

(2014) 09 BOM CK 0063
In the Bombay High Court
Case No : First Appeal No. 168 of 2014

Binddadin Ramasray Varma

APPELLANT

Vs

Ramsajivansingh B. Singh

RESPONDENT

Date of Decision : 22-09-2014

Acts Referred:

Employees Compensation Act, 1923 — Section 3, 4(1)(b), 4A, 4A(3), 4A(3)

Citation : (2015) 4 ACC 25 : (2015) ACJ 1273 : (2015) 2 ALLMR 138 : (2015) 144 FLR 85 : (2015) 1 LLJ 199 : (2014) 4 LLN 69 : (2014) 6 MhLj 309

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : A.M. Gokhale, Advocate for the Appellant; M.D. Modgi and H.G. Misar, Advocate for the Respondent

Judgement

R.D. Dhanuka, J.—Admit. Learned counsel for the respondents waive service. By consent of the parties, the matter is placed on board for final hearing.

2. This appeal is directed against the Judgment and Order dated 29th April, 2009 rendered by the learned Commissioner for Workmen's Compensation and Judge, Sixth Labour Court allowing the claim of the appellant partly.

3. Being aggrieved by the rejection of the part claim of the appellant, the appellant has preferred this appeal. It is not in dispute that the insurance company has already paid the appellant in terms of the judgment and order dated 29th April, 2009. The insurance company has not challenged the said judgment dated 29th April, 2009. It was the case of the appellant that on 13th December, 2003 the appellant was injured while working as Labourer on truck of respondent No. 1 and sustained compression fracture of vertebrae L1 & L2 and was treated in LTMG Sion Hospital. It was the case of the appellant that he has a residual permanent partial impairment of 65% and lost control on bowels and urethra and he has obtained the disability certificate from Dr. Amit Ajgaonkar.

4. Before the learned Commissioner, the appellant examined himself and Dr.

Ajgaonkar. By the impugned judgment and order dated 29th April, 2009, the learned Commissioner allowed the said application filed by the appellant partly and directed the insurer to pay an amount of Rs. 3,74,115/- to the appellant as compensation along with 12% interest from the date of adjudication till the date of its realization.

5. The learned counsel appearing for the appellant invited my attention to paragraph 14 of the impugned judgment and submits that the learned Commissioner has considered deduction of 65% of the wages of Rs.4,000/per month. It is submitted by the learned counsel that the learned Commissioner ought to have considered 100% disability in view of the fact that the appellant was not able to carry out any work what he was doing prior to the accident. The next submission of the learned counsel is that in the operative part of the order, the learned Commissioner has awarded interest @12% not after expiry of 30 days from the date of accident but from the date of adjudication till the date of realization.

6. In so far as first submission of the learned counsel about 100% disability is concerned, the learned counsel invited my attention to paragraph 10 of the impugned judgment and submits that Dr. Ajgaonkar examined by the appellant had certified that the appellant had suffered the injuries of compression fracture L2 with traumatic paraplegia and lost his control over both the legs in bladder and bowel. It is submitted that in view of such certificate submitted by the appellant and in view of the fact that the insurer did not examine any other witness and did not apply for examination of the appellant through any other doctor, the certificate issued by Dr. Amit Ajgaonkar ought to have been considered by the learned Commissioner as proved and the Tribunal ought to have awarded compensation after applying deductions under Section 4(1)(b) of the Employees' Compensation Act, 1923 at 60% of monthly wages of the injured multiplied by relevant factor. It is submitted that though the learned Commissioner applied the correct multiplicand as per Schedule IV of the Act, the learned Commissioner instead of 60% has considered 65% deduction and that also twice.

