
(2009) 10 OHC CK 0093

In the Orissa High Court

Case No : Writ Petition (C) No. 13042 of 2008

Kasinath Das and Others

APPELLANT

Vs

D.M., New India Assurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

Citation : (2009) 10 OHC CK 0093

Hon'ble Judges : B.K. Patel, J.

Bench : Single Bench

Final Decision : Allowed

Judgement

B.K. Patel, J.—In this writ application Petitioners assail the legality of the common order dated 25.7.2008 passed by the Commissioner for Workmen's Compensation cum Asst. Labour Commissioner, Cuttack (for short, "the Commissioner") passed in W.C. Case Nos. 493 D, 494 D and 495 D of 2003, copy of which is at Annexure 1 to the writ application, correcting the common judgment dated 30.1.2008, copy of which is at Annexure 2 to the writ application, passed in the said cases.

2. On consent, the matter was taken up for disposal at the stage of admission.

3. Petitioners and others are among the legal heirs of three deceased workmen who died on 29.9.2000 due to injuries caused by an accident arising out of and in course of their employment as labours in a truck belonging to the opposite party No. 3 who had been insured by opposite party No. 1 New India Assurance Co. Ltd.. Petitioners 1 and two others preferred W.C. Case No. 493 D of 2003; Petitioner No. 2 preferred W.C. Case No. 494 D of 2003; and Petitioner No. 3 and three others preferred W.C. Case No. 495 D of 2003 against opposite parties 1 and 3 before the learned Commissioner. It is pertinent to note that legal heirs of another deceased labourer who also died in the same accident preferred M.V. Misc. Case No. 1241 of 2000 claiming compensation under Section 166 of the Motor Vehicles Act before the learned M.A.C.T., Cuttack. By judgment/award

dated 30.3.2006 passed in M.V. Misc. Case No. 1241 of 2000, copy of which is at Annexure 5 to the writ application, said claimants were awarded Rs. 1,95,000/ towards compensation. Upon enquiry, considering the materials on record including the judgment/award passed in M.V. Misc. Case No. 1241 of 2000, learned Commissioner passed the common judgment dated 30.1.2008 directing the opposite party No. 1 to deposit compensation amount of Rs. 3,27,705/ in W.C. Case No. 493/D/2003, Rs. 3,32,005/ in W.C. Case No. 494 D/2003 and Rs. 3,11,970/ in W.C. Case No. 494 D /2003. Said award was corrected by the impugned order on an application filed by the opposite party No. 1. For better appreciation of the circumstances under which the impugned order was passed, it shall be profitable to reproduce the same. The impugned order at Annexure 1 reads:

Extract copy of order dtd. 25.7.2008 passed by the Commissioner for Workmen's Compensation cum Asst. Labour Commissioner, Cuttack.

W.C. Case No. 493 D/03

W.C. Case No. 494 D/03

W.C. Case No. 495 D/03

Kasinath Das and Ors.... Applicants

v.

DM, New India Assurance Co. Ltd. and Ors.

... Opp. Parties.

The application filed by the opp. party No. 2 for appropriate order, regarding correction of the judgment passed by this Hon''ble Court.

Heard. The opp.party No. 2 prays for correction of judgment on various grounds, which amounts to review of the judgment which is not permissible under law. However, considering the submission of the learned Counsel for the opp.party No. 2 regarding quantum of compensation, I found that the accident occurred prior to the amendment of the W.C. Act and by the time of accident maximum monthly wages under the Act was Rs. 2000/ and Rs. 1600/ for the workmen.

The learned Advocate for the applicant has filed a Xerox copy of the judgment of the Hon''ble MACT in M.V. Misc. No. 1241 of 2000. The Hon''ble MACT while calculating compensation has taken into account the monthly wages of the victim/deceased at Rs. 1500/ per month, the cause of action arising out of one accident and involvement of same vehicle. The pleadings of the Petitioner in the said case was that the deceased was a labour in the same vehicle. But by mistake it has been lost sight while passing judgment.

