

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 15.07.2020

Judgment pronounced on 02.09.2020

MAC No. 280 of 2013

- Rajendra Agrawal, aged about 58 years, s/o late PR Agrawal, Proprietor-Maa Gangai Travels and owner of passenger vehicle bearing No.CG 04 E1057, r/o Near Railway Crossing, Station Para, Rajnandgaon Chhattisgarh

---- Appellant /Non-applicant

Versus

1. Omkar Singh, aged about 65 years, S/o Ratan Singh, R/o Station Para, Ward No. 10, Rajnandgaon, Chhattisgarh
2. Aasha, W/o Omkar Singh Aged About 50 Years R/o Station Para, Ward No. 10, District : Rajnandgaon, Chhattisgarh
3. Bharat S/o Makhan Tiwari Aged About 40 Years, Occupation-Driver CG 04 E1057, R/o Charbhantha, P.S. Sahasur Lohara, Distt. Kabirdham C.G., District : Kawardha (Kabirdham), Chhattisgarh
4. New India Insu.Co. Divisional Manager, Divisional Office Bhilai, Distt. Durg Chhattisgarh

----Respondents

For Appellant	: Shri Rakesh Thakur,Advocate
For Respondents-1 and 2	: Shri Viprasen Agrawal, Advocate
For Respondent- 3	: None appears
For Respondent- 4/Insurance Company	: Shri Pankaj Agrawal, Advocate

Hon'ble Shri PR Ramachandra Menon, Chief Justice &
Hon'ble Shri Justice Parth Prateem Sahu
CAV Order

Per Parth Prateem Sahu, J.

1. This appeal was admitted on 03.07.2017 by learned Single Judge but the substantial question of law could not be formulated as per requirement of Section 30 of the Workmen's Compensation Act, 1923.
2. We have heard learned counsel for the appellant on admission.

3. Shri Rakesh Thakur, learned counsel for the appellant submits that in this appeal, two substantial questions of law are involved. The 1st question is, “Whether the Commissioner, Workmen Compensation justified in holding that the deceased died in an accident arising out of and during the course of employment” and the 2nd question which he tried to formulate is, “Whether the Commissioner, Workmen Compensation justified in imposing the penalty under Section 4A(3)(b) of the WC Act of 1923, without issuing Show-Cause Notice to the appellant under Proviso to Section 4A(3)(b) of the Act of 1923.”

4. The 1st question of law proposed by learned counsel for the appellant is factual in nature and that has been decided by learned Commissioner under the Workmen's Compensation Act, 1923 (hereafter referred to as 'WC Act, 1923') based on the evidence available on record. Therefore, 1st question of law proposed does not come within the purview of substantial question of law.

5. The 2nd question of law proposed by the learned counsel for the appellant appears to be a substantial question of law involved in the appeal which has to be decided by this Court. The substantial question of law involved and requires consideration of this Court is,

(a) “Whether the Commissioner, Workmen Compensation justified in imposing the penalty under Section 4A(3)(b) of the WC Act of 1923, without issuing Show-Cause Notice to the appellant under Proviso to Section 4A(3)(b) of the Act of 1923?”

6. The parties appearing before this Court have consented and agreed to argue the appeal finally on the substantial question of law framed by this Court .

7. Challenge in this appeal is to the order/award dated 13.10.2011 passed by the Commissioner for Workmen Compensation, Labour Court, Rajnandgaon (for short, 'the Commissioner'), in Case No.73/WC Act/2007/Fatal, wherein the Commissioner allowed the application filed under Section 22 of the WC Act, 1923 and awarded a sum of Rs.2,73,087/- as compensation in a death case.

8. Facts relevant for disposal of this appeal are that on 03.06.2007, Dheeraj Singh Rajput (hereafter, referred to as 'deceased'), s/o Omkar Singh and Aasha, respondents- 1 and 2/applicants, was travelling on a Bus bearing No.CG 04 E-1057 (for short, 'offending vehicle') as Conductor under the direction of appellant/NA1, Owner of offending vehicle. While so, when the vehicle reached near village Chaknar Road (Khairagarh-Kawardha Road), it met with an accident by turning turtle. In the said accident, Dheeraj Singh, who was aged about 23 years, working as Conductor, came under the offending vehicle and died. The accident was reported to concerned Police Station, based upon which Crime was registered and Final Report also was filed before the Additional Chief Judicial Magistrate, Khairagarh.

9. Initially, NA1 and 2, who are owner and driver of offending vehicle did not appear before the Commissioner and were proceeded *ex-parte*. Only after completion of recording of evidence of the applicants and

NA3/Insurance Company, NA1 and 2 moved an application for setting aside the *ex-parte* proceeding and to permit them to defend the case. Thereafter, they submitted reply to the claim application filed by respondents-1 and 2, denying the pleading therein with regard to the engagement of the deceased as Conductor with NA1 and consequently, denied other pleadings in the claim application. NA1 admitted that he is owner of offending vehicle and NA2 is Driver and offending vehicle was insured with NA3/Insurance Company. The accident was admitted. It was also admitted the pendency of the Criminal Case before the Competent Court at Khairagarh. But denied the employment with NA1 as Conductor.

10. NA3/Insurance Company submitted reply to the claim application and denied the fact of engagement of deceased as Conductor under the NA1 and his salary/wages @ Rs.2,500/- per month and Rs.50/- per day as daily allowance. It is pleaded that in view of the absence of any documentary evidence placed on record, it is not proved that the deceased is covered under the WC Act, 1923 and further it was pleaded that there was no valid permit, thereby there was breach of conditions of Insurance Policy and the liability to satisfy the amount of compensation is only upon NA1 and 2 ie Owner and Driver of offending vehicle. Insurance Company also pleaded that Driver/NA2 was not possessing valid and effective driving license on the date of accident. The accident was not intimated to the Insurance Company and therefore, it is not liable to pay amount of interest and penalty.

