

NAFR

HIGH COURT OF CHHATTISGARH BILASPUR**M. A. (C) No. 71 of 2015**

1. Munnu Soni S/o Umesh Soni, aged about 26 years,
 2. Umesh Soni S/o late Harihar Prasad Soni, aged about 48 years,
Both resident of Mohalla Chandni Chowk, Police Station & Tahsil Ambikapur, Civil & Revenue District Surguja (C.G.).
- Appellants**

Versus

1. Dhaneshwari Bai Wd/o Anil Kerketta,
 2. Sushila D/o late Anil Kerketta,
 3. Babu S/o late Anil Kerketta,
All resident of village Jhargawa, Police Station and Tahsil Sitapur, District Surguja (C.G.).
 4. Santosh Kumar Shrivastava (Contractor), R/o Babupara, Ambikapur, District Surguja (C.G.).
- Respondents**

For Appellants	: Shri Nishikant Sinha, Advocate.
For Respondents No.1 to 3	: Shri Syed Majid Ali, Advocate
For Respondent No.4	: Shri Rishi Rahul Soni, Advocate

Hon'ble Shri Justice Parth Prateem Sahu**Judgment on Board****28.10.2020**

1. Appellants/non-applicants No.1 and 2 have preferred this appeal under Section 30 of the Employee's Compensation Act, 1923 (hereinafter referred to as 'E.C. Act') (prior to 18/01/2010 known as Workmen's Compensation Act) challenging the order dated 28.10.2014 passed by the Commissioner for Employees Compensation Act-cum-Labour Court, Ambikapur, Chhattisgarh (hereinafter referred to as 'Commissioner') in Case No.16/W.C.Act/Fatal/2008

whereby the learned Commissioner allowed the application filed under Sections 10 and 22 of the E.C. Act in part and awarded compensation of Rs.1,69,190/- and 50% of the amount of compensation towards penalty of the awarded amount along with 12% interest from the date of order if the compensation and penalty is not paid within one month.

2. Facts relevant for disposal of this appeal, are that, on 13.02.2007 when Anil Kerketta was working under the employment of non-applicants No.1 and 2 in under construction building, the slab of building fell down over Anil Kerketta. In the said accident, Anil Kerketta suffered grievous injuries over his person. Non-applicant No.1 took the injured to Udaipur Hospital, where looking to the grievousness of injuries, he was referred to Ambikapur Hospital. On the way to Ambikapur Hospital, Anil Kerketta succumbed to the injuries suffered by him. The accidental death of Anil Kerketta (hereafter referred to as 'deceased') was reported to concerned Police Station, based upon which, criminal case was registered.
3. Applicants/claimants who are widow and children of deceased filed an application under Sections 10 and 22 of the E.C. Act seeking compensation of Rs.3,37,000/- along with 50% penalty and interest thereon at the rate of 9% from the date of accident till satisfaction.

4. Non-applicants No.1 and 2/appellants after appearance before the Commissioner submitted reply to claim application pleading therein that facts pleaded in application against them to be false and fabricated. It was pleaded that they are doing the business of goldsmith, having their shop at Gudri Bazar in the name and style of 'Sonam Jewellers'. It was further pleaded that they are not doing the work of civil contracts nor they have employed the deceased.
5. During the pendency of claim application, claimants have filed an application for impleadment of non-applicant No.3 on 16.02.2010, which was allowed and non-applicant No.3 was arrayed in cause-title of application for compensation.
6. Non-applicant No.3 in its reply has submitted that deceased was not under his employment at any point of time; he worked as contractor, but it was not his main occupation. The work of contractor was done by him only for few months in a year and he was involved in some other works. No fatal accident affecting any labourer in place of work under his contract has taken place. The applicants by way of making false pleadings against non-applicant No.3 have arrayed him as party non-applicant.
7. Upon appreciation of pleadings made in claim application and also considering the evidence/statement placed on record by respective parties, learned Commissioner held that deceased died during the course of his employment

under non-applicants No.1 and 2; non-applicant No.2 engaged the deceased along with other workers for construction of building; assessing the income of deceased as Rs.60/- per day and Rs.1650/- per month, awarded a sum of Rs.1,69,190/- as compensation. Further, awarded 50% of calculated amount of compensation towards penalty and interest at the rate of 12% on the awarded amount and penalty, if the amount of compensation and penalty is not deposited within one month from the date of order.