As such the assessment of compensation by taking Rs. 3000/ as monthly wages is not tainable in the eye of law. This being an Arithmetical error this Court has the power to correct the same. Keeping in mind the aforesaid judgment of the

Hon''ble MACT, I hold the monthly wages of the deceased as Rs. 1600/ per month due to limitation factor and accordingly the compensation in W.C. Case No. 493 D/03 comes to 50% of wages of Rs. 1600/ X 24 years age factor i.e. $800/ \times 218.47 = \text{Rs. } 1,74,776.00$. In W.C. Case No. 494 D/03 50% of the monthly wages of Rs. 1600/ X 22 years of age factor i.e. $\text{Rs. } 800/ \times 221.37 = \text{Rs. } 1,77,096.00$, similarly in W.C. Case No. 495 D/03 the compensation ;amount would be $800 \times 207.98 = \text{Rs. } 1,66,384/$ and accordingly the application filed by the O.P. No. 2 is disposed off.

The office is directed to carry out the necessary correction in the judgment and communicate the same to the parties.

Sd/ Commission

xxx xxx xxx(sic) 4. Sri D.K. Mohapatra, learned Counsel for the Petitioners would submit that it is apparent from the impugned order that the learned Commissioner was fully aware of the fact that review of the judgment under the Workmen's Compensation Act (for short "the W.C. Act) is not permissible under law. Despite categorical observation to the effect that prayer of opposite party No. 1 for correction of judgment amounts to prayer for review of judgment which is not permissible under law, on the pretext of correction of arithmetical error, the learned Commissioner upon reference to the amendment enhancing deemed maximum monthly wages to be adopted from two thousand rupees to four thousand rupees brought into Explanation II to Clauses (a) and (b) of Sub-section (1) of Section 4 of the W.C. Act. w.e.f. 08.12.2000, and the award at Annexure 5 passed by the learned M.A.C.T., Cuttack, reviewed the common judgment passed more than six months prior to such review. It was argued that by no stretch of imagination the impugned order can be construed to have effected arithmetic correction only. Rather, learned Commissioner assigned reasons for reviewing the judgment. Therefore, the impugned award is not sustainable under law. In support of his contention learned Counsel for the Petitioners relied upon decisions of Delhi High Court in Raibir Sinah v. S.K.S. Yadav, Commissioner Workmen's Compensation 1995 (2) T.A.C. 135 (Del), of Himachal Pradesh High Court in Oriental Insurance Co. Ltd. v. Smt. Kola Devi and Ors. 1997 (1) T.A.C. 2 (HP) and of Punjab and Haryana High Court in Gurnam v. Commissioner Workmen's Compensation 1998 (1) T.A.C. 814 (P and H).

5. Learned Counsel for the Petitioners would further argue that though Explanation II to Clauses (a) and (b) of Sub-section (1) of Section 4 of the W.C. Act was amended w.e.f. 08.12.2000, the accident having taken place on 29.09.2000 and the common judgment in the three W.C. cases having been passed on 30.01.2008, the legal heirs of the deceased workman were entitled to benefit which was available on the date when the W.C. case was finally adjudicated. In this context, learned Counsel for the Petitioners relies upon decision of the Hon''ble Supreme Court in Rathi Memon v. Union of India 2001 (2) T.A.C. 250 (S.C.).

6. Learned Counsel for the opposite party No. 1 would contend that as the Insurance Company has already deposited compensation amount as directed in the impugned order and the Petitioners have already received the same during the pendency of the writ application, the writ application has become infructuous. Learned Counsel for the opposite party No. 1 also contended that as the amendment enhancing the amount of deemed maximum monthly wage to be adopted for calculation of compensation was effected after the date of accident, the impugned award does not amount to review. It amounts to correction of inadvertent arithmetical mistake.