11. Learned Commissioner on the basis of pleadings made by respective parties, has formulated as many as seven issues for

consideration and after concluding the evidence, proceeded the trial. Learned Commissioner, on appreciation of pleadings and evidence placed on record by respective parties, held that the deceased died in an accident arising out of and during the course of his employment with NA1; deceased was aged about 24 years on the date of accident and earning Rs.2,500/- per month; liability to satisfy the amount of compensation is upon the Insurance Company; and further, that the claim is within the purview of the WC Act, 1923; and awarded Rs.2,73,087/- as compensation.

12. Shri Rakesh Thakur, learned counsel for the appellant submits that the Commissioner has not followed the provisions of Proviso under Section 4A(3)(b) under the WC Act, 1923 before passing order of imposing penalty to the extent of 40% of awarded amount of compensation and no Show-Cause Notice was issued under the WC Act, 1923. He also pointed out that the claimants in their claim application while claiming compensation, not sought for any relief for awarding penalty. He also submits that the Commissioner under the WC Act, 1923 has not framed any issue in this regard.

13. Shri Viprasen Agrawal, learned counsel appearing for respondents-1 and 2/Claimants submits that as the amount of compensation was not deposited by the appellant immediately after the accident within a period of 30 days, therefore, the Commissioner has rightly imposed penalty upon the appellant. He also submits that order of imposition of penalty is to be passed when the employer fails to explain or justify the delay in payment of amount of compensation awarded to the injured or legal heirs of

deceased workman, and in the case at hand, the employer/NA1 failed to give any explanation or justification before the Commissioner to avoid penalty.

14. Shri Pankaj Agrawal, learned counsel for respondent-4/NA3/Insurance Company only points out relevant provisions under the WC Act, 1923 for imposing penalty and submits that according to the Act, there is provision for issuance of Show-Cause Notice before imposing the penalty upon the employer.

15. We have heard learned counsel for the respective parties and also perused the record.

16. Perusal of pleadings in the claim application filed by respondents-1 and 2 would show that they prayed for grant of compensation of Rs.4,39,900/- with interest @ 9% and cost of the claim application. In the relief clause claimants have not specifically sought for the relief of imposition of penalty upon the employer/NA1 in very specific terms. The Commissioner under the WC Act, 1923, based on the pleadings, has formulated as many as seven issues for consideration, but no issue was framed with regard to imposing penalty.

17. Perusal of impugned award would show that the Commissioner, at the time of awarding amount of compensation, has directly ordered for payment of 40% of the calculated amount of compensation, towards penalty, in addition to the amount of compensation calculated by the Commissioner under the WC Act, 1923.

18. Section 4 of WC Act, 1923 deals with the amount of compensation and Section 4A envisages compensation to be paid when due and penalty for default. Section 4A(3) which is relevant in the issue for consideration by this Court, is extracted here below for ready reference:

Section 4A (1) xxxxxx (2) xxxxxxx

(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) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and,

(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 percent 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.

19. Proviso appended to Section 4A(3)(b) is very clear wherein it restrains the Commissioner from imposing penalty without issuing Show-Cause Notice to the employer and giving a reasonable opportunity to justify his action.

20. We have perused the proceedings recorded by the Commissioner in Order-sheets but could not get any proceeding drawn by the Commissioner of issuance of Show-Cause Notice to the

appellant/employer before imposing penalty of 40% of the calculated amount of compensation, towards penalty, in addition to the amount of compensation calculated by the Commissioner under the WC Act, 1923 to be awarded to the applicants on the ground of failure in depositing the amount of compensation awarded within the time framed.

21. Hon'ble Supreme Court in the matter of **Ved Prakash Garg Vs Premi Devi and others** reported in 1997 (8) SCC 1, considered the issue with regard to imposition of penalty by the Commissioner upon the employer on account of non-depositing the amount of compensation within time and held thus:

“14. xxxxxxxx It is of course true that one month's period as contemplated under Section 4-A(3) may start running for the purpose of attracting interest under sub-clause (a) thereof in case where provisional payment has to be made by the insured employer as per Section 4-A(2) of the Compensation Act from the date such provisional payment becomes due. But when the employer does not accept his liability as a whole under circumstances enumerated by us earlier then Section 4-A(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 4-A(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 4-A(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 up to 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.”

22. From bare perusal of provision of Section 4A(3)(b) and the law laid down by Hon'ble Supreme Court in **Ved Prakash** case (supra), it is explicitly clear that if the Commissioner, under any circumstances, is of the view that imposition of penalty is required in the facts of given case, then, it cannot be imposed without a Show-Cause Notice, giving reasonable opportunity to the employer for his justification before the Commissioner. No such proceeding has been drawn by the Commissioner in the case at hand for issuance of Show-Cause Notice to the appellant/employer of deceased.

23. For the foregoing reasons, the award of imposing penalty to the tune of Rs.1,09,235/- ie 40% of the calculated amount of compensation made in the impugned order/award, is not sustainable and it is hereby set aside.

24. The case is remitted back only to consider the issue of award of penalty under the provisions of Section 4A(3)(b) of the WC Act, 1923. The Commissioner will issue specific notice to the appellant in terms of Section 4A(3)(b) of the WC Act, 1923 and after providing proper

opportunity of hearing to the parties shall decide the point of penalty afresh.

25. In view of above, appeal is allowed in part.

Sd/-
(PR Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

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