8. Shri Nishikant Sinha, learned counsel for appellants/non-applicants No.1 and 2 submits that learned Commissioner erred in arriving at a finding that deceased was working under his employment. He further submits that construction work of building where the deceased met with an accident and died was a construction of Government building. The contract of Government building (construction of police barrack at Udaipur) was awarded to non-applicant No.3/respondent No.4, who is a Government contractor. Non-applicant No.3 was impleaded by way of amendment by applicants in application filed under Sections 10 and 22 of the E.C. Act before the Commissioner. After framing of issues, no additional issues have been framed by the Commissioner with regard to whether construction work was awarded to non-applicant No.3 under Government contract and deceased was under the employment of non-applicant

No.3 or not. The proceedings drawn by Commissioner is defective as once non-applicant No.3 has been impleaded on the ground that construction of building work under the contract-ship of non-applicant No.3, then proper issue on that pleading ought to have been framed. It is contended that appellants/non-applicants No.1 and 2 have filed two applications before the Commissioner for calling documents relating to contract for construction of police barrack where the accident took place and also for calling the Executive Engineer or any employee from that office for their examination to prove ownership of building and to whom the contract work was awarded. The application for calling documents was dismissed on the ground that documents can be obtained under the Right to Information Act, 2005, but other application is allowed for examination of any employee of office of Executive Engineer to prove that to whom the work of contract for construction of police barrack has been awarded with a condition that process fee for examination of witness be paid within three days. It is further contended that inadvertently process fee could not be paid within three days and learned Commissioner on the next day of hearing only, held that order allowing application for calling employee of office of Executive Engineer was conditional, hence, no further time can be granted, hence not given further opportunity to pay process fee and call

employee of office of Executive Engineer. It is also contended that appellants/non-applicants No.1 and 2 have placed on record copy of work order issued by office of Executive Engineer, Public Works Department (B & R) Division No.1, Ambikapur, recommendation letter of Sub Divisional Officer PWD Mainpat, Sub Division Sitapur to Executive Engineer PWD, Division No.1, which clearly mentions that work for construction of police barrack was awarded to non-applicant No.3 and deceased died while doing the work of Mason in the construction of building of police barrack, of which non-applicant No.3 was a contractor. The liability to satisfy the amount of compensation would be upon the contractor for whom the deceased was working. He next contended that the Commissioner erred in awarding penalty of 50% of calculated amount of compensation without following the procedure enumerated under Section 4A(3)(b) of the E.C. Act. It is lastly contended that under the provisions of Section 4A(3)(b) of the E.C. Act, issuance of show cause notice to non-applicants upon whom the amount of compensation has been fastened is mandatory, but no such proceeding has been drawn by the Commissioner, hence, the impugned award is not sustainable and it is liable to be set aside.

9. Per contra, Shri Syed Majid Ali, learned counsel for respondents No.1 to 3/claimants/applicants submits that learned Commissioner has passed just award and imposed penalty as non-applicants have failed to deposit the amount of compensation in accordance with the E.C. Act. It is contended that award of penalty is a consequential compensation in default of payment of amount of compensation, for which applicants became entitled on account of non-payment of compensation as soon as workman suffered accidental injuries during course of employment.
10. Shri Rishi Rahul Soni, learned counsel for respondent No.4/non-applicant No.3 supports the impugned award and submits that learned Commissioner based on the evidence brought on record by the claimants and non-applicants, rightly arrived at a conclusion that deceased was brought to work at construction site under the employment of non-applicants No.1 and 2, he was working under their instructions. During the course of his employment with non-applicants No.1 and 2, he met with an accident and died. It is further contended that impugned order is based on the facts and evidence placed on record, which does not call for any interference.
11. I have heard learned counsel appearing for the respective parties and perused the record the claim case.

12. The appeal was admitted on two questions of law. First question of law was framed on 24.02.2015 and second question of law was framed on 05.12.2019, which are extracted below :

“(i) Whether the contractor who was carrying out the work of construction at the time of alleged accident has been wrongly exonerated or not?

