

(2005) 12 BOM CK 0014
In the Bombay High Court

Ramalu Balkrishna Sagar

APPELLANT

Vs

Rambhau Tukaram Shendre and Others

RESPONDENT

Date of Decision : 21-12-2005

Acts Referred:

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

Citation : (2006) 2 ACC 641 : (2006) 2 ALLMR 522

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Judgement

R.C. Chavan, J.—This appeal by owner of a truck takes exception to the order passed by learned Commissioner for Workmen's Compensation directing the appellant, among other things, to pay penalty to the extent of 25% of compensation awarded to the parents of appellant's deceased employee/driver.

2. The appellant owned vehicle No. MH-31/W-4943. On 1.6.2001 in an accident driver Subhash died. Subhash was son of respondent Nos. 1 and 2, claimants before the Commissioner. The appellant did not deposit any amount towards compensation with the Commissioner nor did he pay any amount to the parents of the deceased employee. The appellant, however, informed respondent No. 3 Insurance Company of the accident on 7.6.2001, since the truck was insured with respondent No. 3. On 9.8.2001 respondent Nos. 1 and 2 filed claim before the Commissioner for Workmen's Compensation. In para 6 of their claim petition they also claimed penalty to the extent of 50% of compensation claimed, since compensation was not deposited within a month of its becoming due.

3. Though duly served, the appellant did not file any written statement/reply. Respondent No. 3 Insurance Company denied its liability to pay compensation as well as interest and penalty. On these pleadings the learned Commissioner framed, among others, a specific issue of entitlement of the claimants to penalty. The claimants tendered evidence in support of their claim. The witnesses of the claimants were not cross-examined by the appellant. The hearing proceeded ex parte-appellant before the Commissioner for Workmen's Compensation.

4. In course of hearing of the appeal before this Court the appellant filed an affidavit stating that he had spent amount of Rs. 12,000 on treatment of the deceased and that he had entrusted the matter to an Advocate on the panel of respondent No. 3 Insurance Company as per advice of the Insurance Advisor.

5. The learned Commissioner for Workmen's Compensation awarded compensation of Rs. 3,83,040, interest and penalty to the extent of 25% on the compensation awarded. While the liability to pay compensation and interest was saddled on both the appellants/owner of the truck and respondent No. 3 Insurer. The amount of penalty was directed to be paid by appellant alone. Aggrieved thereby this appeal has been filed restricted to the question of liability of the appellant to pay penalty.

6. I have heard Mr. Khare, learned Counsel for the appellant, Mr. Kukday, learned Counsel for respondent No. 3 Insurance Company and Mr. Naukarkar, learned Counsel for respondent Nos. 1 and 2/original claimants.

7. The learned Counsel for the appellant in his earnest endeavour to overcome the difficulties created by non-participation of his client before the Trial Court, took me through the scheme of Workmen's Compensation Act. The main stay of his argument was, however, that the learned Commissioner, could not have penalty without issuing to him a notice to show cause as to why such penalty should not be imposed. He contended that it was necessary for the Commissioner to first arrive at a conclusion that the penalty was leviable, then issue show-cause notice and give the appellant an opportunity of being heard and then impose penalty if any.

8. The learned Counsel for the claimants Mr. Naukarkar opposed such a construction and stated that all that Section 4A of the Workmen's Compensation Act requires, before imposition of penalty, was to give reasonable opportunity to the employer to show cause as to why order for payment of penalty should not be passed. He submitted that reasonable opportunity of showing cause does not imply any prior formation of opinion by the Commissioner or necessity to issue any notice to show cause. According to the learned Counsel, the claim in the pleadings, that the petitioners wanted penalty to be ordered, and the issue framed was sufficient to put the appellant on guard that he was supposed to show cause as to why the penalty claimed should not be imposed.

9. The learned Counsel for respondent No. 3 Insurance Company rendered valuable assistance by expounding the provisions of the Workmen's Compensation Act.

10. Section 3 of the Workmen's Compensation Act creates incidence of employer's liability for payment of compensation. It lays down that if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter II of this Act. Section 4 prescribes the quantum of compensation. Clause 1(a) thereof lays down that when death results from such

injury, an amount equal to fifty percent of the monthly wages of the deceased workman multiplied by the relevant factor; or a sum of Rs. 80,000; whichever is more, has to be paid.

