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

*Reserved on: 23<sup>rd</sup> May, 2019*  
*Pronounced on: 01<sup>st</sup> July, 2019*

+ **FAO 396/2015**

M/S BHARAT TOURIST PVT LTD & ANR ..... Petitioners  
Through: Mr. Jitender Mehta, Advocate.

versus

GANGA DEVI & ORS ..... Respondents  
Through: Mr. Hari Kishan, Advocate for R-1 to  
3.  
Mr. L.K. Tyagi, Advocate for R-4.

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**CORAM:**  
**HON'BLE MR. JUSTICE PRATEEK JALAN**

### **J U D G M E N T**

1. This appeal under Section 30 of the Employee's Compensation Act, 1923 (hereinafter as referred to as "the Act") is directed against an order dated 24.09.2015, whereby the application filed by the appellant under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC") for setting aside the *ex-parte* order dated 31.12.2013 passed by the Commissioner, Employee's Compensation, was dismissed. By the said order, the Commissioner *ex-parte* allowed an application filed by the

respondents no. 1 to 3 herein (“the claimants”) under Section 4A of the Act, and imposed a penalty of ₹2,85,360/- on the appellant.

2. The claimants are the wife and children of one Mahindra Singh who was employed as a driver with the appellant. He met with a fatal road accident on 16.07.2012 which led to an application for compensation under the Act being filed on 13.08.2012. The respondents in the application were the appellant/employer and the respondent no.4, which is the insurance company with which the vehicle was insured.

3. The claim was decided on 21.02.2013 by the Commissioner, Employee's Compensation and the insurance company was directed to pay the sum of ₹5,70,720/- to the claimants. The operative portion of the Commissioner's order reads as follows-

*“7. In view of the above made discussion and calculation, petitioners are entitled to get Rs.5,70, 720/- as death compensation from Respondent No-1. Since the vehicle in question was insured with Respondent No -3 as such Respondent No -3 is liable to indemnify to petitioners. I do not find any sufficient ground to impose penalty upon the respondents, as such, same prayer of petitioners are dismissed.*

*8. As respondent no-3 despite having the notice of accident, not discharged his responsibilities as per section 4A of the Act, as such he is liable to pay interest @ 12% from the date of accident till the date of realization.*

*9. In view of above made discussion and calculation, I direct Respondent No-3 i.e. M/s The Oriental Insurance Co. Ltd., Regd. Office-Oriental House, A-25/27, Asaf Ali*

*Road, New Delhi-110002 to deposit Rs.5, 70, 720/- (Rupees Five Lacs Seventy Thousand Seven Hundred Twenty only) within 30 days from this order in favour of Commissioner, Workmen Compensation along with interest @ 12 % p.a. from the date of accident till the date of realization failing which same shall be recovered by way of land revenue.”*

4. After the passing of this order on 02.04.2013, the claimants made a further application under Section 4A of the Act, seeking imposition of penalty upon the appellant. On that application, the Commissioner passed an order dated 31.12.2013 wherein it was recorded that the appellant did not appear despite service of summons and was, therefore, proceeded *ex parte*. Upon the finding that the appellant did not deposit the compensation amount as required under Section 4 of the Act, the Commissioner imposed a penalty of 50% thereof upon the appellant.

5. The appellant filed an application under Order IX Rule 13 of the CPC for setting aside the *ex-parte* order of the Commissioner on the ground that it had not received the summons and had received notice of the order dated 31.12.2013, only upon being served with it from the office of the Sub-Divisional Magistrate, Saraswati Vihar. It is stated in the application that an employee of the appellant had received the summons and did not inform the appellant. The application was resisted by the claimants stating that the service had been refused by the appellant, and was disposed of by the impugned order dated 24.09.2015, finding that the notices/summons were duly served on the appellant and sufficient opportunities were afforded to them. The

Commissioner has also noted that the appellant did not file any documentary evidence in support of its contentions.