(ii) Whether finding of the Commissioner for Workmen's Compensation imposing the amount of Rs.84,590/-, by way of penalty without following the mandatory provision prescribed under proviso to sub-clause (b) of sub-section 3 of Section 4-A of the Act of 1923, is perverse?”

13. So far as the first question of law is concerned, perusal of proceedings of learned Commissioner would show that application under Sections 10 and 22 of the E.C. Act was filed on 10.01.2008, non-applicants No.1 and 2 submitted their reply on 26.06.2008, Commissioner framed issues based on initial pleadings of applicants/claimants and non-applicants No.1 and 2 on 22.09.2008. On 03.09.2009, counsel for non-applicants/appellants submitted an application under Order VIII Rule 1(2) of the CPC along with documents relating to office of Executive Engineer (PWD), which was allowed on cost and on same day, counsel for applicants/claimants have made a prayer for impleadment of additional party in the array of non-applicants. The prayer

was allowed and non-applicant No.3 was impleaded as non-applicant and notice has been issued on 29.01.2010. Claimants have filed an application for amendment in claim application under Order VI Rule 17 of the CPC on 10.06.2010, application for amendment was allowed on 28.09.2010 and pleadings of application under Sections 10 and 22 of the E.C. Act was amended by the claimants.

14. From the above, it is apparent that on the date of framing of issues, non-applicant No.3 was not in the array of non-applicants, not a party to litigation and there was no pleading against him till 28.09.2010. Learned Commissioner after impleadment of new non-applicant No.3, pleadings against him in the application, reply submitted by him to application under Sections 10 and 22 of the E.C. Act only on 23.06.2011 ought to have framed additional issues on the basis of amended pleadings and reply of newly impleaded non-applicant No.3, which was not done and decided the entire case based on original pleadings.
15. The other aspect of the case is that based on the documents placed on record of Government Department i.e. office of Executive Engineer PWD, who has floated the contract and issued work order in favour of non-applicant No.3 for construction of police barrack, has made an application for examining employee of office of Executive Engineer PWD, which was also allowed, but on account of non-compliance

of order in part on first chance, right of the non-applicants to examine any employee of the office of Executive Engineer PWD was closed.

16. The whole case as per pleadings and reply of non-applicant No.1 if considered in the light of documents placed on record with regard to award of work to non-applicant No.3 was that it is the non-applicant No.3, who has been awarded contract for construction of police barrack. The Commissioner without taking into consideration that the witness which non-applicants No.1 and 2 wanted to examine has relevance to root of the case as to who is the employer of deceased under the law and who is having the liability to satisfy the amount of compensation, but learned Commissioner though granted an opportunity for calling witness of office of Executive Engineer PWD, had not granted proper opportunity to non-applicants No.1 and 2 for the same, which is apparent from the proceedings drawn by the Commissioner vide order sheet dated 28.06.2012 and 26.07.2012.
17. As the issue raised by learned counsel for the appellants/non-applicants No.1 and 2 is with regard to liability to pay the amount of compensation, which is the basis of their appeal and upon going through the proceedings, particularly, non-framing of any issue subsequent to amendment of pleadings and addition of

additional party i.e. non-applicant No.3, in the opinion of this Court, learned Commissioner erred, firstly in not framing specific additional issue on the basis of additional pleadings placed on record and secondly, not granting an opportunity to prove the defence of appellants/non-applicants by examining the Government employee who are employed in the office of Executive Engineer PWD, Division No.1, Ambikapur. The Commissioner has not arrived at a finding that who was the contractor for construction of Government building where accident took place, in which deceased (workman) died during the course of employment, has not discussed anything with regard to status of non-applicant No.3 in the impugned order, hence, in the opinion of this Court, the case with regard to fixation of liability of payment of compensation upon non-applicants No.1 and 2 or non-applicant No.3 requires reconsideration at the end of Commissioner. It is directed that the Commissioner shall frame additional issue based on subsequent amendment made in the application under Sections 10 and 22 of the E.C. Act filed by the applicants/claimants, reply filed by non-applicant No.3 and further affording an opportunity of hearing to the respective parties to lead further evidence by examining any employee of the office of Executive Engineer PWD or any other witness in support of their claim. Accordingly, first question of law is answered.

