

(2014) 02 CHH CK 0037

In the Chhattisgarh High Court

Case No : Miscellaneous Appeal Nos. 805 and 1183 of 2005

Dinesh Kumar Golechha

APPELLANT

Vs

Meena Bai Yadav

RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 10, Order 13 Rule 3, Order 16 Rule 2, Order 16 Rule 21, Order 23 Rule 1

Employees Compensation Act, 1923 — Section 22, 3(b), 30, 4(A)(3), 4(A)(3)(b)

Citation : (2015) 3 ACC 236 : (2015) ACJ 941 : (2015) 2 AnWR 764 : (2014) 3 CGLJ 478

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Abhishek Sharma, Advocate for the Appellant; Sachin Singh Rajput and Renu Singh, Advocate for the Respondent

Judgement

Sanjay K. Agrawal, J.

1. Misc. Appeal No. 805/2005 filed by the employer and Misc. Appeal No. 1183/2005 filed by the workman/claimant are being disposed of by this common order as both the appeals arise out of one and the same accident and are directed against the award dated 28.04.2005 passed by Commissioner for Workmen's Compensation, Labour Court, Rajnandgaon (for short, "the Commissioner") in Case No. 19/W.C. Act Non Fatal/2004 granting compensation to the extent of Rs. 64,5597/- and 45% penalty (Rs. 29,052/-) along with interest @ 6% per annum. Facts necessary for disposal of these appeals are as under:--

(1.1) Original claimant - Manoj Yadav (since deceased), during the course of employment of employer Dinesh Kumar Golchha, while driving the car bearing registration No. CG-08-0178 suffered an accident, while he was coming to Rajnandgaon from Durg leading to grievous injury; he was removed to the District Hospital, Rajnandgaon and at a later point of time, he was shifted to

Kedar Hospital, Raipur and he has been certified to be 40% permanent disabled leading to filing of claim petition under Section 22 of the Employee's Compensation Act, 1923 (for short "the Act of 1923") before the Commissioner stating inter alia that he is skilled driver, aged about 35 years and earning Rs. 4,800/- per month and, therefore, he is entitled for Rs. 4,72,944/- along with interest & penalty from the employer and Insurance Company.

(1.2) The Commissioner noticed the employer - Dinesh Chand Golchha as well insurer of the vehicle i.e. the Oriental Insurance Company Limited on the said application for compensation.

(1.3) On being noticed, the employer filed his written statement stating inter alia that workman - Manoj Yadav was working as a driver in his establishment and getting salary of Rs. 1,200/- and Rs. 200/- as allowance, total Rs. 1,400/- per month. It was further pleaded that if any, liability is determined, vehicle being insured, the said amount has to be indemnified by the Insurance Company as all the relevant papers has been brought to the notice of Insurance Company but the Insurance Company did not take any step to make payment of compensation, therefore, the Insurance Company is liable to make payment of compensation to the claimants.

(1.4) Learned Commissioner, after close scrutiny of the evidence available on record, has recorded following findings:--

(i) That, the workman/claimant had sustained fracture in his right elbow resulting into permanent disability to the extent of 40%.

(ii) That, the workman/claimant was earning Rs. 1,400/- per month, aged about 37 years and applying the relevant factor of 192.14, is entitled for Rs. 64,559/- along with interest @ 6% per annum from the date of filing of claim petition.

(iii) That, the employer is liable to make payment of penalty to the extent of 45% as the employer did not take any steps to make payment of compensation as provided in Section 4(A)(3) of the Act of 1923 i.e. 45% of the amount of compensation, which comes to Rs. 29,052/-.

2. Feeling aggrieved and dissatisfied with the award passed by the Commissioner, the claimants have filed Misc. Appeal No. 1183/2005 under Section 30 of the Act of 1923 claiming that the original claimant/workman has suffered injuries in the accident resulting in permanent disability to the extent of 100% as well as penalty imposed is not commensurate with the disability suffered by the appellant/claimant, in which, the respondent/Oriental Insurance Company Limited has filed cross objection stating inter alia that the Insurance Company is not liable to make payment of compensation. The employer has filed M.A. No. 805/2005 stating that while imposing penalty, opportunity of hearing under proviso to Section 4A(3) of the Act of 1923 has not been afforded to the employer, therefore, award imposing penalty deserves to be set aside.

