

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9430 OF 2014

Vinita Satish Toshniwal
Age- 46 years, Occ- Household & Business,
R/o. House No. 3/11/1397, Survey No. 133/1
Chinchwad, Pune-33 ...Petitioner

Versus

Sushilabai Namdeo Ghule
Age- Major, Occ- Household,
R/o. Ruti (Inamgaon) Tal- Ashti,
District- Beed ...Respondent

Mr. R.R. Sancheti, Advocate for the petitioner.
Mr. V.S. Bedre, Advocate for the respondent.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 8th JUNE, 2023

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard finally with the consent of parties.

2. This petition is filed under Article 226 and 227 of the Constitution of India, for following reliefs:

“B. Issue writ of certiorari or any other writ, order and/or direction, and call for record and proceedings of Misc. Application No. WC/16/2013, decided on 9/9/2014 by the Second Labour Court Ahmednagar, and quash and set aside the same and allow the application no.

16/2013.

B-1. Issue a writ of certiorari or any other appropriate writ order etc and quash and set aside the order dt. 15.12.2012, passed in Misc. Application W.C. No. 35/2011 and consequential recovery certificate dt. 15.1.2013 passed by the Commissioner of Workmen Compensation Act, and Labour Court No. 1 Ahmednagar in MCA (WC) No. 35/2011."

3. Facts leading to this petition, in brief, are as follows:

Respondent filed Miscellaneous Application (W.C.) No. 81/2001, claiming compensation on account of death of her son Nanabhau, contending that he was in employment of husband of petitioner Satish Toshniwal and son Kshitij Toshniwal, since year 1991 till his death. While in employment, Nanabhau was murdered on 26.09.2000. After hearing the parties, Labour Court allowed respondent's claim vide order dated 27.05.2004 and awarded compensation of Rs. 2,25,220/- along with interest at the rate of 12% per annum till realization of amount. Funeral expenses of Rs. 1,000/- were also awarded. A show cause notice was issued to the husband and son of the petitioner asking as to why 50% of amount of compensation should not be recovered from them.

4. Respondent thereafter moved Miscellaneous Application (W.C.) No. 35/2011 for recovery of compensation amount. Though, husband and son of the petitioner were served with public notice, they have failed to appear. Miscellaneous Application (W.C.) No. 35/2011 filed by the respondent was allowed and recovery certificate was issued thereby attaching House No. 3/11/1397, Survey No. 133/1, admeasuring 564 sq.ft., situated at Sardar Farm, Chinchwad, Pune (for short 'property in question').

5. Being aggrieved by the attachment of property in question, petitioner filed Miscellaneous Application (W.C.) No. 16/2013, seeking a relief of declaration that recovery certificate dated 15.01.2013 against the property in question, is unjust, illegal and same be recalled. A prayer for compensatory cost of Rs. 10,000/- is also made in the said application. The Labour Court after recording evidence rejected the said application. Hence, the present petition.

6. Heard the learned advocate for the petitioner and learned advocate for the respondent. Perused the memo of writ petition, annexures thereto, impugned order and the citation relied upon by the learned advocate for the petitioner.

7. Learned advocate for the petitioner strenuously submitted that the property in question is self acquired property of the petitioner and her husband and son have no concern with the same, therefore, the Labour Court has erred in rejecting the application filed by the petitioner. By relying on Udhav Rangnathrao Pawar Vs. Sheshrao Ramji Jogdand and anr., 2009(5) Bom.C.R. 523, he submits that as no notice under section 4-A(3)(a) of the Workmens Compensation Act, 1923, (for short 'said Act') was issued to the petitioner, the property in question, since was her self acquired property it was not liable to be attached pursuant to the recovery certificate. He submits that the Labour Court has failed to properly appreciate the evidence on record and has recorded perverse findings, while passing the impugned order. According to him, the impugned order is liable to be quashed and set aside and application filed by the petitioner is liable to be allowed.

8. Per contra, learned advocate for the respondent supported the impugned order. He submits that since year 2001 respondent is fighting for compensation and till date no compensation is paid to her. The petitioner, her husband and son have succeeded in avoiding to pay compensation for 22 years.

He therefore submits that there is no merit in the writ petition and the writ petition may be dismissed.

9. This case is a classic example of unfortunate mother who is fighting for compensation on account of death of her son, since last more than 22 years. Admittedly, Miscellaneous Application (W.C.) No. 81/2001 filed by the petitioner for compensation was contested by the husband and son of the petitioner on merits. By judgment and award dated 27.05.2004, Labour Court awarded compensation of Rs. 2,25,220/- to the respondent. In Miscellaneous Application (W.C.) No. 35/2011 filed by the respondent seeking recovery certificate, in spite of service husband and son of the petitioner deliberately did not appear. It is therefore clear that the husband and son of the petitioner have tried their level best to avoid payment of compensation to the respondent.