11. Section 4 A lays down that the compensation u/s 4 shall be paid as soon as it falls due. The expression as to when the compensation falls due, has been considered by the Supreme Court in Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, . The Court held that, it was wrong to contend that the compensation had not fallen due until it was settled by the Commissioner u/s 19. The employer became liable to pay compensation as soon as the personal injury was caused to the workman by an accident which arose out of and in the course of employment, and that there was no suspension of compensation pending settlement. Same view has been taken by this Court in Margarida Gomes and Another Vs. Mackinnor Mackenzie and Co. Pvt. Ltd., where the Court held that liability to pay compensation is created immediately on the accident occurring to the workman suffering injury and must amount to a debt payable to the workman. In view of this, it is clear that the compensation payable u/s 4 of the Workmen's Compensation Act becomes due on the incident specified in Section 3, namely, causation of personal injury.

12. Question of payment of penalty arises when the employer defaults in paying compensation due under the Act within one month from the date it fell due. In this case, the appellant employer has undisputedly not paid the compensation due within one month of its becoming due, since the accident occurred on 1.6.2001, and the employer had not made any deposit even till the petition was filed on 9.8.2001. a Clause (2) of Section 4A enables the employer who does not accept the liability for paying compensation to the extent claimed, to make provisional payment on the basis of liability which he accepts. The employer is required to deposit the compensation either with the Commissioner or pay it to the workman. The entire scheme of Sections 3, 4 and 4A would show that since the quantum of compensation is fixed by the Act, there is no scope for the employer to say that he would wait for the claim being made or being adjudicated upon. It is the intention of the Legislature that the compensation must be paid as soon as it falls due in order to ensure that the victims get some succour.

13. In this case, there was no scope for the employer not to accept the liability for compensation, since on his own showing on 7.6.2001 he had written to respondent No. 3 Insurance Company about the accident. Therefore, there was no justification whatsoever in not making the deposit within one month.

14. Proviso to Clause (b) of Section 4A(3) reads as under:

Provided that an order for 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.

15. The learned Counsel for the appellant submitted that this expression,

namely, "a reasonable opportunity to show cause" implies issuance of show-cause notice. The learned Counsel sought to place reliance, mainly, on judgment of the Supreme Court in Ved Prakash Garg Vs. Premi Devi and others, . In that case on page 3859 the Court had observed that:

...This is further highlighted by the proviso to Section 4A(3) as substituted by Act 30 of 1995 which clearly indicates that a penalty amount under Clause (b) cannot be imposed against the employer without giving him reasonable opportunity to show cause. No such show-cause notice is contemplated while imposing interest on default of payment of the principal amount on the part of the employer as per Section 4A(3)a)....

Again in para 14 of the judgment at page 3863 the Court observed as under:

But similar consequence will not follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4A(3)(b) of the Compensation Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay in payment of the compensation amount he is not liable for this penalty. However, if ultimately the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then the penalty would get imposed on him.

16. Use of words "show cause notice" at two places in the judgment was stressed upon by the learned Counsel for the appellant to support his contention that the expression, "reasonable opportunity to show cause" would necessarily imply issuing a notice to show cause.

17. It may be impermissible to read the expression in a judgment without comprehending the context in which the expression came. The question before the Court was stated in paragraph 1 of the judgment as under:

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 4A(3) of the Compensation Act.

18. The question thus was, whether the Insurance Company is also liable to meet the award imposing penalty and interest against the employer and not about the

interpretation of "reasonable opportunity of showing cause". This question arose because of the divergence of views by various High Courts as stated in the same paragraph. The facts, in the background of which the question arose, are stated in paragraph 2 of the judgment. A truck met with an accident on 15th February, 1992 in which driver Pritam and cleaner Hemraj died on the spot, the appellant was owner of the truck. He came to know about the accident on 16th February, 1992. He immediately informed Branch Manager of the Insurance Company about the accident. The Insurance Company did not carry out its obligation to pay to the heirs of the deceased employee appropriate compensation as per the insurance cover. The legal representatives of the deceased driver and cleaner filed claims for compensation before the Commissioner for Workmen's Compensation. The Commissioner awarded a sum of Rs. 88,968 to the heirs of the driver and also awarded penalty of Rs. 41,984, since the compensation due was not paid within the prescribed time. The Commissioner also awarded interest " 6% per annum. The Commissioner held the owner as well as Insurer liable to pay the amount ordered. The Insurance Company carried the matter in appeal before the High Court contending that it would be liable to pay only compensation but not interest or penalties. The High Court exempted the Insurance Company from paying the penalty and interest. This is how the matter went to the Supreme Court. The observations of the Court regarding show-cause notice have come in this context. Operative part of the judgment in paragraph 20 would show that the Court had set aside the judgments of the High Court insofar as exempting the Insurance Company from payment of interest and held that the Insurance Company would be liable to pay interest also. The Court had, however, upheld the judgment exempting the Insurance Company from payment of penalty. The last sentence in paragraph 20 of the judgment is significant, where the Court holds as under:

...They will obviously remain untouched so far as they are against the employers. It will be open to the claimants to enforce their claims of penalty amounts with proportionate interest thereon against employers concerned.