3. Mr. Abhishek Sharma, learned counsel appearing for the workman/claimant

would submit that the learned Commissioner has fallen into error in holding that the claimant has suffered only 45% permanent disability. He would submit alternatively that though he has suffered 45% permanent disability but his loss of earning capacity would be 100% and the penalty awarded by Commissioner to the extent of 45% is not commensurate with the disability suffered by, the workman.

4. Mr. S.S. Rajput, learned counsel appearing for the employer while opposing the quantum appeal filed by the workman/claimant would additionally submit that while imposing penalty learned Commissioner has not afforded opportunity of hearing as provided in Section 4(A)(3)(b) of the Act of 1923 and thus, the award directing imposition of penalty against the employer is liable to be set aside.

5. Shri Sudhir Agrawal, learned counsel appearing for the Oriental Insurance Company Limited while opposing the quantum appeal of the workman/claimant would submit that the learned Claim Tribunal has fallen into error in granting application awarding compensation as the loss of earning capacity has not been assessing by the learned Commissioner while awarding compensation. He would further submit that cross objection filed by the Insurance Company be granted and the impugned award fastening the liability be set aside.

6. The following substantial question of law arises for determination:--

"(1) Whether the appellant had suffered 100% disability due to the accident.

(2) Whether the cross objection filed by the Insurance Company in appeal preferred by the workman/claimant under Section 30 of the Act of 1923 is maintainable.

(3) Whether the compensation and penalty awarded by the Commissioner for Workmen Compensation is not commensurate with the disability suffered by the appellant/claimant?

(4) Whether the award of penalty is lawfully sustainable without giving an opportunity of hearing under proviso clause of Section 49(A)(3) of the W.C. Act, 1923?

(5) Whether under the facts and circumstances of the case the appellant can be held liable to pay penalty when on the face of record no opportunity of hearing is afforded to the appellant before passing the award of penalty?"

Answer to substantial question of law No. 1

7. In order to prove permanent disability, claimant has filed Disability Certificate (Ex.P-11C) issued by the Medical Officer, District Hospital, Rajnandgaon, in which, the Medical Officer has certified that the claimant has suffered stiffness of elbow of his right hand resulting into permanent disability to the extent of 40%.

8. Dr. Y.K. Tiwari has been examined on behalf of the workman. He has deposed

before the Commissioner that claimant has suffered stiffness of elbow of his right hand, which cannot be cured. He also states that on 13.12.2012 he advised the workman/claimant to contact the doctor for treatment but the workman has never contacted the said doctor for treatment. Apart from this, no other medical evidence has been brought on record to prove the fact of permanent disability. While considering the medical evidence so brought on record, the Commissioner accepted that permanent disability to the extent of 40%, though no loss of earning capacity has been determined by the Commissioner, yet while taking loss of earning capacity to the extent of 40%, he has been awarded compensation of Rs. 64,559/- along with interest and penalty.

9. A close perusal of the medical certificate (Ex.P-11C) would show that Medical Officer has simply issued certificate stating that claimant has suffered stiffness of his elbow of his right hand. Permanent disability certificate has not been granted by duly constituted Medical Board nor the claimant has taken any efforts during the trial of the claim petition to get himself examined and his permanent disability assessed by the Medical Board. Only on the basis of the evidence of Dr. Y.K. Tiwari, who has issued the disability Certificate to the workman/claimant without proper further medical assessment, it cannot be concluded that 40% permanent disability suffered by the claimant is a permanent disability suffered to the whole body of the claimant, which renders him unfit for the job which he was doing at the time of accident.

