

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

FIRST APPEAL NO.3612 OF 2016

M/s. Tejas Engineering Works,
K-238/4, MIDC, Waluj, Aurangabad,
through its Proprietor,
Mrs. Vandana w/o. Vamanrao Damdhar
Age : 37 years, occ. Business,
r/o. R M 246/3, Vurbus Society,
Tanaji Nagar, Balaji Nagar, Waluj,
Aurangabad

..Appellant

Vs.

1. Rahul s/o. Vitthalrao Pathade,
Age : 33 years, Occ. Nil,
r/o. Plot No.15, Renukanagar,
Garkheda, Aurangabad
2. Bajal Allianz General Insurance
Company, 1st and 2nd Floor,
Rajendra Bhavan, Adalat Road,
Aurangabad

..Respondents

Mr.S.P.Katneshwarkar, Advocate for appellant
Mr.S.R.Bodade, Advocate for respondent no.1
Mr.S.S.Dargad, Advocate h/f. Mr. S.G.Chapalgaonkar, Advocate
for respondent no.2

**CORAM : R.G. AVACHAT, J.
RESERVED ON : JULY 30, 2021
PRONOUNCED ON : AUGUST 02, 2021**

JUDGMENT :-

This is an appeal under Section 30 of the Employee's Compensation Act, 1923 ("E.C. Act", for short). The appellant herein is the employer. He challenges clause no.5 of the award dated 20.07.2015 passed by learned Ex-Officio Commissioner for W.C. & Judge, Labour Court, Aurangabad, in application W.C. No.12 of 2012. Vide the clause under challenge in this appeal, the appellant/employer has been directed to pay respondent no.1 (employee) Rs.4,71,285/- towards penalty, 50% of the amount of compensation determined in the very proceedings (application W.C. No.12 of 2012).

FACTS:-

2. The employer is an engineering company engaged in manufacturing of press components. The employee was serving as a Press Machine Operator (skilled worker) since October, 2011. While the employee was operating the machine, a mishap took place. As a result thereof, his both thumbs had to

be amputated. The employee, as such, suffered permanent total disability as a result of the injury caused in the accident arising out of and in the course of his employment. The employee, therefore, issued a notice dated 02.03.2012 on registered address of the employer and called upon to pay him compensation. The employer refused to receive the notice. The envelope containing the notice came to be returned with an endorsement "not claimed".

The employee, therefore, filed application (W.C. No.12 of 2012) for compensation. Learned Commissioner, on appreciation of the evidence in the case, passed the award in terms of the following order:-

1. The application for W.C. Claim is partly allowed.
2. The respondents do pay jointly and severally the deficit compensation amount Rs.4,09,928/- (Rs.Four Lakhs Nine Thousand Nine Hundred Twenty Eight only).
3. The respondents do pay jointly and severally the interest @ 12% per annum on the amount of Rs.9,45,269/- from the date it fell due till 03.05.2012.

4. The respondents do pay jointly and severally the interest @ 12% per annum on the differential amount of compensation Rs.4,09,928/- from dt.04.05.2012 till realisation of claim amount.

5. The respondent no.1 M/s. Proprietor, Tejas Engineering Works do pay 50% penalty i.e. Rs.4,71,285/- to the claimant.

It is reiterated that clause 5 of the aforementioned terms of award is under challenge in this appeal.

3. Heard.

4. Mr.S.P.Katneshwarkar, learned counsel for the appellant/employer, would submit that learned Commissioner did not give show-cause notice to the employer before directing it to pay 50% of the amount of compensation towards penalty. Learned counsel, in support of his submissions, relied on the judgment of this Court in the case of **Udhav Rangnathrao Pawar Vs. Sheshrao Ramji Jogdand and anr., 2009(6)All MR 117.** According to learned counsel, learned Commissioner did not assign any reason for imposing penalty. Attention of this Court was drawn to paragraph 21 of the impugned judgment in

support of his contention. The relevant provisions of the E.C. Act have also been relied on to ultimately urge for allowing the appeal.

5. Mr.S.R.Bodade, learned counsel appearing for respondent no.1-employee, would, on the other hand, submit that the prayer for grant of penalty was introduced in the application by seeking amendment thereof. The employer had filed its response to the amendment application. The application was allowed. The claim for imposition of penalty was introduced in the claim application. The employer, thereafter, did neither amend its written statement nor has filed additional written statement. The employer did not even lead evidence before the Commissioner in justification for non-payment of compensation within the statutory time frame. Learned counsel has relied on judgment of this Court in the case of **Ramalu Balkrishna Sagar Vs. Shri. Rambhau Tukaram Shendre and ors.**, 2006(2)ALL MR 522. He, ultimately, urged for dismissal of the appeal.