7. In so far as submission of the learned counsel for the appellant is concerned, the learned counsel invited my attention to the judgment of the Supreme Court in the case of The Oriental Insurance Company Ltd. Vs. Siby George and Others, and submits that the Supreme Court, after considering the various judgments including the judgment of a four Judge Bench of this Court in the case of Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, , has held that the relevant date for determination of the rate of compensation is the date of accident and not the date of adjudication of the claim. It is submitted that thus the impugned direction of the learned Commissioner awarding interest from the date of adjudication is contrary to the Supreme Court Judgment and thus that part of the judgment should be set aside and shall be substituted with a direction of payment of interest period after expiry of the 30 days from the date of accident

till realisation.

8. In so far as the submission about rate of interest is concerned, the learned counsel for the respondent No. 2 invited my attention to the judgment of the Supreme Court in the case of Ved Prakash Garg Vs. Premi Devi and others, and submits that it is a discretion of the learned Commissioner whether to award interest from the date of accident or from the date of the award. It is submitted that the learned Commissioner has exercised such discretion by awarding the interest from the date of adjudication. This Court thus cannot interfere with the discretion exercised by the learned Commissioner. Reliance is placed on paragraphs 18 and 19 of the said judgment which read thus:"

"18. We may now refer to the other set of judgments, on which reliance was placed by learned Counsel for the appellants. In the case of Oriental Fire and General Ins. Co. Ltd. v. Nani Bala and Anr. (supra) a learned Single Judge B.L. Hansaria, J. (as he then was) speaking for the High Court of Judicature at Gauhati had to consider the question whether any liability could be imposed upon the insurer of the offending vehicle which had caused accidental injury to the employees of the insured employer. It was decided in the said case on a conjoint operation of the Motor Vehicles Act and the Compensation Act that the provisions of the Compensation Act cannot be viewed in isolation when the Motor Vehicles Act had specifically stated that a policy of insurance cannot exclude the liability arising under the Compensation Act and that the expression "any person" has to cover insurer also. The aforesaid decision was rendered entirely in a different context and was not concerned with the question whether the insurance company would be liable to meet the claim of penalty amount and interest as awarded under Section 4A(3) of the Compensation Act against the insured employer. It is, therefore, of no assistance in the present cases. However, the same learned Judge speaking on behalf of a Division Bench of the Orissa High Court in the case of Khirod Nayak v. Commissioner for Workmen's Compensation and Ors. (supra) has taken the view that when any penalty is imposed on the insured employer under Section 4A(3) of the Compensation Act along with interest the insurance company would be liable to make good the entire claim. In the light of the scheme of both the relevant Acts as discussed by us earlier it has to be held that the aforesaid view of the Division Bench of the Orissa High Court in so far as it holds that the insurance company would be liable to meet the claim of penalty to the tune of 50% of the amount of compensation as imposed on the insured employer is not correct. But so far as it is held that the insurance company would be liable to meet the claim of interest at the rate of 6% per annum as granted under Section 4A(3) of the Compensation Act, the same is justified on the scheme of the Act. Aforesaid decision of the Orissa High Court has to be partly overruled to the aforesaid extent. We may now turn to a decision of the Madhya Pradesh High Court in the case of New India Assurance Co. Ltd. v. Guddi and Ors. (supra). A learned Single Judge in the said case took view that on the scheme of Section 4A(3) of the Compensation Act the insurance company will have to make good the claim of interest and penalty as imposed upon the

insured employer. In the light of what we have discussed earlier it must be held that the said view is partly correct in so far as it is held that the insurance company would be liable to pay the amount of interest imposed upon the insured employer by the Workmen's Commissioner under Section 4-A(3). But to the extent it seeks to cover even the penalty amount and makes obligatory on the insurer to meet the said claim of penalty imposed upon the insured employer it must be held that the same is not correct and is not borne out from the scheme of the Acts discussed by us. To that extent the said decision of the learned Single Judge would stand partly overruled. In the case of *United India Insurance Co. Ltd. v. Roop Kanwar and Ors.* (supra) a learned Single Judge of the Rajasthan High Court had to consider a situation where on payment of additional premium the insurance company had agreed in the light of endorsement No. 16 of the Policy to cover all liabilities incurred by the insured under Workmen's Compensation Act. In view of this contractual coverage of liability the insurance company in that case was held liable to meet the claim for penalty and interest as imposed upon the insured under Section 4-A(3) of the Compensation Act. This judgment proceeds on its own facts and was concerned with a situation converse to the one as was examined by the Karnataka High Court in *Oriental Insurance Co. Ltd. v. Raju and Ors.* (supra). In the case decided by the Karnataka High Court, as seen earlier, there was an express exclusion of such liability of the insurance company. In the aforesaid case decided by the Rajasthan High Court there was an express inclusion of such liability for the insurance company which had taken additional premium. This judgment also, therefore, is of assistance to either side.