10. The Supreme Court in case of Raj Kumar Vs. Ajay Kumar and Another, has summarized the law relating to permanent disability and assessment of loss of earning capacity. Paragraphs 18 & 19 of the report states as under:--

"18. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give "ready to use" disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily give liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or discharge certificate will not be proof of the extent of disability stated therein unless the doctor who treated the claimant or who medically examined and assessed the extent of disability of the claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local hospitals/medical colleges) and refer the claimant to such Medical Board for assessment of the disability.

19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).

(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentage of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

11. In the instant case, neither medical certificate granted by duly constituted Medical Board has been submitted nor treating doctor has been examined, Despite above, the Tribunal has accepted the permanent disability to the extent of 40% as it is without assessment of loss of earning capacity has granted compensation taking loss of earning capacity to the extent of 40%. Thus, it cannot be held that the workman has suffered 100% permanent disability and thus, the finding recorded by the learned Commissioner is well reasoned finding, which does not call for any interference and substantial question of law is answered accordingly.

Answer to substantial question of law No. 2

12. Whether the cross objection filed by the Insurance Company in appeal preferred by the workman/claimant under Section 30 of the Act of 1923 is maintainable.

13. A close scrutiny of Section 30 of the Act of 1923, it appears that appeal shall lie to the High Court from the specific orders mentioned in sub-Section 1 of Section 30, clauses (a to e).

14. Rule 41 of the Workmen's Compensation Rules, 1924 (for short "the Rules of 1924") provides certain provisions of Code of Civil Procedure, 1908 will be applicable in the proceeding before the Commissioner. Rule 41 of the Rules of 1924 reads as under:--

"41. Certain provisions of Code of Civil Procedure, 1908, to apply.--Save as otherwise expressly provided in the Act or these Rules the following provisions of the First Schedule to the Code of Civil Procedure, 1908, namely, those contained in Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII, Rules 3 to 10;

Order XVI, Rules 2 to 21; Order XVII; and Order XXIII, Rules 1 and 2, shall apply to proceedings before Commissioners, in so far as they may be applicable thereto:

Provided that--

(a) for the purpose of facilitating the application of the said provisions the Commissioner may construe them which such alterations not affecting the substance as may be necessary or proper to adapt them to the matter before him;

(b) the Commissioner may, for sufficient reasons, proceed otherwise than in accordance with the said provisions if he is satisfied that the interests of the parties will not thereby be prejudiced."

15. A bare perusal of Rule 41 of Rules, 1924, it would appear that specific provisions of Code of Civil Procedure such as contained in Order 5, Rules 15 to 30 shall apply to the proceeding before the Commissioner and other provisions of the CPC has not been applicable to the proceeding initiated under the Act of 1923 and, therefore, in my opinion, no other provisions can be made applicable to the proceedings under the Act of 1923 except as provided in the aforesaid Rule 41 of the Rules of 1924 and since the said Rule 41 does not provide making applicable the Order 41 of the Rules of 1924 applicable to the appeals under Section 30 of the Act of 1923, therefore, the cross objection filed by the Insurance Company under Order 41 Rule 22 of the CPC in the appeal filed under Section 30 of the Act of 1923 by workman would not be maintainable in absence of specific provisions making the Order 41 of Code of Civil Procedure applicable to the proceedings before the Commissioner under the Employees Compensation Act, 1923.

16. That, the High Court of Madhya Pradesh in case of Ram Shiromani Mishra Vs. Shiv Mohan Singh and Another, has occasion to deal with the identical situation as to whether appeal under Order 43 Rule 1(d) of the CPC would be maintainable if the application under Order 9 Rule 13 of the Code of Civil Procedure is rejected by the Motor Accident Claims Tribunal. Paragraph 10 of the report held as under:

