(2008) 09 OHC CK 0043

In the Orissa High Court

National Insurance Co. Ltd. — APPELLANT

Vs

Smt. Kuni Panigrahi and Another — RESPONDENT

Date of Decision : 02-09-2008

Acts Referred:
Workmens Compensation Act, 1923 — Section 30

Citation : (2008) CLT 481 Supp : (2008) 119 FLR 953 : (2008) OLR 481 Supp

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.S. Chauhan, C.J.—This appeal has been filed by the appellant against the judgment and order dated 15.3.2001 as well as 19.10.2001 passed by the learned Single Judge to the limited extent that the issue of imposition of penalty under the provisions of Workmen''s Compensation Act, 1923 (hereinafter called ''the Act'') has not been dealt with. So far as the otherwise are concerned, Mr. N.K. Mishra, learned Senior Counsel for the appellants no grievance.

2. The facts and circumstances giving rise to the case are that a claim petition was filed by the respondents before the Commissioner under the Act contending that one Rajkishore Panigrahi, the driver of the bus bearing Registration No. OSG 6677 met an accident during the course of his employment and received serious injuries as a result of which he died in the hospital on 7.4.1993. The Commissioner made an award vide order dated 25.4.1995 granting compensation to the tune of Rs. 73,668/- against the appellant with the following direction:

Therefore, opposite party No. 2 is liable to pay compensation as determined above for disbursement to the legal dependants of the deceased. The compensation is payable within one month from the date of this order failing which 50% penalty with 6% interest will be charged over the awarded amount.

3. Being aggrieved, the appellant filed appeal u/s 30 of the Act which was dismissed by the learned Single Judge vide judgment and order dated 15.3.2001.

The appellant filed an application i.e. Misc. Case No. 1091 of 25)01 contending that the issue of competence of the Commissioner for imposing the penalty at the time of making award was challenged but it has not been dealt with by the Court. The said application has also been rejected vide order dated 19.10.2001 without making any reference of the issue as competence of the Commissioner in this regard. Hence this appeal.

4. The award was made on 25.4.1995. The outstanding amount was deposited by the appellant on 21.8.1995 and the appeal was preferred with an application for condonation of delay which was allowed vide order dated 18.10.1995. This Court directed the appellant to deposit the amount of interest which was deposited accordingly. Subsequently, the appeal has been dismissed without dealing with the issue of competence of the Commissioner to impose penalty at the time-of making the award. Misc. Application filed for the same purpose has also been rejected.

5. It is not in dispute that the award amount and the interest on the same has already been deposited by the appellant in this Court. Payment of 50% penalty on the award amount has not been deposited as according to the appellant, the order to that extent is without jurisdiction. The only question agitated before us is as to whether the Commissioner was competent to pass the conditional order imposing 50% penalty on the date of making the award if there was failure to pay the compensation within the prescribed time. The provisions of Section 3 of the. Act provide that liability of the employer for compensation has to be determined by the Commissioner. Section 4 provides for computation of the amount of compensation. Section 4-A deals with payment of compensation and penalty for the default. According to Sub-section (1) thereof, compensation u/s 4 has to be paid as soon as it falls due. Sub-section (2) thereof provides that in case the employer does not accept the liability for compensation to the extent determined, he shall be bound to make provisional payment based to the extent of liability which his 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.

6. Sub-section (3) provides that where an 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 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.

7. The aforesaid provisions make it clear that condition precedent for passing an order imposing penalty would arise provided the employer is in default of making compensation after expiry of one month from the date of the award and where the Commissioner is of the opinion that there was no justification for the delay, he could impose penalty upon the employer not exceeding 50% of the outstanding dues. It is evident mat imposition of 50% penalty of the dues is the maximum limit i.e. the Commissioner cannot imposses penalty more than 50%. The Act does not envisage that he would imposses maximum penalty in each and every case. Therefore, to what extent there penalty can be imposed depends on the facts of each Case and no strait jacket formula can be laid in this regard. In view of the above, there was no occasion for the Commissioner to pass an order imposing penalty to the extent of 50% while making the award. The scheme of recovery of dues as provided under this section suggests that conditional order of penalty cannot be passed at the time of making an award. In case of failure of making the payment within the prescribed time, penalty can be imposed only after giving opportunity-of hearing to the employer. Admittedly, in the instant case such an occasion did not arise, as this was not the: stage where, order of imposition of penalty could be passed.