18. So far as the second question of law with regard to imposition of penalty of 50% to the calculated amount of compensation in contravention of Section 4A(3)(b) of the E.C. Act is concerned, upon going through the proceedings drawn by the Commissioner, it reflects that Commissioner gave last opportunity to non-applicant No.2 on 26.03.2014 at cost. On 27.05.2014 on account of absence of non-applicants No.1 and 2 as well as their counsel, the Commissioner held that they proceeded *exparte*. On 25.06.2014, application under Order IX Rule 6 of the CPC filed by non-applicants No.1 and 2 was allowed and thereafter, case was fixed for final arguments. After hearing final arguments, Commissioner held that applicants/claimants be entitled for Rs.1,69,190/- as compensation and in the same order, 50% penalty was also awarded. The order sheet does not reflect that Commissioner has issued any notice to non-applicants in terms of provisions of Section 4A(3)(b) of the E.C. Act, particularly the proviso mentioned therein, hence, the proceedings drawn by the Commissioner is in contravention of the provisions of Section 4A(3)(b) of the E.C. Act.
19. The Hon'ble Supreme Court while considering the requirement of issuance of show cause notice as envisaged under proviso to Section 4A(3)(b) of the E.C. Act in case of

Ved Prakash Garg v. Premi Devi and Others reported in
(1997) 8 SCC 1 held thus :

“14.when the employer does not accept his liability as a whole under circumstances enumerated by us earlier then Section 4A(2) would not get attracted and one month's period would start running from the date on which due compensation payable by the employer is adjudicated upon by the Commissioner and in either case the Commissioner would be justified in directing payment of interest in such contingencies not only from the date of the award but also from the date of the accident concerned. Such an order passed by the Commissioner would remain perfectly justified on the scheme of Section 4A(3)(a) of the Compensation Act. But similar consequence will not follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4A(3)(b) of the Compensation Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay in payment of the compensation amount he is not liable for this penalty. However, if ultimately the Commissioner after giving reasonable

opportunity to the employer to show cause takes the view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then the penalty would get imposed on him. That would add a further sum upto 50% on the principal amount by way of penalty to be made good by the defaulting employer. So far as this penalty amount is concerned it cannot be said that it automatically flows from the main liability incurred by the insured employer under the Workmen's Compensation Act.....”

20. In case at hand, learned Commissioner after hearing final arguments and arriving at a finding that non-applicants are entitled to pay the amount of compensation, has not issued the show cause notice for imposition of penalty. The Commissioner while awarding penalty has not complied with the provisions of Section 4A(3)(b) of the E.C. Act.
21. For the foregoing reasons, the award of penalty without show cause notice to non-applicants No.1 and 2 is not sustainable and is hereby set aside. The matter is remanded back to the Commissioner for drawing appropriate proceedings in accordance with the provisions of Section 4A(3)(b) of the E.C. Act for issuance of show cause notice to non-applicants and thereafter, to pass fresh order on penalty. Accordingly, second question is law is answered.

22. In the result, the appeal is allowed. The impugned order is set aside. The matter is remitted back to the Court of Commissioner for Employees Compensation Act-cum-Labour Court, Ambikapur, Chhattisgarh for deciding the case after framing additional issues with regard to fixation of liability to pay the amount of compensation upon non-applicants. After framing additional issues, Commissioner concerned shall provide an opportunity of hearing to all the parties to lead further evidence in support of their claim by examining any of the employees of office of Executive Engineer PWD or any other witness in support of their claim. The Commissioner is further directed to pass an appropriate order on imposition of penalty afresh after issuing show cause notice and giving opportunity of hearing to non-applicants as envisaged under Section 4A(3)(b) of the E.C. Act to decide Case No.16/W.C.Act/Fatal/2008. It is made clear that entitlement of compensation of applicants/claimants decided by the Commissioner is affirmed. The case is remanded only for fixation of liability and initiating proceedings of imposition of penalty in terms of Section 4A(3)(b) of the E.C. Act.
23. Original record of Case No.16/W.C.Act/Fatal/2008 be sent back forthwith along with copy of this judgment. Looking to the filing of an application under Sections 10 and 22 of the E.C. Act by the applicants/claimants, learned Commissioner

is directed to conclude the proceedings and pass fresh order at the earliest without any delay.

Sd/-
(Parth Prateem Sahu)
Judge

Yogesh