19. It may thus be seen that in that case either the owner had an opportunity of showing cause why penalty should not be imposed before the Commissioner, or the question as to whether they did, in fact, have such opportunity, and, if so, in what form, Was not raised before the Court. Therefore, it is not possible to deduce the ratio from Ved Prakash Garg's case that, the Commissioner is required to first come to the conclusion that the penalty is leviable and then issue notice to show cause before actually imposing the penalty. The discussion about proviso to Clause (b) of Section 4A(3) is incidental to the question of liability of Insurance Company.

20. This decision was relied upon by the Jharkhand High Court in Rajendra Prasad Shah and Another Vs. The New India Assurance Company Ltd. and Another, . The Court observed at Page 1023 as under:

A reading of the Award suggests that the Commissioner has mechanically and

without any application of mind held the appellants liable to pay the penalty without taking recourse to mechanism provided in the Proviso (supra) because admittedly no opportunity whatsoever was given to the appellants to show cause as to whether they are liable to be saddled with the payment of penalty amount or not. In the case of Ved Prakash Garg v. Premi Devi and Ors. Their Lordships of the Supreme have clearly observed and held that insofar as the liability to pay the penalty is concerned, it can not be said that it automatically flows from the main liability incurred by the employer under the Act and that the penalty amount therefore is outside the sweep of the term "liability incurred".

21. It may be seen that on facts the Court held that admittedly no opportunity whatsoever was given to the appellant to show cause as to whether they are liable to be saddled with payment of penalty. It may be seen that even this judgment refers to the opportunity of showing cause and not giving notice to show cause.

22. The learned Counsel for the appellant relied on a decision of Madras High Court in Management of Devi Press Vs. S. Selvaraj, . In that case appellant employee and his wife had approached the employer for payment of compensation. The employer indicated that he would pay a sum of Rs. 50,000 but did not pay or deposit it. The workman made a claim towards compensation and penalty. The employer had contested the application by filing counter. Upon consideration of the contentions and evidence, the Commissioner awarded compensation, interest and penalty of Rs. 51,995. The award was challenged before the High Court on the ground that the accident had occurred on account of workman's own imprudent conduct and that the penalty could not be imposed for want of proper notice. The Court considered the judgment of Kerala High Court where it had been held that it would be appropriate to frame an issue regarding liability of penalty and that it would be a matter of fair play and fair procedure relating to principles of natural justice. The Court also referred to a decision of Puriben Nagabhai v. Nathabhai where it was held that if the claim was contested by the management, and after full-fledged enquiry the Commissioner did not award penalty, the order of Commissioner was not proper. There was however no discussion about requirement to issue notice. In this context in paragraph 14 of the judgment the Court observed that, opportunity to show cause would be available only if specific notice is given and management is put on notice and defence as regards the claim of penalty. The Court observed that in the show-cause notice given by the Tribunal to the management, the management has not been called upon to explain against the imposition of penalty and, therefore, set aside the order imposing penalty.

23. High Court of Karnataka in S. Kumaraswamy and Another Vs. Ramu, held that upon examination of the record, the Court found that the owner had not been issued with show cause notice and, therefore, imposition of penalty was not justified.

24. Similar view has been taken by Karnataka High Court in S. Samboji Rao Vs.

Oriental Insurance Company, Bangalore and Others, some other cases and relied on by the learned Counsel.

25. High Court of Punjab & Haryana in *Smt. Rajni Rani v. Om Prakash* reported at 1992(65) FLR 801 observed that, unless the employer was called upon to show cause for the delayed payment, it would not be reasonable for the Commissioner to come to the conclusion, whether or not there was justification for the delay.

