

(2008) 02 MP CK 0013
In the Madhya Pradesh High Court

Kamal Kumar

APPELLANT

Vs

Smt. Swarnkaur and Another

RESPONDENT

Date of Decision : 06-02-2008

Acts Referred:

Workmens Compensation Act, 1923 — Section 10

Citation : (2008) 117 FLR 1148

Hon'ble Judges : N.K. Mody, J

Bench : Single Bench

Judgement

N.K. Mody, J.—This order shall also govern the disposal of M.A. No. 2864/2005, as both the appeals are arising, against the order dated 23.6.2005, passed by Commissioner for Workmen's Compensation, Labour Court, Mandsaur, in Case No. 6/2003 W.C.N.F. M.A. No. 1504/2006, is filed by claimant while M.A. No. 2864/2005 has been filed by respondent No. 1.

2. Short facts of the case are that the appellant Kamal Kumar, filed a claim petition alleging that on 11.4.1997 appellant was working as cleaner on a truck, bearing registration No. M.P.09K 4334, which was owned by respondent No. 1. It was alleged that appellant was earning Rs. 2,400/- per month, which was being paid by respondent No. 1. It was alleged that appellant was aged 23 years at the time, of accident. Further case of appellant was that one Umrao Singh Ahirwar was the driver of the offending truck, which was insured with, respondent No. 2. It was alleged that when the truck was coming from Ratlam to Neemuch, at about 05:00 a.m. at that time a bus, which was going towards Neemuch bearing registration No. M.P.14 A-4377, dashed the truck in which, appellant was travelling as cleaner, with the result appellant sustained grievous injuries in his leg. Appellant was brought to Government Hospital Mandsaur, from where appellant was referred to Udaipur and Ahemdabad. Further case of appellant was that looking to the grievousness of the injuries, right leg of the appellant was amputated above the knee. It was alleged that since the offending vehicle was insured with respondent No. 2 and appellant was under employment of

respondent No. 1, who sustained 100% disablement, therefore, a sum of Rs. 3,35,000/- be awarded along with interest @ 12% p.a. and penalty.

3. The case proceeded ex-parte against respondent No. 1. Respondent No. 2 contested the case. After framing of issues and recording of evidence learned Court below allowed the claim petition filed by the appellant holding that income of the appellant was Rs. 2,00,0/- p.m. After deducting 50% of the amount of the salary and after assessing loss of earning capacity @ 70%, multiplied by 219.95. Learned Court below awarded a sum of Rs. 1,53,965/- along with interest @12% p.a. w.e.f. 11.4.1997 and also awarded penalty @ 50%. Being aggrieved by the amount awarded by the learned Tribunal the present appeal has been filed. While M.A. No. 2864/2005, was filed by respondent No. 1, wherein respondent No. 1 has challenged the liability of interest and penalty.

4. Mr. Sameer Athwale, learned Counsel for the appellant submits that learned Court below wrongly assessed the income of the appellant @ Rs. 2,000/- p.m. and has deducted 50%" of the amount for the purpose of assessing the amount of compensation. It is submitted that accident took place on 11.4.1997 and the Workmen"s Compensation Act was amended w.e.f. 15.9.1995, whereby Section 4(b) of the Act has been amended, according to which in case of permanent total disablement results from the injury the amount of compensation has to be calculated on the basis of an amount equal to 60% of the monthly wages of the injured workman multiplied by the relevant factor. Learned Counsel submits that learned Court below committed error in multiplying the monthly wages of the appellant with 50%. It is submitted that if the income of the appellant would have been multiplied by 70% then appellant would have been entitled for higher amount. It is also submitted that learned Court below has applied the factor of 219.95, holding the age of the appellant as 23 years, while appellant was aged 22 years, therefore, factor of 221.37 ought to have been applied. Learned Counsel submits that accident took place on 11.4.1997, while the date of birth of the appellant is 1.7.1975, which was proved by the mark-sheet filed by the appellant.

5. Mr. Vishal Verma, learned Counsel for respondent No. 1 submits that learned Court below committed error in holding respondent No. 1 liable for payment of interest and penalty. Learned Counsel submits that no notice was given by the appellant to respondent No. 1, which is mandatory as per Section 10 of Workmen"s Compensation Act. It is submitted that in the facts and circumstances of the case learned Court below committed error in holding respondent No. 1 liable for payment of penalty and that too, to the extent of 50%. So far as interest is concerned learned Counsel submits that since the respondent No. 2 is liable for payment of amount of compensation, therefore, learned Court below committed error in not holding respondent No. 2 liable for payment of interest. It is submitted that the accident is dated 11.4.1997, while claim petition was filed on 30.1.2003, i.e. after more than 6 years.

6. Mr. R.J. Pandit, learned Counsel for respondent No. 2 submits that the amount

awarded by the learned Tribunal is just and proper. Learned Counsel submits that the age of the appellant was mentioned as 23 years in the claim petition itself and so far as the income is concerned neither respondent No. 1 was examined nor any other evidence was produced from where it can be assessed that income of the appellant was Rs. 2,000/- per month. So far as liability of penalty and interest is concerned learned Counsel placed reliance on a decision in the matter of New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and Another, .

7. After taking into consideration all the facts and circumstances of the case and evidence on record, this Court is of the view that so far as age of the appellant is concerned, mark-sheet of the appellant is on record according to which the age of the appellant was 22 years, at the time of accident, therefore, even if the age of appellant is mentioned as 23 years in the claim petition, is of no relevance in presence of documentary evidence, which is more reliable. Since the accident was dated 11.4.1997 and the Workmen's Compensation Act has been amended w.e.f. 15.9.1995, therefore, for the purpose of assessment of compensation an amount equal to 60% of the monthly wages was required to be taken into consideration and looking to the age of the appellant as 22 years the relevant factor as per Schedule IV of the Act is 221.37 and not 219.95, thus, the appellant is entitle for a sum of Rs. 1,86,951/- instead of Rs. 1,53,965/-.

8. So far as the payment of interest is concerned it is true that the claim petition has been filed with a delay of 6 years, but prior to it the appellant has filed the claim petition before the Motor Accident Tribunal and contested the same up to this Court, whereby the claim petition was dismissed with a liberty to the appellant to file the claim petition before the Commissioner for Workman's Compensation, therefore, the delay stands explained. So far as the penalty is concerned from the record it is evident that no notice was given to the respondent No. 1 in that regard. Proviso to Sub-section (3) of Section 4-A of the Act lays down 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.

9. In the circumstances of the case the impugned order so far as it relates to penalty is concerned cannot be allowed to sustain and for that purpose it is required to be sent back. So far as the liability of interest is concerned that is also disputed by the respondent No. 1. Respondent No. 2 is also avoiding the liability of interest. Since the case is being remanded for determining the entitlement of the appellant so far as penalty is concerned, therefore the case is also remanded for deciding the liability of interest as well, which will be decided by the learned Court below after taking into consideration the position of law and also after recording further evidence if any, led by the parties.

10. Parties are directed to remain present before the learned Court below on 17.3.2008. Record be sent back. The amount of compensation be paid to the appellant.

11. With the aforesaid observations both the appeals stand disposed of. Ho order as to costs.