19. As a result of the aforesaid discussion it must be held that the question posed for our consideration must be answered partly in the affirmative and partly in the negative. In other words the insurance company will be liable to meet the claim for compensation along with interest as imposed on the insured employer by the Workmen's Commissioner under the Compensation Act on the conjoint operation of Section 3 and Section 4-A Sub-section (3)(a) of the Compensation Act. So far as additional amount of compensation by way of penalty imposed on the insured employer by the Workmen's Commissioner under Section 4A(3)(b) is concerned, however, the insurance company would not remain liable to reimburse the said claim and it would be the liability of the insured employer alone."

9. In so far as the issue as to whether the learned Commissioner ought to have deducted 60% of the monthly wages and not 65% is concerned, the learned counsel submits that it is not in dispute that the appellant had not examined the doctor who had treated him as a witness. It is submitted that the disability certificate Exhibit U10 submitted by the appellant was admittedly of 25th March, 2007 whereas, the application itself was instituted by the appellant as on 31st December, 2003. Learned counsel submits that the doctor examined by the appellant in the cross-examination admitted that he had not treated the appellant. Learned counsel does not dispute that the learned Commissioner has

considered the deduction twice.

10. In so far as the issue of the date of interest raised by the learned counsel for the appellant is concerned, a perusal of the impugned judgment indicates that the learned Commissioner for Workmen's Compensation and Judge has awarded interest from the date of adjudication and not from the date of expiry of 30 days from the date of accident. The Supreme Court in the case of Oriental Insurance Company Limited (supra) after adverting to various judgments, including a four Judge Bench in the case of Pratap Narain Singh Deo (supra) has held that the relevant date for determination of the rate of compensation is the date of accident and not the date of adjudication of the claim. Paragraphs 10 to 13 of the said judgment which are relevant read thus:

"10. The matter once again came up before the Court when by amendments introduced in the Act by Act No. 30 of 1995 the amount of compensation and the rate of interest were increased with effect from 15.9.1995. The question arose whether the increased amount of compensation and the rate of interest would apply also to cases in which the accident took place before 15.9.1995. A three Judge Bench of the Court in Kerala State Electricity Board and Another Vs. Valsala K and Another, answered the question in the negative holding, on the authority of Pratap Narain Singh Deo, that the payment of compensation fell due on the date of the accident. In paragraphs 1, 2, and 3 of the decision the Court observed as follows:

1. The neat question involved in these special leave petitions is whether the amendment of Sections and of the Workmen's Compensation Act, 1923, made by Act No. 30 of 1995 with effect from 15.9.1995, enhancing the amount of compensation and rate of interest, would be attracted to cases where the claims in respect of death or permanent disablement resulting from an accident caused during the course of employment, took place prior to 15.9.1995?

2. Various High Courts in the country, while dealing with the claim for compensation under the Workmen's Compensation Act have uniformly taken the view that the relevant date for determining the rights and liabilities of the parties is the date of the accident.

3. A four Judge Bench of this Court in Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, : speaking through Singhal, J. has held that an employer becomes liable to pay compensation as soon as the personal injury is caused to the workmen by the accident which arose out of and in the course of employment. Thus, the relevant date for determination of the rate of compensation is the date of the accident and not the date of adjudication of the claim.

