

(2023) 03 KL CK 0118
In the High Court Of Kerala
Case No : MFA (ECC) No .65 Of 2017

Fertilizers And Chemicals Travancore Limited

APPELLANT

Vs

Sushama Kumari, W/o.Late V.N.Sasi

RESPONDENT

Date of Decision : 02-03-2023

Acts Referred:

Employee's Compensation Act, 1923 — Section 4, 4(1), 4(1)(a), 4(1B), 5

Citation : (2023) 03 KL CK 0118

Hon'ble Judges : P.Somarajan, J

Bench : Single Bench

Advocate : K.Anand, Joseph Sebastian Parackal, Latha Anand, K.R.Pramoth Kumar, M.N.Radhakrishna Menon, Cibi K.Chерian, C.S.Karthika, C.P.Jagadesh, C.S.Karthika, Laisa B.Jose, V.K.Manju M, A.N.Premal, S.V.Rajan, Shibi. K.P., M.A.Sulfia, R.Santhosh Varkala, S.Santhy S

Final Decision : Partly Allowed

Judgement

P.Somarajan, J

1. A substantial question of law was raised as to the permissibility of accepting the actual salary of the deceased as on the date of death, for fixation of compensation in a proceedings initiated under the Employee's Compensation Act, 1923. The Compensation Commissioner has awarded an amount of Rs.33,35,690.45 with interest, based on the last drawn salary of the deceased, which comes to Rs.47,950/-. The alleged incident happened on 23.01.2011 and the victim fell down in a mixing pit of sulfuric acid and had sustained 20% burn injury. During the course of treatment, he met with a sad death due to myocardial infraction. The trial court has applied 50% of the last drawn salary and arrived at a compensation of Rs.33,35,690.45 and passed an award accordingly.

2. It was submitted by the learned counsel for the appellant that it is Section 4(1) of the Employee's Compensation Act, 1923 which governs the area and the compensation has to be calculated by applying 50% of the 'monthly wages' of

the deceased employee multiplied by the relevant factor. It is also brought to the notice of this court as per the proviso attached to Section 4(1) of the Act, the Central Government may, by notification in the official gazette, from time to time, enhance the amount of compensation mentioned in clauses (a) and (b). An amendment was effected by virtue of Act 45 of 2009 with effect from 18.01.2010, by which yet another provision was inserted as sub-section (1-B) to Section 4 of the Act and a notification was issued enhancing the "monthly wages" for the purpose of Section 4(1) to Rs.8,000/- from the earlier amount of Rs.4,000/-. Hence, it was submitted that the expression "monthly wages" made mentioned in Section 4(1)(a) has to be understood in relation to the amount notified by the Central Government in that behalf.

3. In fact, sub-section (1-B) was inserted in substitution of Explanation II attached to Section 4(1) of the Act, which was taken away under the very same Amendment Act 45 of 2009, by which the deeming provision under the said Explanation was also taken away. It is by virtue of the said provision, a notification was issued by the Central Government enhancing the monthly wages applicable to Section 4(1) to Rs.8,000/- from Rs.4,000/-. The alleged incident has happened subsequent to the said enhancement, hence, it was argued that Rs.8,000/- should be taken as the monthly wages for the purpose of Section 4(1) of the Act. While applying 50% of the said amount with the relevant factor – 139.13, the amount of compensation would come to only Rs.5,56,520/-, hence it was argued that the Compensation Commissioner is not justified in awarding a large sum of Rs.33,35,690.45/- with interest thereof. It was also submitted that the legal position is very much settled by the Apex Court in *K.Sivaraman and Others v. P.Satheesh Kumar and Others* (AIR 2020 SC 954 = (2020) 4 SCC 594].

4. There are two provisos attached to Section 4(1) and 4(1-B) of the Act. The proviso attached to Section 4(1) says that the Central Government may by notification in the Official Gazette from time to time enhance the amount of compensation mentioned in clauses (a) and (b). But clauses (a) and (b) has got two limbs, which are extracted below for reference:

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

(a) Where death results

from the injury

an amount equal to fifty per cent of the monthly wages of the deceased employee multiplied by the relevant factor;

or

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

(b) Where permanent total

(c) disablement results

(d) from the injury

an amount equal to sixty percent 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:

Provided that the Central Government may, by notification in the Official Gazette from time to time, enhance the amount of compensation mentioned in clauses and (b)."