8. In Ved Prakash Garg v. Premi Devi and Ors. 1997 (77) FLR 637 (SC), the Apex Court examined a similar case taking into account the provisions of Sections 147(1)(b) and 149 of the Motor Vehicles Act, 1988 and held that the insurer cannot be fastened with the liability of penalty at all. The Court came to the conclusion that on a conjoint operation of the relevant schemes of the Act and the Motor Vehicles Act, it becomes clear that the insurer shall be liable to make good the principal amount of compensation and the interest thereon if ordered by the Commissioner. The liability of penalty is not covered for the reason that it is the statutory liability pf the employer to make good the principal amount of compensation within the prescribed time limit during which interest may run for delayed payment. However, by reading the provisions of Section 4-A(3)(b) of the Act, if the Commissioner issues a show cause notice to the employer and while considering the reply to the same comes to the conclusion that there was no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his personal fault, he is responsible for the delay, only then penalty can be imposed. However, such a liability cannot be shifted to the insurer as it is not contemplated under the provisions of Section 147(1)(b) of the Act, 1988 or in the terms of the insurance policy. The Court held as under:

But so far as the amount of penalty on the insured employer under contingencies contemplated by Section 4-A(3)(b) is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that part of the penalty amount imposed on the employer. So far as the default amount on compensation of award of penalty imposed on the insured employer by the Workmen''s Commissioner u/s 4-A(3)(b) is concerned, the insurance company would not remain liable to reimburse the said claim and it would be liability of the insured employer alone.

9. Therefore, it is evident that the penalty if imposed in accordance with the provisions of the Act after giving opportunity of hearing to the employer would be his personal responsibility and such responsibility cannot be shifted to the insurer. While deciding the case, Hon''ble Supreme Court considered a judgment of the Division Bench of this Court in Khirod Nayak v. Commissioner for Workmen''s Compensation 1992 (64) FLR 446 (Ori.), wherein this Court has taken a view that if penalty is so imposed under the provisions of Section 4-A(3) of the Act along with interest etc., the insurer will be responsible to reimburse the said amount also. The Apex Court held that the said judgment did not lay down the correct law so far as the liability of the penalty, had been declared that of the insurer. It remains the liability of the employer insured.

10. Be that as it may, it is evident from the aforesaid discussion that liability to the penalty cannot be fastened either to the insured or insurer at the time of making award for the reason that the penalty can be imposed provided there is delay in making payment of compensation. The Commissioner has to give show cause notice to the employer and consider his reply and then pass a appropriate order and it is only when he comes to the conclusion that the delay on the part of the employer was unjustified. Penalty can be imposed to the tune of 50% of the amount. The penalty so imposed may vary from case to case and it is not that in every case penalty to that extent has to be imposed. More so, even if the penalty is imposed, that cannot be the liability of the insurer.

11. In the instant case, aS such liability has been imposed at the time of making the award, the Commissioner exceeded in its jurisdiction and that part of the award of the Commissioner is liable to be quashed and is hereby quashed.

12. The respondent Counsel on the other hand has asked for issuing a direction to the Court to release the amount in favour of the claimants and to that learned Counsel for the appellant has no objection.

13. In view of the above, the appeal stands disposed of modifying the judgment and order of the learned Single Judge to the extent indicated hereinabove and further with direction to the Registry of the Court to permit the claimants to withdraw the entire amount deposited by the appellant as outstanding dues with interest accrued thereon. No costs.

B.N. MAHAPATRA, J.

I agree.

