

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No. 992 of 2013**

1. Ramkumar, S/o Ram Vriksh Mahto Ji, aged about 50 years
2. Smt. Lilawati Devi, W/o Ram Kumar Mahto, aged about 45 years.

Both are R/o Ganesh Chowk, Charoda Bhathapara, Near Bus Stand, Charoda, Tahsil (Civil and Revenue District) District Durg (CG)

---- Appellants**Versus**

1. The Senior Sub Divisional Engineer, Rail Path, South Eastern Central Railway, Division, Raipur, District Raipur (CG)
2. Union of India, through General Manager, South Eastern Central Railway, Bilaspur, District Bilaspur (CG)
3. The Manager, A To Z Maintenance and Engineering Service Pvt. Ltd. 116, 1st Floor, Shopping Mall, Arjun Marg, Near D.L.E. City, Phase-1, Gurgaon 12202 Haryana, Through Union of India, General Manager, S.E.C.R., Bilaspur (CG)

---- Respondents

For Appellants	:	Mr. Amiyakant Tiwari, Advocate
For Respondent No.1 & 2	:	Mr. HS Ahluwalia, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, CJ**Hon'ble Shri Parth Prateem Sahu, J****Order On Board****Per Parth Prateem Sahu, J****09/07/2020**

1. Appellants, who are legal representatives of deceased employee, have preferred this appeal under Section 30 of the Workmen's Compensation Act, 1923, now the 'Employee's Compensation Act, 1923', (henceforth 'the Act of 1923') against the judgment / award dated 17.7.2013 passed by the

Commissioner, Workmen's Compensation Act - cum - Labour Court, Durg (for short 'the Commissioner') in Case No.56/W.C. Act/2010 Fatal, for enhancement of compensation and also for grant of interest @ 12% per annum from the date of accident and penalty upto 50%.

2. Facts relevant for disposal of this appeal are that Jitendra Mahto was employed by non-applicant No.3, a private Contractor, as Housekeeping staff in Jan Shatabdi Express train. On 23.3.2010 when said Jitendra Mahto while on the work of cleaning in the said train, he fell down near H-Cabin, BMY Charoda, suffered grievous injuries and while undergoing treatment in Sector-9 Hospital, Bhilai, District Durg died on 24.3.2010.
3. On account of death of Jitendra Mahto stating to be accident arising out of and in the course of his employment, appellants filed an application under Section 22 of the Act of 1923 against respondent No.1 to 3, for award of compensation mentioning therein that on the date of accident, deceased was 22 years old, employed with respondents and he was getting salary of Rs.5,000/- per month.
4. Non-applicant Nos.1 & 2 /respondents No.1 & 2 submitted their reply to application denying the fact that the deceased being employed in their department, posted as 'Housekeeping staff' in Jan Shatabdi Express train and that he died on account of fall from the said train. They have denied that the deceased died in the course of his employment with them. The income and

age of the deceased, as pleaded in application, was also denied by non-applicants No.1 & 2. In additional submissions it was pleaded by non-applicants No.1 & 2, that to ensure smooth operation of trains, non-applicant Nos.1 & 2 engaged private agencies. In this context, a contract for maintenance & cleaning of trains was awarded to non-applicant No.3 and as per terms of contract, non-applicant No.3 is responsible for all types of liabilities of the employees engaged by non-applicant No.3 in execution of the work under contract. As such, liability to pay amount of compensation is upon non-applicant No.3. It was also pleaded that on 23.3.2010 the deceased made a deliberate attempt to alight down from running train, as a result he fell down and sustained injuries. He was taken to the Sector-9 Hospital, Bhilai where he succumbed to injuries on next day. Thus, the deceased himself was responsible for the said accident. The deceased was neither employee of non-applicants No.1 & 2 nor were they paying any salary or wages to him.

5. Non-applicant No.3 /respondent No.3 also filed his reply to the application admitting that deceased was engaged by him as 'Housekeeper' for maintenance & cleansing of train. However, it was denied that deceased died due to injuries sustained by him in an accident arising out of and during the course of his employment because on the date of accident, the deceased was not on duty with Jan Shatabdi Express train as 'Housekeeper'. It was also pleaded that deceased Jitendra

Mahto met with accident and died on account of his own negligence.