5. Going by the provision, it is clear that in clauses (a) and (b), there are two separate limbs and in both the clauses, the first limb deals with monthly wages and calculation of compensation thereof without specifying any amount to be paid by way of compensation. It is in the second limb of both the clauses (a) and (b), an amount of compensation is made mentioned as a sum of Rs.1,20,000/- and Rs.1,40,000/- respectively. The proviso attached to Section 4(1) refers only enhancement of "amount of compensation" mentioned in clauses (a) and (b), which stands for the respective second limb of those clauses, hence may not have any application to the first limb of both the said clauses. So the authority given to the Central Government by virtue of the proviso to Section 4(1) is only to enhance the respective amount of Rs.1,20,000/-and Rs.1,40,000/- mentioned in the second limb of clauses (a) and (b) and it may not have any application to alter the amount that can be assessed as "monthly wages" and it is clear from the language used in the proviso which is restricted to enhance the "amount of compensation" made mentioned in clauses (a) and (b).

6. The amended provision, sub-section (1-B), which was inserted by virtue of the Amended Act is extracted below for reference:

"(1-B) The Central Government may, by notification in the Official Gazette, specify, for the purposes of sub-section (1), such monthly wages in relation to an employee as it may consider necessary."

7. The earlier provision - Explanation II attached to Section 4(1) of the Act is also extracted below for reference:-

"Explanation II - Where the monthly wages of a workman exceed four thousand rupees, his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be four thousand rupees only."

(emphasis supplied)

The said provision - Explanation II had been taken away by virtue of the Amendment Act 45 of 2009 with effect from 18/1/2010 and thereby deleted the deeming provision therein and substituted with the newly inserted provision- Section 4(1-B), without a deeming provision or any restriction or upper limit regarding "monthly wages" made mentioned therein. Sub-section (1-B) says only

that the Central Government may specify for the purpose of sub-section (1) such "monthly wages" in relation to an employee "as it may consider necessary". The expression initially used that "the Central Government may" makes the provision directory and not mandatory without imposing any obligation on the part of the Central Government to notify any such amount, but left open to the discretion of the Central Government, which is well evident from the wording and language used "as it (the Central Government) may consider necessary" in that provision. It is incorporated and inserted not in derogation of the application of Section 5 of the Act, which deals with the method of calculating "monthly wages", which stands and means the amount of wages deemed to be payable for a month's service, whether the wages are payable by month or whatever other period or at piece rate and should be calculated in accordance with clauses (a) to (c) therein. Clause (a) says that where the employee has, during the continuous period of not less than 12 months immediately preceding the accident, been in service of the employer who is liable to pay compensation, the monthly wages of the employee shall be 1/12th of total wages, which have fallen due for payment to him by the employer in the last twelve months of that period. The victim involved in the case was in continuous service for a longer period of more than 12 months prior to the alleged incident, hence falls under clause (a) of Section 5 of the Act and his monthly wages for the purpose of the said Act should be calculated as 1/12th of the total wages payable to him for the last 12 months. No provision was incorporated either under the Amendment Act 45 of 2009 or anywhere in the Act either by way of a non-obstante clause or by deemed provision so as to curtail or limit or to take away the application of Section 5 of the Act. Necessarily, the newly amended provision – sub-section (1-B) to Section 4 of the Act and the language employed therein which makes the provision not mandatory to notify any sum by the Central Government must be understood not to make the other provision inoperative. It is also not permissible to have an interpretation to the abovesaid newly inserted provision so as to take away the method available for computation of monthly wages made mentioned under Section 5 of the Act. Hence, there cannot be any merit in the argument that the amount notified (Rs.8,000/-) by the Central Government by virtue of sub-section (1-B) should be the "monthly wages" for the purpose of determination of compensation cannot be accepted, otherwise, Section 5 of the Act would stand redundant and purposeless. Necessarily, the non-incorporation of either a deeming provision akin to that of in the earlier provision - Explanation II attached to Section 4(1) of the Act or any non-obstante clause or any provision either limiting, reducing or specifying any upper limit with respect to the application of Section 5 of the Act would make the legal position clear that the "monthly wages" and its method of calculation narrated under Section 5 of the Act is applicable in the matter of determination of compensation by virtue of Section 4(1) of the Act, especially when it deals with the determination of compensation based on the "monthly wages". It is made clear in Section 5 of the Act that the method available under that Section is for the purpose of calculating "monthly wages" under that Act. It is Section 4 of the Act which says how the