"10. The Rule 240 of "the Rules" expressly states, unless otherwise provident in the Act or in those Rules, no orders of the First Schedule of C.P.C. shall be applicable other than those mentioned in the list. The intention of the Rule Making Authority is explicit. It did not want to burden the procedure of Claims Tribunal with all the provisions of First Schedule of C.P.C. Therefore, only a chose few orders have been mentioned in Rule 240 of "the Rules". Once this aspect of the Rule 240 is borne in mind, it would be crystal clear that the Rule Making Authority omitted application of Order 43, Rule I of C.P.C. to the cases under Claims Tribunal. The omission deliberate or otherwise has to be respected. There is no other provision of Motor Vehicles Act, 1988 (hereinafter called "the Act" for short) or the Rules which makes Order 43 of CPC applicable. Section 4(1) of C.P.C. reads as under:--

"4. Savings.--(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special form of procedure prescribed, by or under any other law for the time being in force."

It is clear from the aforesaid section that the Rules of procedure of Special Tribunal or a Court shall override the provisions of C.P.C. Thus the Rule 240 of "the Rules" by implication overrides the provisions of C.P.C. and makes only certain provisions in the First Schedule applicable.

17. Thus, for the foregoing reasons, it is held that in an appeal preferred by the workman under Section 30 of the Act of 1923, Order 41 of the Code of Civil Procedure would not be applicable and as such, cross objection filed by the Insurance Company would not be maintainable.

18. Accordingly, the cross objection filed by the Insurance Company deserves to be dismissed as not maintainable.

Answer to substantial questions of law No. 3 to 5

19. Substantial questions No. 3 to 5 are inter connected, therefore, they are being taken up collectively for consideration.

20. Workman/claimant Manoj Yadav filed claim petition under Section 22 of the Act of 1923 claiming compensation to the tune of Rs. 4,72,944/-, in the claim petition he also claimed interest and penalty.

21. Employer - Dinesh Kumar Golchha has stated in his written statement that all the relevant documents has been provided to the Insurance Company to make payment of compensation but since the payment of compensation has not been made, therefore, the Insurance Company is liable to make payment of compensation, if any, determined by the Commissioner and the following issues were framed by the Commissioner, which reads thus:

22. Learned Commissioner, while determining the compensation, has recorded a finding that though the employer had admitted that workman was employed in his establishment and suffered grievous injuries in the course of employment but did not take any steps for depositing the amount of compensation and was negligent in his duty and, therefore, the penalty to the extent of 45% of amount of compensation is liable to be imposed thereby.

23. At this stage, learned counsel appearing for the employer would submit that the employer has not been afforded reasonable and due opportunity of hearing before directing the penalty over the total amount of compensation.

24. Proviso to Section 3(b) of Section 4A was inserted by amending the Act 30 of 1995 with effect from 15.9.1995, which states as under:--

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

(1).....

(2).....

(3)(a).....

(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 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."

25. In the instant case, the employer, in reply to show cause, has justified non payment of compensation by taking a defence that the vehicle was duly insured and all the requisite papers was provided to the respondent/Insurance Company to make payment of compensation and it was for the Insurance Company to deposit the requisite compensation. Thus, the employer was not negligent in matter regarding payment of compensation.

26. The provision for penalty is intended to act as deterrent on the part of employer from raising frivolous or pleas delaying the payment of compensation without justification.

27. Rule 28 of the Workmen Compensation Rules, 1924 states about framing of the issues, which provides as under:--

"28. Framing of issues.--(1) After considering any written statement and the result of any examination of the parties, the Commissioner shall ascertain upon what material propositions of fact or of law the parties are at variance and shall thereupon proceed to frame and record the issues upon which the right decision of the case appears to him to depend.

(2) In recording the issues, the Commissioner shall distinguish between those issues which in his opinion concern points of facts and those which concern points of law."

28. A bare perusal of Rule 28 of the Rules of 1924 would show that Commissioner shall ascertain upon what material propositions of fact or of law the parties are at variance and shall thereupon proceed to frame and record the issues upon which the right decision of the case appears to him to depend.

29. It appears that though Commissioner has framed issues but has not framed any issue with regard to imposition of penalty on the employer.