Mr.S.P.Chapalgaonkar, learned counsel for respondent no.2 – insurance company, would submit that the insurance company has satisfied the award passed against it.

6. Section 3 of the E.C. Act speaks of the employer's liability to pay compensation. Section 3(1) reads :-

3(1) If personal injury is caused to an employee by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Provided that

Whereas, Section 4 deals with quantum of compensation. It reads thus:-

4. Amount of Compensation

(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

(a)

(b) Where permanent total disablement results from the injury –

an amount equal to sixty per cent of the monthly wages of the injured (employee) multiplied by the relevant factor;

or

an amount of one lakh and forty thousand rupees whichever is more;

Reading of the provisions of Section 4 of E.C. Act would suggest that the section quantifies the amount of compensation.

7. It would be apposite to reproduce Section 4A of the E.C. Act:

4A. Compensation to be paid when due and penalty for default-

(1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may be, without prejudice to the right of the employee to make any further claim.

(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 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.

8. The expression “falls due” appearing in Section 4A(1) has been interpreted by Hon'ble four-Judge bench of the Apex Court in the case of **Pratap Narain Singh Deo Vs. Shrinivas Sabata and anr., AIR 1976 SC 222.** It was observed:-

“(a) Section 3(1) of the Act provides that an 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. Therefore, under s.4A(1) it was the duty of the appellant to pay the compensation at the rate provided in s.4, as soon as the personal injury was caused to the respondent.....”

9. Admittedly, the mishap took place on 05.12.2011. As a result of the injury suffered by the employee due to the

accident that arose out of and in the course of his employment, his both thumbs came to be amputated. The employer does not claim to have had no notice or knowledge of the accident and the of injury suffered by the employee. The employer claimed to have paid the employee little over Rs. Six Lakhs towards compensation. Said fact has, however, not been proved. True, the employee admitted to have received a sum of Rs.1,25,000/- from the employer. According to him, it was paid towards medical expenditure. Admittedly, the employee did not raise a claim for reimbursement of medical expenditure incurred by him. Section 4(2A) of the E.C. Act entitles the employee for reimbursement of the actual medical expenditure incurred by him. This provision is independent of Section 4, which speaks about quantum of compensation. As such, there is no evidence indicating the employer to have had paid the employee any compensation. It is only after learned Commissioner passed the award dated 20.07.2015, the respondent-insurance company paid the amount of Rs.5,35,341/- by cheque.

10. In terms of Section 4A(3) of the E.C. Act, the Commissioner is empowered to direct the employer to pay, in addition to the amount of arrears and interest thereon, further sum not exceeding fifty per cent of such amount by way of penalty. The order directing the employer to pay the penalty shall not be passed unless the employer is given a reasonable opportunity to show cause, why it should not be passed. The terminology of proviso to Section 4A nowhere states that the employer should be given show cause notice. Learned single Judge of this Court vide the judgment in the case of **Udhav Pawar** (supra), relying on the judgment of the Apex Court in the case of **Ved Prakash Garg Vs. Premi Devi and ors., AIR 1997 SC 3854**, held that, "the show cause notice contemplated by clause (b) of Section 3 of section 4-A of the said Act is with reference to the arrears of the amount of compensation determined to be payable by the employer along with the interest payable thereon. This finding would arise only upon determination of the compensation by the Commissioner under section 19 of the said Act. Hence, the show cause notice

contemplated is after passing of the order by the Commissioner determining the compensation.”

11. The judgment of the Apex Court in the case of **Ved Prakash** (supra) has been interpreted by this Court in the case of **Ramalu Sagar** (supra) in paragraphs 17 to 19 of the judgment, as under:-

“17. It may be impermissible to read the expression in a judgment without comprehending the context in which the expression came, the question before the Court was stated in paragraph 1 of the judgment as under:

"Where an employee receives a personal injury in a motor accident arising out of and in the course of his employment while working on the motor vehicle of the employer, whether the insurance company, which has insured the employer-owner of the vehicle against third party accident claims under Motor Vehicles Act, 1988 (hereinafter referred to as the Motor Vehicles Act) and against claims for compensation arising out of proceedings under the Workmens Compensation Act, 1923 (hereinafter referred to as the

Compensation Act) in connection with such motor accidents, is liable to meet the awards of Workmens Commissioner imposing penalty and interest against the insured employer under Section 4A(3) of the Compensation Act?"