26. The question as to whether the words "opportunity of showing cause" imply issuance of specific notice did not come up for consideration in *Shri Ashok Gangaram Katkar Vs. Prama Industries*, before this Court. In *Pradeep Surajbhan Agrawal v. Bapu Krishna Yadava* reported at I (2005) ACC 76 : 2004 (4) ALL MR 2421 this Court refused to interfere with the order of the Commissioner levying penalty upon the employer for delay in payment of compensation. In that case the Commissioner had awarded maximum penalty. The Court, on perusal of the evidence and the impugned judgment, found that except a bald statement, being made by the employer that he had informed the Insurance Company, there was nothing on record to show that such an information was given. The Court also observed that it was primary liability of the owner/employer to pay compensation within one month. However, the question as to what is the form in which opportunity to show cause has to be given, was not considered.

27. A decision of M. P. High Court in *Divisional Forest Officer, Gwalior v. Baijnati Bai* reported at 1994 Lab. I.C. 2561 was delivered before the proviso was added to Clause (b) to Section 4A(3). In respect of the unamended section the Court observed that, when no deposit was made and when the dependent of the victim had filed application for award of compensation wherein dependents had claimed compensation, interest and penalty, and that notice was issued and written statement was filed and the application was contested no further notice of showing cause was necessary as the employer gets an opportunity to prove justification for not depositing the compensation.

28. The review of various authorities cited would show that Karnataka High Court had taken a view that the expression "reasonable opportunity to show cause" implies issuance of show-cause notice. It is not clear why something which is not in the provision should be read in it. If Legislature so desired, it could have specifically prescribed that the Commissioner should issue notice to the employer to show cause as to why he should not be called upon to pay penalty. The expression chosen by the Legislature is that such an order imposing penalty may not be passed without giving reasonable opportunity to the employer to show cause as to why it should not be passed.

29. The provisions of Workmen's Compensation Act are beneficial in nature. The procedure is required to be simple, efficient and fast. It is not expected that the question of grant of compensation should be allowed to be rattled in procedural hassles. Therefore, when workman or his dependents make a claim of penalty in the petition presented to the Commissioner, notice whereof is received by the

employer, he must be held to have notice to show cause as to why he should not be required to pay penalty which is claimed. Also, when the Commissioner frames an issue specifically to the effect, as to why penalty should not be imposed, the employer must be taken to be on the guard that he has to show as to why penalty should not be imposed. The provision does not require the Commissioner to come to any conclusion that penalty is impossible first and then issue show-cause notice, and again adjudicate upon the question of imposition of penalty. Therefore, if the employer, fails to furnish any reason for not making deposit within prescribed period, does not file written statement and does not participate in the proceedings of which he has notice, no separate notice need be given to him for imposing penalty on the amount to be awarded. The employer who refused to discharge his duties under the statute first in failing to deposit compensation, and then to lack in the elementary duty of participating in the proceedings before the Court, cannot claim notice. The contentions of the learned Counsel for the appellant that his client was advised by the Insurance Advisor that the Insurance Company would take care of his interest, etc. has come belatedly at the stage of final hearing of this appeal. An employer who neglects to take care of his own interest and allows matters to proceed ex parte against him cannot be heard to say that he was entitled to one more show cause notice, which would result in denial for further period of time of the monies due to the victim's parents. Even now the appellant employer does not state as to what cause he wished to show for preventing imposition of penalty, had he been served with a notice he sought. The quantum of compensation to be paid is statutorily fixed. Period of making deposit is also fixed. Appellant had even informed his insurer of accident. So he knew his duty and liability both. He should therefore have discharged his duty.

30. The expression "reasonable opportunity of showing cause" has not been used only in proviso to Section 4A(3)(b). Similar expression could be found in proviso to Section 45A(1) of Employees State Insurance Act, 1948 where the person incharge of the factory or establishment has to be given a reasonable opportunity of being heard before an order determining amount of contribution is passed, and the like. In all these provisions for the benefit of women unless so prescribed it would be impermissible for the Courts to acquiesce to suggestions of dilatory procedures which would also add to the workload on already overloaded adjudicatory machinery.

31. To sum up, since the Legislature could have used the expression indicating that nothing short of a notice to show cause was required to be issued by the Commissioner on the question of penalty, which it has not chosen, and since the Legislature was content with the use of expression "reasonable opportunity of showing cause", it is imperative that if the facts of the case it is found that the employer had such a reasonable opportunity which he squandered away he would not be entitled to insist upon any further notice.

32. In this view of the matter it would not be possible to follow the view taken by

Karnataka High Court in the judgments cited above.

In the result, the appeal fails and is dismissed.