

VRJ

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.1405 OF 2009

Chandrikaprasad Pasi & Anr.	... Appellants
V/s.	
Shivkumar Pudiram Jana & Anr.	... Respondents

Ms. Rina Kundu for the appellants.

Mr. D.R. Mahadik for the respondent Nos.1 & 2.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 20, 2023

P.C.:

1. The appellants/original claimants are challenging judgment and order dated 1st June 2009, passed by the learned Commissioner for the Workmen's Compensation 5th Labour Court, Mumbai, partly allowing the application holding sub-contractor and principal employer liable to pay an amount of Rs.4,50,440/- towards compensation along with interest at the rate 12% from the date of award till its realization.

2. The appellants are the legal representatives of the deceased who met with an accident on 26th December 2004 while on duty at construction site of respondent No.2. The deceased was working as a labourer carpenter at the salary of more than 4,000/- per month with respondent No.1 and 2. The claimants have, therefore, filed an application before the commissioner seeking compensation of Rs.4,50,440/-. The respondent No.2 is principal employer and

respondent No.1 is immediate employer. The respondent No.1/original opponent No.1 failed to appear before the learned Commissioner in spite of being duly served. However, the opponent No.2 appeared in the proceedings and contested it by submitting that there was no master and servant relationship. It had insured all the employees of respondent No.1 with opponent No.3.

3. Based on the pleadings, the learned Commissioner framed necessary issues and allowed all the parties to lead oral evidence.

4. The claimant in support of their claim examined applicant No.1 who stated on oath that the accident occurred during the course of employment. The learned Commissioner after considering the oral evidence led on behalf of all the claimants recorded a finding that during the course of employment the deceased was working with opponent Nos.1 and 2. Based on school leaving certificate below Exhibit-U19, the Commissioner recorded a finding that the deceased was 19 years of aged on the date of accident.

5. In spite of due service, opponent Nos.1 and 2 have failed to appear in this proceeding.

6. The claimants stated on oath that the salary of the deceased was Rs.4,500/- per month which remain controverted. On failure of opponent No.2 to produce the documents regarding salary of the deceased, the Commissioner recorded a finding that the deceased was getting Rs.4,000/- per month as salary.

7. The copy of insurance policy was placed on record. The

clause 2 of sub-clause 1 which reads as under:-

“Provided that the Insurer granted hereunder is not extended to include...

1) Any interest and/or penalty imposed on the insurer company on account of his/her failure to comply with the requirements laid down under the W.C. Act.”

8. The learned Commissioner therefore did not impose the liability of payment of interest on the insurance company. Neither the insurance company nor the employers have challenged the impugned judgment and order. Therefore, clauses and findings in the judgment holding salary of the deceased to be Rs.4,000/-; the accident occurred during the course of employment and age of the deceased being 19 years on the date of the accident attained finality. The claimants are challenging that part of the judgment which refuses to grant penalty and interest against the employer.

9. According to the appellant, interest needs to be calculated since the end of 30 days from the date of incident and in absence of evidence by employer to justify, penalty to the extent of 50% must have been directed by the Commissioner. Section 4A of the Employees' Compensation Act, 1923 deals with compensation to be paid when due and provides for penalty in default. Sub-section 3 of section 4A cast liability on the employer to pay due compensation within one month from the date of the incident. Clause B of sub-section 3 of section 4A confers power of the Commissioner to direct penalty to the extent of 50% in the absence of justification for delay by the employer.

10. In the facts of the case, the employer failed to lead evidence to justify delay in payment of compensation. In absence of justification, the learned Commissioner ought to have granted 50% of amount of compensation towards penalty.

11. In so far as the date of the payment of interest is concerned, the liability to pay interest arises after one month from the date it falls due. Therefore, the learned Commissioner ought to have directed the opponent Nos.1 and 2 to pay interest at the rate 12% per annum from 27th January 2005 till its realization. For the above reasons the first appeal is allowed.

12. The operative part of the impugned judgment and order dated 1st June 2009 passed by the learned Commissioner for Workmen's Compensation, Mumbai in Workmen's Compensation Act 246/B-52/2007 is modified and substituted as follows.

(i) Clause 3 of the operative part is modified as under:-
The compensation amount shall carry the interest @ 12% per annum from 27th January 2005 till its realization to be paid by the opponent Nos.1 and 2.

(ii) The opponent Nos.1 and 2 shall pay penalty to the extent of 50% of the compensation directed to be paid by the Commissioner for Workmen's Compensation, Mumbai.

13. The first appeal stands disposed of.

(AMIT BORKAR, J.)