6. On the basis of pleadings of the parties, the Commissioner has framed as many as 04 issues for consideration and upon appreciation of the pleadings and evidence placed on record by the respective parties, allowed the application in part and awarded a sum of Rs.4,32,740/- as compensation, by recording that deceased Jitendra Mahto died in an accident occurred while he was working for and under the non-applicants; he was earning Rs.4,000/- per month and that liability to pay the entire amount of compensation is of non-applicant No.3. The Commissioner has directed non-applicant No.3/ respondent No.3 to deposit the award amount within a period of two months from the date of award/judgment, in default, the award amount would carry interest @ 12% per annum from the date of accident till the date of deposit
7. Mr. Tiwari, learned counsel appearing on behalf of appellants submits that the Commissioner despite holding in Para-6 of its award / judgment that from the evidence adduced by appellants it is established that monthly income of the deceased was Rs.5,000/-, has erroneously determined the compensation by taking monthly income of deceased as Rs.4,000/-, applying omitted provision of Explanation-II of Section 4 of the Act of 1923. He submits that the Act of 1923 was amended w.e.f. 18.1.2010 and not only the name of the Act has been amended from "Workmen's Compensation Act, 1923' to "Employee's

Compensation Act, 1923” but Explanation -2 of Section 4 (1) of the Act of 1923 was also deleted. Whereas, the accident in question occurred on 23.3.2010 i.e. after coming into operation the amended provision of the Act of 1923. He submits that once the maximum cap of income to be taken of an employee stands deleted, then the actual proved income of an employee is to be taken for the purpose of calculating amount of compensation. He also submits that under the provision of Section 4 of the Act of 1923, once the employer fails to pay the amount of compensation as soon as it falls due, then award of interest at the rate of 12% p.a. from the date of accident is mandatory. Admittedly, the respondents/non-applicants have not paid the amount of compensation as soon as it falls due, therefore, the Commissioner should have awarded interest from the date of accident and not conditional/default interest. It is further contended that the Commissioner has not awarded any amount towards penalty even when the non-applicants / respondents have not deposited or paid the amount of compensation against the accidental death of the deceased employee nor recorded any satisfaction or reason for not paying the amount of compensation which fell due on the date of accident. He submits that the Commissioner under the Act of 1923 erred in not considering the provision under Section 4A (3) (b) of the Act of 1923 for awarding the amount of compensation as per Act of 1923. He also submits that award of penalty unless & until reason / justification of delay is shown, is mandatory. Lastly, he submits that there is no dispute with

regard to employment of deceased as a Housekeeper in Jan Shatabdi Express train and further, non-applicant No.3 / respondent No.3 is a Contractor of non-applicant No.1 & 2, therefore, non-applicant Nos.1 & 2 are principal employer of deceased and being so, the Commissioner ought to have directed the principal employer to deposit the entire amount of compensation awarded and thereafter to recover the same from the Contractor under the provisions of Section 12 of the Act of 1923. He places his reliance on the case law of Gopal Agrawal vVs. Munni Devi reported in 2018 ACC 705 Delhi (equivalent citation- Manu/DE/175/2018) in support of his submission with regard to liability of principal employer to first satisfy the amount of compensation.

8. Per contra, Mr. Ahluwalia, learned counsel representing respondents No.1 & 2 submits that respondent No.3 was engaged as a Contractor for a period from 2009 to 2015 which came to an end on the last date of agreement; deceased employee was employed by the Contractor and not by respondents No.1 & 2, he was not on the rolls of respondent Nos.1 & 2 as an employee, hence, no liability can be fastened upon respondents No.1 & 2. It is further argued that respondent No.3 has deposited the amount of compensation with interest. Referring to relevant documents placed along with reply to this appeal, it is submitted that on the date of accident the deceased was not on duty and that there was no stoppage of train between Durg & Raipur. He submits that the

Commissioner has rightly fastened liability to satisfy the amount of compensation on respondent No.3, who was original employer of the deceased. He submits that the Commissioner has awarded just amount of compensation considering the relevant provisions of the Act of 1923 and it does not call for any interference.

9. We have heard learned counsel for parties and perused the record.

10. Upon hearing of learned counsel for parties, following questions of law were formulated for consideration of this appeal:-

“1. Whether the Commissioner was justified in calculating amount of compensation by taking income of deceased as Rs.4,000/- per month only, taking into consideration un-amended Explanation-2 of Section 4 of the Act of 1923 which stands deleted w.e.f. 18.1.2010?

2. Whether the Commissioner was justified in not awarding interest @ 12% p.a. from the date of accident under Section 4A (3) (a) of the Act of 1923?

3. Whether the Commissioner was justified in not invoking provision of Section 12 of the Act of 1923 in the facts and circumstances of the case?

4. Whether the Commissioner erred in not awarding penalty in terms of Section 4A (3) (b) of the Act of 1923?”

11. So far as submission made by learned counsel for respondent Nos.1 & 2 with regard to employment of deceased on the date of accident is concerned, the same cannot be considered in this appeal as respondent Nos1 & 2 have not filed any separate appeal challenging the finding recorded by the Commissioner vide judgment/award impugned that the death of deceased was not due to accident arising out of and during the course of his employment. Hence, the submission made by learned counsel for respondents No.1 & 2 is hereby repelled.

