(2008) 06 BOM CK 0007

In the Bombay High Court

Case No : First Appeal No. 1030 of 2007

Muley Brother Pvt. Ltd., Aurangabad and another — APPELLANT

Vs

Samindarabai Karbhari Dandge, (SAU.) Aurangabad and others — RESPONDENT

Date of Decision : 25-06-2008

Acts Referred:

Workmens Compensation Act, 1923 — Section 4A(3)

Citation : (2009) 120 FLR 701

Hon'ble Judges : A.S. Oka, J

Bench : Single Bench

Advocate : S.V. Dankh, for the Appellant; V.I. Bhope and V.R. Mundada, for the Respondent

Final Decision : Allowed

Judgement

A.S. Oka, J.—The submissions of the learned Counsel for the parties were heard on the last dates. The appeal is preferred by the appellants for challenging judgment and order dated 21st April, 2007 passed by the learned Judge of the Labour Court at Aurangabad in a claim petition filed by the first respondent under the provisions of the Workmen''s Compensation Act, 1923 (hereinafter referred to as the said Act).

According to case of the first respondent, her son was employed as a helper of a Driver. According to her case, he was drawing salary of Rs. 2200/- p.m. According to her, the appellants were his employers. According to case of the first respondent, on 11th August, 1997, the first appellant directed her son to go along with third respondent who was at the relevant time working as a Driver of a Dumper No. MP-C -17/1942. According to case of the first respondent, the Dumper was being driven in rash and negligent manner by the respondent No. 3. Ultimately, the Dumper gave a dash to a tree. As a result of the impact, the son of the first respondent received serious injuries and he succumbed to the injuries. According to case made out by the first respondent, the appellants herein and the third respondent herein, were responsible for causing death of her son.

2. It must be stated here that in the claim petition as originally filed, the registration number of the Dumper was mentioned as MP-17/1942 instead of MP-17-C/1942. In the written statement filed by the first appellant it was contended that the vehicle bearing No. MP-17/1942 was not owned by the first appellant but the vehicle No. MP-17-C/1942 was owned by the first appellant which was at the relevant time insured with the second respondent-insurer. The first appellant denied that deceased son of the first respondent was drawing salary of Rs. 2200/- per month. It was stated that the deceased was working with first appellant as a Helper to the Driver of the first appellant and that he was paid Rs. 600/- per month for doing work of casual nature. It was contended that the deceased died during the course of journey as stated by the first respondent in paragraph 4 of her claim petition. It was lastly contended in the written statement that the vehicle bearing No. MP-17/C/1942 was insured with the second respondent at the time of accident and, therefore, the second respondent- insurer was liable to pay compensation to the first respondent.

3. Second respondent-insurer also filed written statement containing general denials. The second respondent prayed for dismissal of the claim petition.

4. The learned Commissioner held that the accidental death of the deceased occurred during the course of his employment with the first appellant. The operative part of the impugned order reads thus--

The application is allowed as under:--

1. The opponent No. 4 Insurance Company shall deposit compensation amount of Rs. 2,46,400/- in the Court within one month, of the order.

2. The opponent Nos. l and 2 employers shall deposit interest @ 12% per annum on the compensation amount of Rs. 2,46,400/- from the date or accident i.e. 11.8.1997 till full realisation of the compensation amount and 50% penalty on the compensation amount of Rs. 2,46,400/-, within one month of the order, in the Court.

3. No order as to costs.

4. Proceeding is closed henceforth.

5. The first submission made by the learned Counsel appearing for the appellant is that the learned Commissioner has committed an error by directing the appellants to pay penalty equivalent to 50% of the compensation amount. It is further submitted that the second Respondent was a party to the claim petition and, therefore, the second Respondent ought to have deposited the amount of compensation without any delay. Inviting my attention to the operative part of the impugned order, it is submitting that the second respondent-insurer ought to have been held liable to pay interest @ 12% p.a. awarded on the compensation

amount. He invited my attention to the averments made by the first appellant in the written statement and submitted that there was no justification for directing the appellants to pay interest and that also from the date of the accident. He submitted that considering the stand taken in the written statement of the first appellant and considering the presence of the insurance of the vehicle before the learned Commissioner, it was obvious that no case was made out for directing the appellants to pay penalty. It is submitted that there was no material on record warranting grant of penalty at the maximum rate of 50%. He has placed reliance on certain decisions of the Apex Court, this Court and various other High Courts. A reference to the said decisions has been made in the later part of this judgment.