30. The imposition of penalty without framing an issue or without affording the employer an opportunity to be heard regarding the imposition of penalty or its quantum is in my view not valid in law. The question of framing of an issue or putting the appellant on notice of the penalty are really matters of fair play and fair procedure relating to the principles of natural justice. No doubt, section 4-A(3) on its terms does not contain any provision for framing of an issue or for

hearing of an employer before imposing penalty or regarding its quantum. But that is a requirement of natural justice. That apart, the proviso of Section 4-A(3) prescribes 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. Section 4-A(3) mandates that no order for payment of penalty to be passed under clause (b) without affording an opportunity to the employer to show cause why it should not be passed. In fact, the Commissioner as a quasi-judicial authority exercising statutory powers involving determination of rights of parties, it is elementary that the Commissioner should observe the rules of natural justice in the performance of his functions. Though the Act or the Rules do not envisage a full-fledged trial as in a civil court, a regular hearing and determination of rights is contemplated therein. In fact, rule 28 of the Rules framed under the Act requires the Commissioner to frame and record the issues upon which the right decision of the case appears to depend. This is evidently intended to put the parties on notice of the points arising for consideration and on which they are expected to adduce evidence. It is a matter for the Commissioner to decide whether penalty should be imposed or not? Therefore, the question of imposition of penalty may arise for consideration even without a specific plea in that behalf by the workman. Since the question of imposition of penalty is a matter which will necessarily arise for consideration while passing an award, it will be prudent and advisable for the Commissioner to frame an issue as to whether the penalty is imposable under section 4-A(3) and if so, the quantum thereof to enable the parties to address themselves on these aspects as well at the hearing. Section 4-A(3) is a penal provision imposing penalty on the employer. The satisfaction of the Commissioner contemplated therein should be based on materials. It has to be reached on a conspectus of all the facts and circumstances of the case. There may be various reasons why the employer is not liable for the penalty. There can be various reasons from the penalty. There can be various reasons for non-payment of the amount of compensation on the due date or for its delayed payment. The employer may be able to point out justifiable reasons for the delay or the non-payment. In any case he may also be able to make out sufficient reasons why the penalty should either be waived or to be fixed at a low amount. In fact, the section vests a discretion in the Commissioner in the matter of penalty, the prescription being only the maximum. The reasons made out by the employer may have an impact not only on the question of imposition of penalty, but also on its quantum. All these cannot be effectively decided unless the attention of the parties is focused on the question of imposition of penalty and the exercise of the discretion in which event the employer can place his materials in justification of the delay or at least plead in mitigation for lesser amount of penalty, which he will not be able to do unless he is given an opportunity to be heard in the matter. The hearing to be afforded need not necessarily have the trappings of a regular trial or a hearing. The framing of an issue under rule 28, however, suffice but that may not be obligatory though desirable. The Commissioner may even in the course of hearing draw the attention of the

parties on the question of penalty and hear them. If such an opportunity to produce their materials and to be heard is afforded, that will be sufficient to meet the requirements of the natural justice and the proviso appended to section 4-A(3). What is essential and what is required is compliance with the rules of natural justice so that the affected party, namely, the employer gets an opportunity to produce his materials and to plead that there was justification for the delay or for imposition of a lesser amount than the maximum prescribed. Essentially it is a question of complying with the rules of natural justice as well as the proviso to section 4-A(3).

31. In the case in hand, no issue were framed with regard to imposition of penalty and even after determination of compensation, no show cause notice was issued separately to the employer to impose penalty, which has resulted serious prejudice to the employer.

Conclusion

32-A. Resultantly, the miscellaneous appeal filed by the employer deserves to be and is hereby allowed. The impugned order dated 28.04.2005 imposing penalty is set aside. The matter is remitted back to the Commissioner to frame additional issue and decide the question of imposition of penalty afresh after giving opportunity of hearing to both the parties within a period of three months from the date of receipt of copy of this order. The parties are directed to appear before the Commissioner on 10th March, 2014.

32-B. The Appeal filed by the claimant and the cross objection filed by the Insurance Company are hereby dismissed.

No order as to costs.