18. The question, thus was, whether the Insurance Company is also liable to meet the award imposing penalty and interest against the employer and not about the interpretation of "reasonable opportunity of showing cause". This question arose because of the divergence of views by various High Courts as stated in the same paragraph. The facts in the background of which the question arose, are stated in paragraph 2 of the judgment. A truck met with an accident on 15th February, 1992 in which driver Pritam and cleaner Hemraj died on the spot, the appellant was owner of the truck. He came to know about the accident on 16th, February, 1992. He immediately informed Branch Manager of the Insurance Company about the accident. The Insurance Company did not carry out its obligation to pay to the heirs of the deceased employee appropriate compensation as per the insurance cover. The legal representatives of the deceased driver and cleaner filed claims for compensation before the Commissioner for Workmen's Compensation. The Commissioner awarded a sum of Rs.88,968/- to the heirs of the driver and also awarded penalty of Rs.41,984/-, since

the compensation due was not paid within the prescribed time. The Commissioner also awarded interest @ 6% per annum. The Commissioner held the owner as well as Insurer liable to pay the amount ordered. The Insurance Company carried the matter in appeal before the High Court contending that it would be liable to pay only compensation but not interest or penalties. The High Court exempted the Insurance Company from paying the penalty and interest. This is how matter went to the Supreme Court. The observations of the Court regarding show cause notice have come in this context. Operative part of the judgment in paragraph 20 would show that the Court had set aside the judgment of the High Court in so far as exempting the Insurance Company from payment of interest and held that the Insurance Company would be liable to pay interest also. The Court had however, upheld the judgment exempting the Insurance Company from payment of penalty. The last sentence in paragraph 20 of the judgment is significant, where the Court holds as under:

"..... They will obviously remain untouched so far as they are against the employers. It will be open to the claimants to enforce their claims of penalty amounts with proportionate interest thereon against employers concerned."

19. It may thus be seen that in that case either the owner had an opportunity of showing cause why penalty should not be imposed

before the Commissioner, or the question as to whether they did, in fact, have such opportunity, and, if so, in what form, was not raised before the Court. Therefore, it is not possible to deduce the ratio from Ved Prakash Garg's case that, the Commissioner is required to first come to the conclusion that the penalty is leviable and then issue notice to show cause before actually imposing the penalty. The discussion about proviso to Clause (b) of Section 4A(3) is incidental to the question of liability of Insurance Company.

12. The judgment in **Ramalu Sagar's** (supra) case has been delivered on 21.12.2005, long before the judgment in the case of **Udhav Pawar** (supra) is delivered. It appears that the judgment in **Ramalu Sagar's** (supra) case had not been relied upon by any of the parties in **Udhav Pawar's** (supra) case. In view of the principle of law of precedent in case of two conflicting judgments of the co-ordinate benches, the first in point of time prevails.

13. I have already observed above that the proviso to Section 4A of the E.C. Act does not speak of issuing the employer show-cause notice before the order is passed, directing him/her to pay the amount by way of penalty. What has been expected by the statute is granting the employer a

reasonable opportunity of hearing before the order is passed. In the case in hand, the employee amended the claim application and introduced a prayer for imposition of penalty. The employer had replied to the application for amendment of the claim. After the amendment was incorporated in the claim application, the employer did neither amend its written statement nor has filed additional written statement. As such, the claim for imposition of penalty went untraversed. Learned Commissioner had specifically framed issue no.3 as under:-

“3 Whether the applicant is entitled for interest and penalty on the compensation amount?

14. The employer did not lead any evidence, as it cannot for want of pleadings, in justification for delay in payment of compensation as soon as it fell due. Learned Commissioner was, therefore, justified in directing the employer to pay 50% of the amount of compensation by way of penalty. This Court has, therefore, no reason to interfere with the impugned award. The appeal, therefore, fails. The same is dismissed.

[R.G. AVACHAT, J.]

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**CIVIL APPLICATION NO.15116 OF 2015
IN
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for respondent no.2

**CORAM : R.G. AVACHAT, J.
DATE : AUGUST 02, 2021**

ORDER :-

In view of dismissal of the appeal, this Civil Application for stay stands dismissed. Interim relief granted on 15.12.2015 stands vacated.

[R.G. AVACHAT, J.]

KBP