6. The learned Counsel appearing for the second respondent submitted that the insurer cannot be held liable to pay interest and penalty. It was submitted that in any case the interest cannot be granted from the date of the accident.

7. The learned Counsel appearing for the first respondent supported impugned judgment and order and contended that the interest ought to have made payable by the second respondent insurer.

8. On the basis of the aforesaid submissions, following questions arise for consideration in the facts of this case.

(i) Whether interest is payable on the compensation amount and if yes, from what date the interest could have been granted by the learned Commissioner?

(ii) Whether insurer is liable to pay interest and penalty on the compensation amount?

(iii) Whether the learned Commissioner was justified in directing the appellants to pay penalty of 50% ?

(iv) Whether in the facts of the case the learned Judge committed an error by directing the appellants to pay interest on the compensation amount from the date of the accident?

9. It will be necessary to refer to various decisions relied upon by the learned Counsel appearing for the parties. It is also necessary to refer to relevant provisions of the said Act. Section 4-A of the said Act reads thus:--

4-A. Compensation to be paid token due and penalty for default.-(1) Compensation u/s 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

(3) Where any employer is in default in paying the compensation due under this

Act within one month from the date it fell due, the Commissioner shall--

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) If, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of 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.

Explanation--For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

(3-A) The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependent, as the case may be.

10. It will be necessary to refer to the decision of the Apex Court in the case of Ved Prakash Garg v. Prem Devi and others 1997 (77) FLR 637. The following question arose for consideration of the Apex Court in the said decision:--

Where an employee receives a personal injury in a motor accident arising out of and in the course of his employment while working on the motor vehicle of the employer, whether the insurance company, which has insured the employer-owner of the vehicle against third party accident claims under Motor Vehicles Act, 1988 (hereinafter referred to as ''the Motor Vehicles Act'') and against claims for compensation arising out of proceedings under the Workmen''s Compensation Act, 1923 (hereinafter referred to as ''the Compensation Act'') in connection with such motor accidents, is liable to meet the awards of Workmen''s Commissioner imposing penalty and interest against the insured employer u/s 4-A(3) of the Compensation Act.

11. The Apex Court considered the relevant provisions of the said Act as well as the provisions of the Motor Vehicles Act, 1988 and in particular section 147 thereof. After considering the relevant statutory provisions, the Apex Court held that--

(a) The liability to pay compensation under the said Act of 1923 gets foisted on the employer provided it is shown that the workman concerned suffered from personal injury, fatal or otherwise, by any motor accident arising out of and in the course of his employment. Such an accident is also covered by the statutory coverage contemplated by section 147 of the said Act of 1988.

(b) In case of such accident, the liability to pay interest on the principal amount of compensation u/s 4-A (3)(a) remains part and parcel of the statutory liability of the insurer of the vehicle. The imposition of interest on the principal amount of compensation payable under the said Act of 1923 partakes the character of the legal liability of the insured-employer to pay compensation amount with due interest as imposed by the learned Commissioner. Therefore, principal amount o* compensation as well as the interest made payable thereon on a claim petition filed under the said Act of 1923 would remain part and parcel of the legal liability of the insurer.

(c) In so far as penalty payable u/s 4-A(3)(b) of the said Act of 1923 is concerned, it cannot be said that it automatically flows from the main liability incurred by the insured employer under the said Act of 1923 and the penalty amount imposed upon the insured employer would get out of the sweep of the ''liability incurred'' under the proviso (c) to section 147(1) of the said Act of 1988.

(d) In certain contingencies the Commissioner is justified in directing payment of interest not only from the date of adjudication (date of Award) but also from the date of accident concerned and such an order passed by the Commissioner would remain perfectly justified.