6. During the course of proceedings before this Court, the penalty amount has been deposited in the Registry of this Court by the appellant and the order awarding penalty has been stayed. The claimants (respondent nos. 1 to 3 herein) filed CM Appl. No. 6752/2018 for release of the amount deposited. In the course of the hearing of that application, learned counsel for the parties agreed that the appeal itself be heard finally.

7. I have heard the parties on the following substantial questions of law arise in these proceedings:-

A. Whether the Commissioner under the Act is empowered to proceed *ex parte* in the absence of any record regarding the service of summons on the party concerned?

B. Whether a separate application under Section 4A of the Act is maintainable, when the provisions of Section 4A have been considered in the original compensation order?

C. Whether the liability for penalty under Section 4A of the Act is fastened upon the employer or the insurance company?

8. Mr. Jitendra Mehta, learned counsel for the appellant referred to the records of the Commissioner to submit that in fact no notice of the application under Section 4A had been served upon the appellant. He pointed out that, in the order dated 31.12.2013, it has been stated that

summons were issued to the appellant on 21.02.2013 and 02.09.2013. However, the first of these dates is prior to the application having been filed and on the second date, the record reveals that the Commissioner did not in fact hold a hearing. In these circumstances, Mr. Mehta submitted that the appellant's application under Order IX Rule 13 ought to have been allowed. Mr. Mehta also submitted that the principal order of the Commissioner dated 21.02.2013 itself contained direction under Section 4A and the order dated 31.12.2013 in effect revisits issues which had already been decided and closed. His third contention is that the vehicle having been properly insured, it is the insurance company which ought to have been made liable for the penalty, if any.

9. Mr. Hari Kishan, learned counsel for the claimants drew my attention to the observations contained in the order dated 31.12.2013, and 24.09.2015 to the effect that summons had in fact been served on the appellant. However, he conceded that the amount should have been paid by the insurance company rather than the appellant. Mr. Tyagi, learned counsel for the respondent no.4/insurance company, disputed the last submission and relied upon the judgment of the Supreme Court in *Ved Prakash Garg. vs. Premi Devi* (1997) 8 SCC 1 to contend that the penalty amount is payable only by the employer. He has also referred to two judgments of this Court on the same point.

10. The first point to be decided concerns the service of notice upon the appellant in the claimants' application under Section 4A of the Act. The record of the Commissioner was requisitioned by this Court,

and I have gone through the order sheets with regard to the said application. It appears that the application was taken up on six dates, and the orders recorded are reproduced below:

“6-6-13 –

*File taken up today as A/R of claimant moved an application for penalty.*

*A/R of claimant present.*

*Respondent – Absent*

*As prayed. Next date is fixed for 15-7-13 at 10:00 A.M. for show cause notice to respondent for penalty.*

*Sd*  
*C.W.C*

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15-7-13 –

*Claimant / AR – Present*

*Respondent – Absent*

*As prayed issue notice to Respondent through Speed Post for 26-8-13 at 10:00 A.M. for penalty.*

*Sd*  
*C.W.C*

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26-8-13 –

*Claimant / AR – Present*

*Respondent – Absent*

*As prayed issue dasti notice to Respondent for 02-9-13 at 10:00 A.M. for penalty.*

C.W.C

2-9-13 –

*Claimant / AR – Present*

*R- 1 – Absent*

*R- 2 – Present*

*Ld. Commissioner has gone to training. As prayed. Next date is fixed for 5-9-13 at 10:00 A.M. as directed by Ld. Commissioner for reply & arguments on the application.*

*Reader*

5-9-13 –

*Claimant /AR – Present*

*R-1 – Absent*

*R-2 – Absent*

*Despite service of summon R-2 neither appeared & nor filed reply. dt. notice regarding penalty. It appears R-2 does not want to submit defence in this regard. As such matter is proceeded ex parte Respondents. Reserved for order.*