12. So far as submission made by learned counsel for respondent Nos.1 & 2 that in view of provision of Section 12 (3) of the Act of 1923 it is not necessary or mandatory to fasten liability to satisfy amount of compensation on the principal employer i.e. Railways, is concerned, the same also is not correct. Perusal of Section 12 (3) of the Act of 1923 would show that this only specifies that the provision under Sections 12 (1) & 12 (2) of the Act of 1923 would not bar employee or his legal representative from recovery of amount of compensation from the Contractor instead of principal employer. Submission made by learned counsel for respondents no.1 & 2 with regard to Section 12 (3) of the Act of 1923 is misconceived.

13. Coming to the first question of law framed by us with respect to income of the deceased for the purpose of calculating amount of compensation. The Commissioner has found proved the income of the deceased as Rs.5,000/- per month, hence there is no dispute on the income of the deceased, as argued by

learned counsel for appellants that on the date of accident income of deceased was Rs.5,000/-. In this situation, the Commissioner should have taken the income of deceased as Rs.5,000/- per month for the purpose of calculation of amount of compensation. The provision of Section 4 stood amended w.e.f 18.1.2010. In the case at hand, accident took place on 22.3.2010. Therefore, the amended provision of Section 4 will apply. Prior to incorporation of amendment, under Explanation II of Section 4 (1) there was a cap of maximum income to be taken of a workman as Rs.4,000/- for the purpose of calculating the amount of compensation even if the actual income of workman was more. But, under the amended provision, this Explanation was deleted. After deletion of the Explanation, there is no cap of maximum income for calculating the amount of compensation. The amount of compensation is to be calculated on the actual proved income. In view of above, we set aside the finding recorded on Issue No.2 with respect to income of the deceased as Rs.4,000/- and fix the income of deceased as Rs.5,000/- per month.

14.As regards the second question of law, the issue of award of interest from the date of accident has been dealt by Hon'ble Supreme Court in case of Pratap Naraain Singh Deo vs. Srinivas Sabata & another reported in (1976) 1 SCC 289 and it was held thus:-

“7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to

pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due with after the Commissioner's order dated May 6, 1969 under section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of a agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under section 3, in respect of the injury, was suspended until after the settlement contemplated by section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary."

15. Further, in the matter of **Kerala State Electricity Board and another v. Valsala K. and another** reported in **(1999) 8 SCC 254** a three Judges Bench of the Hon'ble Supreme Court considered the issue with regard to the date for determining the liabilities and rights of the parties and held as under:-

"5. Our attention has also been drawn to a judgement of the Full Bench of the Kerala High Court in *United India Insurance Co. Ltd. v. Alavi*, (1998) 1 KLT 951 (FB) wherein the Full Bench precisely considered the same question and examined both the above noted judgements. It took the view that the injured workmen becomes entitled to get compensation the moment he suffers personal injuries of the types contemplated by the provisions of the Workmen's Compensation Act and it is the amount of compensation payable on the date of the accident and not the amount of compensation payable on account of the

amendment made in 1995 , which is relevant. The decision of the Full Bench of the Kerala High Court, to the extent it is in accord with the judgement of the larger bench of this Court in Pratap Singh Narain Singh Deo v. Srinivas Sabata (supra) lays down the correct law and we approve it.”

16. In view of above law laid down by the Hon'ble Supreme Court that it is clear that the amount of compensation to a workman or legal heirs of deceased workman is payable on the date of accident and not on the date of passing of award by the Commissioner. The provision of Section 4A (3) (b) of the Act of 1923 provides for award of interest upon the employer's default in paying the amount of compensation due under the Act of 1923 within one month from the date when it fell due. As per law laid down by Hon'ble Supreme Court, the compensation fell due as soon as injuries suffered by workman / employee. Hence, the award of interest should be from the date of accident and not from the date of passing of the order/award by the Commissioner.
17. Considering the judgment passed in case of Pratap Singh Deo Rai (supra) has held that date of entitlement of compensation will be the date of accident and if employer fails to deposit / pay the amount of compensation within the period of 30 days from the date of accident, the interest @ 12% p.a. is to be awarded from the date of accident. In case at hand, accident took place on 23.3.2010 and perusal of the impugned award/judgment passed by the Commissioner does not reflect that the respondents have deposited/paid the amount of compensation to the applicants/legal heirs of the deceased employee within

the prescribed time.

18. For the foregoing reason and in the light of law laid down by Hon'ble Supreme Court, the Commissioner erred in not awarding interest on the amount of compensation from the date of accident but awarded default/conditional interest @ 12% p.a. which is liable to be set aside and it is hereby set aside. We hold that the applicants are entitled for the interest at the rate of 12% p.a. from the date of accident on the amount of compensation.