7. None of the provisions under the W.C. Act provides for power of review of judgment. The only power of review that has been conferred on the Commissioner under Section 6 of the W.C. Act is in respect of half -monthly payment payable under Section 4(1)(d) of the W.C. Act. Admittedly, in the present case, learned Commissioner has not resorted to provision under Section 6 of the W.C. Act. On the contrary, learned Commissioner has observed that prayer for correction of the impugned judgment sought by the Insurance Company amounts to prayer for review of the judgment which is not permissible under law. Nonetheless, learned Commissioner proceeded to modify the impugned judgment on the pretext of correcting arithmetical error. In bringing about so called correction of arithmetical mistake or error, learned Commissioner has referred to award passed by learned M.A.C.T., Cuttack in M.V. Misc. Case No. 1241 of 2000 as well as amendment of Explanation II to Clauses (a) and (b) of Sub-section (1) of Section 4 of the W.C. Act enhancing the amount of deemed maximum monthly wages from Two thousand rupees" to "four thousand rupees".

8. Prior to amendment Explanation II to Clauses (a) and (b) of Sub-section (1) of Section 4 of the W.C. Act read as follows:

xx xx xx xx xx Explanation II Where the monthly wages of a workman exceed two thousand rupees, his monthly wages for the purposes of Clause (a) and Clause (b) shall be deemed to be two thousand rupees only. By virtue of Workmen's Compensation (Amendment) Act, 2000 (Act 46 of 2000) the words "two thousand rupees" were substituted by the words "four thousand rupees" w.e.f. 08.12.2000.

9. Thus, obviously, on the date of accident monthly wages of the deceased could not have been deemed to have more than two thousand rupees. However, such amount was enhanced to four thousand rupees pursuant to the Act 46 of 2000 long before the common judgment was passed on 30.01.2008 in W.C. Case Nos. 493 D/03, 494 D/03 and 495 D/03.

10. Review is a creature of statute. Power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. In absence of any provision granting express power of review, an order in review is ultra vires, illegal and without jurisdiction. The Courts may have limited power only to make correction if the order, as drawn up, did not express the intention of

the Court. (See Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, , Major Chandra Bhan Singh Vs. Latafat Ullah Khan and Others, , Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , Harbhajan Singh Vs. Karam Singh and Others, and Patel Chunibhai Dajibhai etc. Vs. Narayanrao Khanderao Jambekar and Another,).

11. It is apparent from the impugned order that on an application filed by the Insurance Company learned Commissioner passed the impugned order without notice to the Petitioners. It is also apparent that impugned order is a reasoned order in which the learned Commissioner observed that award passed in the three W.C. cases was not in accordance with provision of the W.C. Act prior to amendment as well as award passed by learned M.A.C.T., Cuttack in M.V. Misc. Case No. 1241 of 2000. As is observed, learned Commissioner determined the monthly wages of deceased workmen "keeping in mind the award passed by the learned M.A.C.T., Cuttack. Resorting to such recourse was not at all available to the learned Commissioner in view of not only absence of any provision under the Act but also specific bar contained in Rule 32 of the Workmen's Compensation Rules, 1924 which reads:

Judgment. (1) The Commissioner, in passing orders, shall record concisely a judgment, his finding on each of the issues framed and his reasons for such finding.

(2) The Commissioner, at the time of signing and dating his judgment, shall pronounce, his decision, and thereafter no addition or alteration shall be made to the judgment other than the correction of a clerical or arithmetical mistake arising from any accidental slip or omission.

12. An arithmetical mistake, as has been laid down by the Hon'ble Supreme Court in Master Construction Co. (P) Ltd. Vs. State of Orissa and Another, , is a mistake of calculation, a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. Such an error should be apparent on the face of record. It should not be an error which should depend for its discovery, on elaborate argument of questions of fact or law. Therefore, correction of arithmetical mistake as contemplated under sub rule (2) of Rule 32 of the Workmen's Compensation Rules, 1924 cannot be construed to mean correction of anything more than mistake in addition, subtraction, multiplication etc. arising from accidental slip or omission. Save and accept such rectification of the mistake apparent on the face of the judgment, neither the Workmen's Compensation Act nor the Rules framed, thereunder confers on the Commissioner any jurisdiction to interfere with the judgment already passed. Learned Commissioner appears to have modified the judgment already passed without jurisdiction and in blatant violation of Sub-rule (2) of Rule 32 of the Workmen's Compensation Rules, 1924.