10. Obviously, the petitioner has filed Miscellaneous Application (W.C.) No. 16/2013 in collusion with her husband and son, thereby challenging the recovery certificate, claiming that property in question is her self acquired property and hence it cannot be attached.

11. It is clear from the evidence led before the Labour Court that sale deed of the property in question executed in favour of the petitioner on 06.09.2022, bears signature of her husband Satish Toshniwal as attesting witness. The petitioner has admitted in her cross examination that she has not filed any documentary evidence to show that since the date of her marriage with Satish Toshniwal, she was having any source of income up to the year 1999. By not filing documents showing that gold and silver ornaments were sold by the petitioner for payment of consideration amount while purchasing the property in question, the petitioner has failed to substantiate her claim in that behalf. The fact of selling gold and silver ornaments for purchasing the property in question is not even pleaded in her application. The petitioner has filed income tax returns (Exhibit-C-20) of the year 2000-2001, wherein her gross annual income from the business or profession is shown as Rs. 76,205/-. However, the petitioner has failed to submit income tax returns for the earlier or subsequent period.

12. After considering the evidence on record, the Labour Court has recorded a finding of fact that the property in question is not self acquired property of the petitioner and the property in

question is a Joint Hindu Family property of the petitioner and her husband. The Labour Court has also observed that, '*it is cardinal principle of law that the husband and wife are having no separate entity when they are residing jointly.*' In the facts of the present case, therefore, the Labour Court was perfectly justified in concluding that the petitioner has failed to prove that recovery certificate issued against property in question is unjust and illegal. The Labour Court, therefore, is justified in rejecting the application filed by the petitioner.

13. In Udhav Pawar (supra), it is held:

"31. Now, turning to the question of imposition of penalty under sub-clause (b) of sub-section (3) of section 4-A of the said Act, the Apex Court has held in Ved Prakash's case (supra) that the penalty is required to be levied under the said provision after issuing show cause notice to the employer concerned who will have a 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. It has further been held that if ultimately, the Commissioner after giving reasonable opportunity to the employer to show cause, takes a view that there is no justification for such a delay on the part of the insured

employer and because of his unjustified delay and due to his personal fault he is held responsible for the delay, then the penalty would be imposed on him. It has further been observed that so far penalty is concerned, the same is not automatic flowing from the main liability incurred by the insured employer under the said Act.

32. This judgment in Ved Prakash's case has been followed in un-reported judgment of this Court in F.A.No. 1562/2009, Nandi Sahakari Sakhar Karkhana's case (supra). It has been held that a show cause notice was required to be issued to the employer calling upon him to furnish the explanation for the delay caused in making the payment of arrears. Upon receipt of the explanation from the employer, if the Commissioner is not satisfied then the penalty to the extent of maximum 50 per cent of the amount of compensation determined is required to be paid by the employer. The order impugned in the present case is a composite order determining the compensation payable by the employer imposing the interest on the arrears of the amount of compensation and imposing penalty for failure to furnish the satisfactory explanation. 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. In view of this order imposing penalty of Rs.45,000/- to the extent of 50% of the amount of compensation of Rs. 90,000/- determined by the Commissioner, needs to be quashed and set aside with a direction to the Commissioner to issue a show cause notice providing the appellant / employer a reasonable opportunity of being heard in the matter and to furnish the explanation for the delay caused in making the payment of arrears of compensation and interest, and thereafter to pass an appropriate order."

14. In the present case, admittedly, public notice was issued by the Labour Court to the husband and son of the petitioner before issuing recovery certificate. They have chosen not to appear. In that view of the matter, aforesaid observations would not help the petitioner.

15. In the light of aforesaid reasons and considering the peculiar fact that the respondent is deprived of death

compensation since year 2001 and is made to run from Court to Court for the compensation, this Court is not inclined to entertain the prayer made by the petitioner in the present petition. There is no illegality or perversity in the order impugned in the present petition. The writ petition being devoid of merit is dismissed.

16. The amounts deposited in this Court as well as in the Labour Court, Ahmednagar, be paid to the respondent forthwith, along with accrued interest. The respondent is entitled to recover interest, if any, in terms of the order passed by the Labour Court, from the husband and son of the petitioner, if necessary by selling the attached property.

Rule stands discharged.

[NITIN B. SURYAWANSHI, J.]