11. The Court then referred to a Full Bench decision of the Kerala High Court in United India Insurance Company Ltd. v. Alavi, (FB) and approved it in so far as it followed the decision in Pratap Narain Singh Deo.

12. The decisions in Pratap Narain Singh Deo was by a four Judge Bench and in Valsala by a three Judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.

13. In light of the decisions in Pratap Narain Singh Deo and Valsala, it is not open to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala do not express the correct view and do not make binding precedents."

11. In so far as the judgment of the Supreme Court in the case of Ved Prakash Garg (supra) relied upon by the learned counsel for the appellant is concerned, the said judgment is delivered by the bench of two Judges. In my view, the latter judgment in the case of Oriental Insurance Co. Ltd. (supra) rendered in the year 2012, which is rendered after considering the judgment delivered by four Judge's Bench, is binding. I am thus inclined to accept the submission of the learned counsel for the appellant that the learned Commissioner was required to grant prayer for interest after expiry of 30 days from the date of accident and not from the date of adjudication. I am of the view that the appellant was entitled to award an interest after expiry of 30 days from the date of accident till realisation. The impugned direction of the learned Commissioner thus awarding rate of interest from the date of adjudication is contrary to the judgment of the Supreme Court in the case of Oriental Insurance Co. Ltd. (supra) and the same is accordingly set aside.

12. In so far as the issue as to whether the learned Commissioner ought to have considered the deduction of 60% and not 65% under Section 4(1)(b) of the Employees' Compensation Act, 1923 is concerned, a perusal of the record indicates that the appellant had not examined the doctor as a witness who had treated the appellant. The appellant had examined Dr. Amit Ajgaonkar who had issued a disability certificate on 25th March, 2007 whereas the accident had taken place on 13th December, 2003. The claim application itself was filed on 31st December, 2003. The learned Commissioner has considered the cross-examination of the said doctor in detail in paragraph 13 of the impugned judgment. The doctor examined by the appellant admitted that there was no mention of injuries malunion. It is also deposed that compression fracture would unite within 1 1/2 to 2 months. The doctor deposed that he had not given any opinion whether the compression fractures are united or not, though he issued a disability certificate after the period of 4 years. The disability certificate is issued in normal course without giving much attention on the medical papers and clinical examination. Considering these materials on record, the learned Judge came to the conclusion that it would be better to grant compensation for the

permanent partial disability and consider the deductions of 65% and not at 60%.

13. In my view, the appellant ought to have examined the doctor who had treated the appellant for the purpose of proving the percentage of disability and also that though the disability was at 65%, the appellant was not able to carry out any work as was doing prior to the date of accident resulting in 100% disability. In my view, the appellant could have led evidence on this issue that he was not able to carry out any work which he was doing prior to the accident since evidence was led much after the date of the accident. In my view, the certificate issued after a gap of 4 years of the accident thus could not have been considered to be conclusive for the purpose of examining the issue whether the accident would have led to 100% disability. In my view, the learned Judge has taken a reasonable view by accepting such certificate though issued after a gap of 4 years of the accident and that too when he had not treated the appellant. I do not propose to reduce the claim awarded by the learned Commissioner on this aspect. There is no merit in this submission of the learned counsel for the appellant.

14. In so far as the submission of the learned counsel that the learned Commissioner has considered the deduction of 65% twice is concerned, at this stage, the learned counsel for the appellant does not press this issue. I, therefore, pass the following order :

- a) The appellant would be entitled to the compensation of Rs. 3,74,115/- along with interest @12% p.a. which shall be computed after expiry of 30 days from the date of accident and not from the date of adjudication till realisation;
- b) The insurer shall pay the balance amount to the appellant within a period of four weeks from today;
- c) It is made clear that the insurer shall pay the interest to the appellant as awarded aforesaid till the date of realization;
- d) Appeal is partly allowed;
- e) No order as to costs.