13. In *Raibir Sinah v. S.K.S. Yadav*, Commissioner Workmen's Compensation (supra), it has been held by Delhi High Court, with regard to power of review of judgment under Section 6 of the W.C. Act:

6. No power of review has been conferred on the Competent Authority for reviewing the orders passed under Section 4(1)(a), (b) and (c). Only power of review is conferred in respect of the order which is passed presumably under Section 4(1)(d) of the Act and rightly so because under Section 4(1)(d) of the Act there is a temporary disablement which may be curable and in such a situation if subsequently it comes out that there has been change in the medical condition of the employee then obviously a fresh application can lie to the Competent Authority giving the new facts and Competent Authority can get the employee medically examined. It is possible that in such medical examination it may be found that the workman had either been cured or had suffered permanent disablement. In such a case, review can be made by the Competent Authority and appropriate order made under Section 6 of the Act, but such is not the case where compensation has been awarded under Section 4(1), (b) and (c) of the Act. Similar view has also been taken by Himachal Pradesh High Court in *Oriental Insurance Co. Ltd. v. Smt. Kala Devi and Ors.* (supra) and Punjab and Haryana High Court in *Gurnam v. Commissioner Workmen's Compensation* (supra).

14. The W.C. Act is a beneficent legislation. Long before the adjudication of W.C. Case Nos. 493 D/03, 494 D/03 and 495 D/03 amendment more beneficial to workmen had already been brought into Explanation II to Clauses (a) and (b) of Sub-section (1) of Section 4 of the W.C. Act. In *Rathi Memon v. Union of India* (supra), it has been observed:

34. Shri K. Sukumaran, learned senior Counsel relied on the decision of another Division Bench of the Kerala High Court in *Oriental Insurance Co. Ltd. v. Asokan* 1997(1) KLT 608: 1997 (1) T.A.C. 835, in which a decision of this Court is quoted. That decision of this Court is dated 6th November, 1996, rendered by a two Judge Bench (Kuldip Singh and Saghir Ahmad, JJ.) of this Court (C.A. Nos. 16904 09 of 1996). Later we came across that the said decision is reported in *New India Assurance Co. Ltd. v. V.K. Neelakandan and Ors.* 1999 (8) SCC 256. The said decision was also under the Workmen's Compensation Act. This is what the two Judge Bench said:

We are finally determining the rights of the workmen today. The Act is a special legislation for the benefit of the labour. Keeping in view the scheme of the Act we are of the view that the only interpretation which can be given to the amendment is that if any benefit is conferred on the workmen and the said benefit is available on the date when the case is finally adjudicated, the said benefit should be extended to the workmen 35. A three Judge Bench of this Court in *Kerala State Electricity Board and Another Vs. Valsala K and Another*, , has referred to the aforesaid decision and held that it was wrongly decided in view of the four Judge Bench decision of this Court in *Pratap Narain Singh Deo*

(supra). Nonetheless, in appropriate cases the principle of taking advantage of the beneficial legislation, subsequently enacted, is not dissented from by the larger Bench.

At paragraph 30 of the judgment it has been categorically held:

xx xx we are of the definite opinion that the Claims Tribunal must consider what the Rules prescribed at the time of making the order for payment of the compensation. 15. In view of the above, the writ application is allowed and the impugned order is quashed. Opposite party No. 2 Commissioner for Workmen's Compensation Cum Assistant Labour Commissioner, Cuttack is directed to take steps for recovery of compensation as awarded in terms of judgment dated 30.01.2008 and payment thereof to the Petitioners at the earliest. No cost.