/- per month. So also, the penalty has not been awarded though copy of the notice issued under Section 10 has been

produced on record. The very purpose for which that notice is required to be issued was allowed to be frustrated and respondent no.01 failed to participate in the proceedings later on before the trial Court itself. There was no explanation on the part of respondent no.01, as to why he did not pay the compensation within the statutory period.

09. Per contra, learned Advocate appearing for respondent no.02 vehemently submitted that except the bare words of the widow of the deceased, there was nothing on record to support her contention that her husband was getting salary of Rs. 9,000/- per month and allowance of Rs. 100/- per day. Under such circumstance, the learned trial Court was justified in holding the salary equivalent to a skilled labour at the time of death as his basic salary. Reliance has been placed on the decision in *United India Insurance Co. Ltd. Vs. Jagdish Madhukar Patil & another* (2017(2) Mh.L.J. 470), wherein the claimants had contended that he was getting salary of Rs. 4,000/- per month; however, the trial Court considered said salary at the rate of Rs. 6,000/- per month and therefore, the said compensation which was granted by the learned Commissioner was reduced. Further reliance has been placed on the decision of Madras High Court in *United India Insurance Co. Ltd. Vs. Seethammal* [(2015) 1 LLJ 650], wherein on the facts of the case, the concerned Court had refused to enhance the

amount.

10. At the outset, it can be said that the present respondent no.02 has not filed any appeal challenging the findings given against it by the learned Tribunal. Therefore, those findings i.e. the deceased was serving as driver with respondent no.01 on his tempo and his death has been caused during and out of the course of employment with respondent no.01 have achieved finality. Now, only question is in respect of quantum. The claimants had come with a case that the deceased was earning Rs. 9,000/- per month and in addition to that, he was getting Rs. 100/- per day as Bhatta; whereas respondent no.01, who could be interested in denying the said fact and in whose knowledge the said fact was, in his written statement had stated that he used to give Rs. 8,000/- per month as salary and Rs. 100/- per day as Bhatta. Now, as regards Bhatta is concerned, it has not been stated by the claimants as to for how many days deceased used to go on trip so that Bhatta can be claimed. It cannot be considered that, that Bhatta was irrespective of the trips; otherwise it would have been included in the salary itself. Under such circumstance, when there is no corroboration to the days of Bhatta, it will have to be considered that the deceased was getting salary of Rs. 8,000/- per month. Learned Commissioner erred in not considering the admission

given by respondent no.01 in his written statement. Though the Insurance Company had denied the said fact, yet, we are required to consider the position of the Insurance Company. The Insurance Company is not justified in challenging the income of the deceased which respondent no.01 used to give him. On the background, that the respondent no.01 had stated that he used to give salary of Rs. 8,000/- per month and then the Insurance Company intended to canvas that there was a collusion between respondent no.01 and the claimants, then evidence ought to have been adduced to that effect. When no evidence has been adduced, there is no hurdle in accepting that the deceased used to get salary of Rs. 8,000/- per month.

11. In view of Section 4A of the E.C. Act, the amount of compensation where death results from the injury, the compensation to be awarded would be an amount equal to 50 % of the monthly wages of the deceased employee, multiplied by the relevant factor or an amount of Rs. 1,20,000/-, whichever is more. 50 % of the monthly salary of the deceased would be Rs. 4,000/- per month. The age of the deceased, as has been concluded by the learned trial Court, is 45 years and therefore, as per Schedule IV of the Act, the relevant factor would be 169.44. Thus, the claimants would be entitled to get compensation of Rs. 6,77,760/- (Rs. 4,000/- per month X 169.44).

Learned trial Court has granted amount of Rs. 1,32,000/- towards medical bills which has not been challenged by the Insurance Company.

12. Further objection to the said award by the appellants is in respect of 50 % penalty to be granted under Section 4-A(3)(b) of the Act. Clause 'b' of Section 4-A(3) reads thus :

"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)

(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. "

The said penalty can be claimed only against employer and not the Insurance Company. Here, in this case, there is no evidence led by the claimants, that the notice under Section 10 of the

Act was issued to respondent no.01 also prior to the institution of the petition. No doubt, in their petition, they had claimed penalty but there was no specific prayer as against respondent no.01. The examination in chief of CW 01 Jabeen Begum is nothing but replica of the petition and as such, it appears that even when the arguments were advanced before the learned trial Court, there was no prayer on behalf of the claimants to issue notice as per the proviso to Sub-section 3(b) to Section 4A of the Act. When notice was not issued giving reasonable opportunity to the employer, as to why such penalty should not be imposed upon him, the penalty cannot be so imposed now. Under such circumstance, for the above said reasons, the appeal deserves to be partly allowed to the extent of quantum only.

13. Hence, the following order :-

(a) The appeal is hereby partly allowed to the extent of quantum, as follows, by setting aside the judgment and award passed by the Commissioner for Employees' Compensation & Judge, Labour Court, Nanded, in ECFA No.23 of 2013, dated 11-08-2014 :-

"2. The respondents shall pay jointly and severally amount of Rs. 6,77,760/- to the petitioners with interest at the rate of 12 % per annum from the date of accident till its realization as a compensation."

(b) It is clarified that rest of the award is maintained, as it is.

(c) There shall be no order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

.....