12. Thus, in so far as penalty amount is concerned, the position is no more res-integra. An insurer cannot be held liable to pay the penalty amount. However, the insurer is liable to pay interest u/s 4-A(3) (a) of the said Act of 1923. This is the answer to the question (ii) referred to above.

13. My attention was invited to a latest decision of the Apex Court in the case of National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, . Reliance was placed on following portion of paragraph No. 9 of the said judgment which reads thus--

Interest is payable u/s 4-A (3) if there is default in paying the compensation due under this Act within one month from the date it fell due. The question of liability Linder section 4-A was dealt with by this Court in Maghar Singh v. Jashwant Singh 1997 ACJ 517 (SC). By Amending Act, 30 of 1995, section 4-A of the Act was amended, inter alia, fixing the minimum rate of interest to be simple interest at the rate of 12 per cent. In the instant case, the accident took place after the amendment and, therefore, the rate of 12 per cent as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The starting point is on completion of one month from the date on which it fell due. Obviously, it cannot be the date of accident. Since no indication is there as when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because section 4-A (1) prescribes that compensation u/s 4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication u/s 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of sub-section (2) of section 4-A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is ''falls due''. Significantly, legislature has not used the expression ''from the date of accident''. Unless there is an adjudication, the question of an amount falling due does not arise.

14. In short, the Apex Court held that unless an adjudication is made by the Commissioner, the question of an amount falling due does not arise and, therefore, interest cannot be made payable from either the date of accident or from the date of filing claim petition. The said decision has been rendered by a Bench of two Hon''ble Judges of the Apex Court. On this aspect, it will be necessary to go back to the decision of the Apex Court in the case of Ved Prakash Garg (supra). In the said decision, a co-ordinate Bench of the Apex Court has considered the issue relating to the date from which interest can be made payable u/s 4-A(3)(a). While dealing with this aspect, the Apex Court has held thus:--

Thus the principal amount as well as the interest made payable thereon would remain part and parcel of the legal liability of the insured to be discharged under the Compensation Act and not dehors it. It, therefore, cannot be said by the insurance company that when it is statutorily and even contractually liable to reimburse the employer qua his statutory liability to pay compensation to the claimants in case of such motor accidents to his workmen, the interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part of the insured liability of the employer. No question of justification by the insured-employer for the delay in such circumstances would arise for consideration. It is of course true that one month''s period as contemplated u/s 4-A(3) may start running for the purpose of attracting interest under sub-clause (a) thereof in case where provisional payment has to be made by the insured employer as per section 4-A(2) of the Compensation Act from the date such provisional payment becomes due. But when the employer does not accept his liability as a whole under circumstances enumerated by us earlier then section 4-A(2) would not get attracted and one month''s period would start running from the date on which due compensation payable by the employer is adjudicated upon by the Commissioner and in either case the Commissioner would be justified in directing payment of interest in such contingencies not only from the date of the award but also from the date of the accident concerned. Such an order passed by the Commissioner would remain perfectly justified on the scheme of section 4-A(3)(a) of the Compensation Act.

(Emphasis added)

The Apex Court has clearly held that the Commissioner would be justified in certain contingencies in directing payment of interest not only from the date of the award/adjudication but also from the date of the accident concerned.

15. Thus, it appears that there is a conflict of opinion in the two co-ordinate Benches of the Apex Court on this aspect. In this behalf, it will be necessary to refer to a decision of Full Bench of this Court in the case of Kamleshkumar I. Patel v. Union of India and others 1994 Mh. LJ 1669. The Full Bench had an occasion to consider the aforesaid aspect. The question was whether in such a contingency the latter decision has to be preferred. The Full Bench of this Court quoted with approval a decision of special Bench of the Calcutta High Court in the case of Bholanath v. Madanmohan, with approval. The view taken by the special Bench of the Calcutta High Court is that when contrary decisions of the Supreme Court emanate from the Benches of equal strength, the course to be adopted by the High Court is, firstly, to try to reconcile and explain those contrary decisions by assuming, as far as possible, that they applied to different states of circumstances. The special Bench of Calcutta High Court held that if the aforesaid option cannot be adopted, the High Court may not necessarily follow the decision which is latter in point of time.