*Sd*

*C.W.C*

*Order signed. Pl. issue it all the concerned.*

*Sd/-*

*31/12/13”*

11. It appears from the above that, on the first three dates, the Commissioner directed service of notice upon the appellant. However, on the next date, 02.09.2013, the Commissioner was unavailable, and on his directions, the matter was fixed on 05.09.2013 “for reply and

arguments on the application”. There is no record on that date as to whether service had in fact been effected upon the appellant. Despite this, on 05.09.2013, the Commissioner proceeded to record that the appellant had neither appeared nor filed a reply, and therefore proceeded *ex parte*. The matter was reserved for orders on the same date, and the order signed on 31.12.2013. No separate summons had been issued for 05.09.2013. The record also shows that although the notice appears to have been sent to the appellant by speed post pursuant to the order of *dasti* service made on 26.08.2013, there was neither an acknowledgement of receipt placed on record, nor an affidavit of service. In these circumstances, the Commissioner’s conclusion that the appellant had not appeared despite service of summons was unjustified.

12. The order dated 31.12.2013, as pointed out by Mr. Mehta, is also clearly in error in recording that summons were issued and filing of reply was directed on 21.02.2013 and 02.09.2013, and that the appellant did not appear or file a reply. The question of issuing summons or directing reply to be filed on 21.02.2013 did not arise as the application was filed only on 02.04.2013 and, according to the record, first taken up on 06.06.2013. Although notice was issued *dasti* by order dated 26.08.2013, as stated hereinabove, there was no evidence before the Commissioner that it had been served. On 02.09.2013, the Commissioner was not available and no further directions were given regarding filing of the reply.

13. In the impugned order dated 24.09.2015, after noting the contentions of the parties, the Commissioner has recorded the following conclusion:

*“6. And Whereas, after going through the facts of this case, and examination of documents on record, reply by claimant side, it is established/ found that the notices/ summons have been duly served upon the applicant respondent management. Further, sufficient opportunities have been afforded to the respondent to defend themselves but it is regretted that the management failed to appear/defend themselves in this matter. It is also pertinent to mention here that even during the hearing/proceedings in the matter, the respondent management not filed any documentary evident to prove their contention.*

*7. And Whereas, in view of above facts and circumstances and material available on record, the application filed by the respondent management for setting aside the order dated 31.12.2013 is not sustainable and hence, the same is dismissed accordingly and the stay order dated 06.04.2015 for recovery stands quashed.”*

The above observations of the Commissioner do not give any details as to the evidence which led to the finding that the appellant had in fact been served. It is, therefore, not possible to sustain the order as it stands.

14. The appellant and the respondent no. 4 (insurance company) have raised the further plea that the claimants' application under Section 4A of the Act was not maintainable in view of the fact that, in the order dated 21.02.2013, Section 4A was invoked to award interest

in favour of the claimants, and the claim for penalty was expressly rejected. They have also raised contesting contentions regarding whether the liability for penalty, if any, falls on the employer or the insurance company. Learned counsel for the parties therefore submitted that, in the event the impugned order is set aside, the matter be remanded to the Commissioner for a fresh *inter partes* decision on the contentions of the parties. In this view of the matter, I do not propose to enter upon the merits of these submissions, or deal with the judgments cited by the parties in this connection. The parties will be at liberty to raise these arguments before the Commissioner.

15. In the facts and circumstances aforesaid, the appeal is allowed and the impugned order of the Commissioner dated 24.09.2015 is set aside. The appellant's application for setting aside the *ex parte* order dated 31.12.2013 is also allowed; the order is set aside and the matter remanded to the Commissioner for a fresh decision on the application of the claimants (respondent nos. 1 to 3 herein) under Section 4A of the Act. The parties shall appear before the Commissioner on 12.07.2019, when the appellant and the respondent no. 4 (insurance company) shall also file their replies to the application. The Commissioner will fix a date of hearing and pass orders in accordance with law after hearing the parties. Their rights and contentions are left open. In view of the fact that the application is of the year 2013, the Commissioner is directed to dispose of it expeditiously, and the parties are directed to cooperate in this regard.

16. The appeal is allowed in terms of the above, but without order as to costs. Consequently, the Registry is directed to release to the appellant, the amount deposited by it in this Court, pursuant to the interim order dated 16.11.2015, passed in this appeal.

**PRATEEK JALAN, J.**

**JULY 01, 2019**

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