19. As regards the Question of Law No.3- whether the Commissioner was justified in not invoking provision of Section 12 of the Act of 1923, we find it appropriate to extract below Section 12 of the Act of 1923 for reference;-

"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. 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.”

20. Provision of Section 12 is very clear and specific that when any person engages another person under a contract, in the course or for the purpose of his trade or business for execution of his work and the whole or any part of the work to be ordinarily part of the trade or business of principal, the principal shall be liable to pay to any employee employed in the execution of the work, any compensation if that employee had been immediately employed by him. Sub-section (2) of Section 12 envisages that principal to be indemnified by the Contractor by recovering the amount of compensation so paid by him or it.

21. In **Vijayraghavan v. Velu** reported in **1973 1 LLJ 490** the Kerala High Court has dealt with the provision of Section 12 of the Act of 1923 and held thus:-

“2.If any workman suffers an injury as a result of an accident arising out of or in the course of the employment, the employer is liable to pay compensation to the workman under Section 3 of the Act. There must be an employer and employee relationship between the workman and the person against whom compensation is asked for. But, in many cases, persons who want to get work done try to avoid this liability by contracting with someone else to provide labour or to execute the work and then contend that as there is no employer and employee relationship between the workman who suffered an injury and themselves, they are not liable to pay any compensation. To prevent such escape from liability to pay compensation Section 12 has been enacted.....”

22. In the matter of **Assistant General Manager, State Vs. Asha Chouhan** reported in **2004 ACJ 1474**, a Division Bench of the High Court of MP taking into consideration the judgment passed by the High Court of Kerala in case of Vijayraghavan (supra) has dismissed the appeal filed by the Bank taking into consideration the provision of Section 12 (1) of the Act of 1923.
23. In the facts of case, where it is admitted by respondent Nos.1 & 2 that they have engaged respondent No.3 as Contractor for purpose of cleaning and maintenance work of Jan Shatabdi Express train in which the deceased was engaged by respondent No.3 as a Housekeeper. In this situation, we are of considered opinion that respondent No.1 & 2 being principal employer are having liability to first satisfy the amount of compensation and thereafter to recover the same under the provision of Section 12 (2) of the Act of 1923.
24. In view of the above, we hold that if the entire amount of compensation is not deposited by respondent No.3, then respondent No.1 & 2 are liable to deposit the amount of compensation before the Commissioner and if the amount of compensation awarded by the Commissioner is already deposited by respondent No.3, then balance amount of compensation to be calculated in view of income as held above and award of interest from the date of accident to be deposited by respondent Nos.1 & 2 and they will recover the amount so deposited by them from respondent no.3 Contractor in terms of Section 12 (2) of the Act of 1923.

25. So far as Question of Law No.4 is concerned, provision under Section 4A (3) (b) of the Act of 1923 prescribes for award of penalty by the Commissioner if in his opinion there is no justification for delay in payment of amount of compensation to the injured / claimant as soon as it fell due. In case at hand, the appellants in their application under Section 22 of the Act of 1923 have sought for the relief of award of 50% penalty along with interest @ 12% per annum from the date of accident. The Commissioner has not considered the entire claim as sought by appellants in their application under Section 22 of the Act of 1923, neither recorded any reason for not awarding the penalty under Section 4A (3) (b) of the Act of 1923 after calculating the amount of compensation to be awarded to the appellants for the accidental death of workman. Proviso to Section 4A (3) (b) of the Act of 1923 provides that an order for 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.

26. Looking to the facts and circumstances of the case where the Commissioner has not recorded any reason for not awarding penalty despite specifically prayed and claimed by the appellants for award of penalty to the extent of 50% of the amount of compensation, and further considering that the proviso to Section 4A (3) (b) of the Act of 1923 mandates that if the Commissioner arrives at a conclusion that penalty is required to be awarded, then the Commissioner has to issue

show-cause notice, we find it appropriate to remit back the case only for the purpose of considering the claim of claimants/ appellants with regard to award of penalty.

27. For the foregoing reasons, the appeal is allowed in part.

Income of deceased workman is taken as Rs.5000/- per month and by applying multiplier of 221.37 to 50% of the income of deceased, the amount of compensation to be awarded comes to Rs.5,53425/-. Appellants will also be entitled for interest @ 12% p.a. from the date of accident.

28. Respondent No.1 & 2 will deposit the entire compensation with interest first before the Commissioner and thereafter recover the same from respondent No.3 (Contractor) in accordance with law. If respondent No.3 has already deposited the awarded amount, then in such a situation respondent No.1 & 2 shall deposit the balance amount of compensation within a period of two months from the date of receipt of copy of the order. It is further directed that the Commissioner shall make all its endeavour to decide the issue of penalty at the earliest, preferably within four months from the date of receipt of certified copy of this order.

29. Record be sent back.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-