16. The Apex Court in the case of National Insurance Company (supra) considered a case where adjudication was required to be made are regards loss of earning capacity of the injured. In so far as the earlier decision of the Apex Court in the case of Ved Prakash Garg (supra) is concerned, the Apex Court has expressly held that the Commissioner has a power to grant interest even from the date of accident and such order passed by Commissioner would remain perfectly justified in the scheme of section 4-A(3)(a) of the said Act of 1923. If the two decisions are reconciled, it is obvious that the law laid down by the Apex Court is that in a given case, in view of admitted or proved facts, the learned Commissioner can award interest from a date which is prior to the date of adjudication made by the learned Commissioner. There are cases where death of an employee due to employment injury is admitted and there is no dispute about the age and income of the deceased. If in such a case compensation is withheld, such a power can be exercised by the Commissioner.

17. Therefore, it is obvious that the Commissioner after considering the facts and circumstances of a particular case, can direct payment of interest from a date prior to the date of adjudication made by the learned Commissioner on a claim petition u/s 22 of the said Act.

18. Thus, in the present case, the insurer will be liable to pay interest payable on the compensation amount The date from which the interest is payable, will have to be determined. It will be necessary to refer to the written statement filed by the appellant. In paragraph No. 1 of written statement, it is admitted that vehicle bearing No. MP-17-C/1942 was owned by the first appellant. It will be necessary to refer to paragraph 16 of the written statement. The relevant portion of the said paragraph reads thus--

16. That, the applicant has no cause of action against the non-applicant No. 1 as Raju Asaraba was with the Driver on the date of accident and not Raju Karbhari, therefore non-applicant No. 1 is not at all liable for any compensation, penalty

and interest as demanded by the applicant f therefore no question arises to deposit any compensation claimed by the applicant before this Hon''ble Court. Further the vehicle bearing No. MP- 17-C/1942 is insured with the respondent No. 4 and Insurance was valid at the time of accident therefore respondent No. 4 is liable to pay compensation to the applicant. Respondent No. 4 was already informed about accident immediately after the accident occurred therefore the insurance company i.e. respondent No. 4 is liable.

Thus the stand taken by the first appellant is that there was an accident involving the vehicle owned by the first appellant and the insurer (second respondent) was immediately informed about the accident. The prayer made in the written statement also deserves to be considered. Prayer (A) reads thus--

(A) The vehicle bearing No. MP-17/C/1942 is insured with the respondent No. 4 at the time of accident occurred and that too valid, therefore respondent No. 4 is liable to pay the compensation to the applicant and Insurance company be held responsible for payment if the accident is occurred by the vehicle No. MP-17-C/1942.

From the tenor of the written statement, it appears that the factum of accident was accepted by the first appellant. The first appellant raised a contention that the compensation will be payable by the second respondent-insurer. Thus, knowing fully well that they were liable to pay compensation, only on the ground that there was a valid insurance on the date of the accident, the compensation amount was not deposited by the appellants. In the circumstances, the learned Commissioner was right in directing the appellants to pay interest from the date of the accident. In view of such conduct, the appellants have been rightly penalised by awarding maximum penalty of 50% of the compensation

19. In the circumstances, the appeal succeeds in part and I pass following order--

(1) Clause 1 of the operative part of the impugned judgment and Award is modified and the original opponent No. 4 i.e., United Insurance Company Ltd. is directed to deposit the compensation amount of Rs. 2,46,400/- with interest thereon @ 12% p.a. from 11th August 1997 till realisation of the compensation amount.

(2) Time of ten weeks is granted to the insurer to deposit the interest component.

(3) Clause 2 of the operative part of the impugned order is confirmed with the modification that along with the appellants even the second respondent insurer is liable to pay the interest component.

(4) Time of twelve weeks is granted to the appellants to deposit the penalty amount.