compensation has to be computed based on the "monthly wages". Except in Section 4 of the Act, nowhere the expression "monthly wages" is made mentioned in the Act. The legislature has in its wisdom incorporated the expression "monthly wages" with the highlight of double inverted commas in that provision – Section 5 of the Act. No restriction or limitation was incorporated so as to limit the application of Section 5 anywhere in the Act, even at the time of Amendment Act 45 of 2009. On the other hand, the deeming provision under the Explanation II limiting the liability has been taken away by the abovesaid Amendment Act. Necessarily, the amended provision (1-B) will not have any overriding effect or any legal consequence over and above Section 5 of the Act and Section 5 of the Act would come into operation in the matter of assessment or method of calculation of monthly wages as made mentioned under Section 4(1) of the Act.

8. It is based on the decision drawn by the Apex Court in K.Sivaraman's case (supra), it is submitted that the said question was considered, addressed and answered by the Apex Court, by which it was ultimately concluded that the parties would stand governed by the limitation and the upper cap based on the notification issued by the Central Government by virtue of the power under Section 4(1-B) of the Act. The Apex Court has elaborately considered the argument advanced on that issue including the argument rendered by Amicus curiae in paragraph 10 of the judgment regarding the application of notification issued by the Central Government by virtue of authority under sub-section (1-B) of Section 4 in relation to Section 5 of the Act. But the question involved in that case is with respect to the date on which the liability to pay compensation would arise and the Apex Court by relying on the earlier judgment of the four Judges of the Apex Court in Pratap Narain Singh Deo v. Srinivas Sabata [(1976) 1 SCC 289] had laid down the legal position by settling the conflict between the decision drawn in Kerala State Electricity Board v. Valsala [(1999) 8 SCC 254] with the decision rendered in New India Assurance Co. Ltd. v. Neelakandan (Civil Appeal No.16904-09 of 1996) and National Insurance Co. Ltd. v. Mubasir Ahmed [(2007) 2 SCC 349] that it has to be reckoned in relation to the date of alleged incident and not based on the date of application or date of disposal. In fact, the application of Section 5 of the Act in reference to the amended provision – sub-section (1-B) of Section 4 has not been gone into or addressed by the Apex Court. The attempt of the learned Senior Counsel for the appellant to show the contrary by relying on paragraphs 32 and 33 of the said judgment cannot be sustained as what is considered and adjudicated in paragraph 32 is only with respect to the relevant date of determination of compensation payable and it is held that it is the date of accident and that the benefit of Amendment Act 45 of 2009 does not apply to the accident that took place prior to its coming into force and it was further reiterated in paragraph 33 that the deemed cap of Rs.4,000/- by virtue of Explanation II to Section 4 is applicable to the accident which took place prior to the commencement of Amendment Act 45 of 2009. Hence, the acceptance of an amount of Rs.47,950/- calculated under Section 5 of the Act as

the monthly wages of the deceased deserves no interference. The relevant factor to be applied is 139.13 and when it is multiplied with the 50% of the monthly wages, it would come to Rs.33,35,641.75.

9. What is ordered by the Compensation Commissioner by way of funeral expenses is excessive and the petitioners are entitled to an amount of Rs.5,000/- as against the amount of Rs.25,000/- awarded. The interest payable is at the rate of 12% per annum. Hence, the award passed by the Compensation Commissioner would stand allowed in part by modifying the same for an amount of Rs.33,40,641.75 with interest @ 12% per annum from 29/01/2011 till the date of payment.

The appeal will stand allowed in part accordingly. No costs.