

(2010) 03 GUJ CK 0019
In the Gujarat High Court
Case No : F.A. No. 1416 of 2005

Shankarji Kaluji Thakor

APPELLANT

Vs

Chhabildas Babulal Jain (Sonaiya)

RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 30, 5

Citation : (2011) 1 LLJ 27

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : B.J. Trivedi, J.T. Trivedi and Jignasa B. Trivedi, for the Appellant; K.K. Nair, for the Respondent

Judgement

K.M. Thaker, J.—The Appellants, who are the original claimants, have brought under challenge the award dated July 21, 2004 passed by the Commissioner of Workmen's Compensation, Palanpur in Workman Compensation Case. The Appellants have challenged the said award to the limited extent in so far as the learned Commissioner has not awarded interest and penalty. The Appellants have not raised any challenge or dispute as regards the award for compensation.

2. The facts giving rise to present Appeal are that the son of the Appellants, who was employed by opponent No. 1 as a labourer, met with an accident on September 17, 1992 while he was traveling in the truck bearing registration No. GTF-4184 owned by the opponent No. 1 and insured by the opponent: No. 2. He met with the accident while he was on duty (working as labourer) on the said truck which was returning to Deesa from Mangrol. The Appellants claimed before the learned Commissioner that the driver had lost control of the truck which led to the accident. The victim died on the spot. The employer opponent No. 1 was aware about the accident and the complaint pertaining to the accident was lodged by the opponent No. 1. Since the Appellants were not: paid any compensation, they were constrained to prefer the Workman Compensation Case

which came to be registered as Workman Compensation Case No. 30/1992 and was then renumbered as workman Compensation Case No. 124/1996 wherein, the award impugned in present Appeal came to be passed on July 21, 2004 By the impugned award, the learned Commissioner has awarded Rs. 89,600/- towards compensation and held that the opponent Nos. 1 and 2 are jointly and severally liable to pay the said compensation amount.

Learned Commissioner, however, has not awarded any interest or penalty, though claimed by the Appellants. Hence, the appeal.

3. Mr. J.T. Trivedi, learned advocate has appeared for the Appellants and Mr. K.K. Nair, learned advocate has appeared for the opponent No. 2 insurance company. Though served, no one has entered appearance on behalf of the opponent No. 1.

4. Mr. Trivedi, learned advocate for the Appellants has submitted that neither the accident nor the death of the Appellants' son on account of accident nor his status as a workman employed (as a labourer) by opponent No. 1 are in dispute. He also submitted that the rate of the wages at which the victim was being paid by the opponent No. 1 and/or the fact that he was on duty on the truck on the date of the accident are also not in dispute. He also submitted that the Appellants do not challenge the quantum of compensation, however, the Appellants are aggrieved by the award so far as the learned Commissioner has not awarded any interest or penalty. He has submitted that in present case, considering the facts and circumstances of the case, though interest and compensation towards penalty ought to have been awarded, the learned Commissioner has not awarded any amount towards penalty or statutory interest. Mr. Trivedi has submitted that the denial of interest and penalty deserves to be appropriately rectified and modified and the award deserves to be modified to such extent as the Court may consider proper in the facts and circumstances of the case with regard to the claim for interest and penalty.

5. Per contra, Mr. Nair has submitted that the Appellants have not proved that the opponents deliberately failed to deposit the amount and that therefore, there is no error or illegality in not granting interest and/or penalty. He has also submitted that the learned Commissioner has rightly not awarded any amount towards interest and/or penalty. Mr. Nair has also attempted to ascribe the delay in conclusion of the proceedings to the Appellants alleging that the Appellants did not diligently prosecute the case before the learned Commissioner. He has also submitted that no fault can be placed at the door-steps of the insurance company as there was no award to be satisfied. He has submitted that the Appellants have claimed interest at the rate of 12%, however, at the time of accident, the rate of interest as prescribed under the Act was 6% p.a. As his last submission, Mr. Nair has submitted that in view of the provisions u/s 30 of the Act, an appeal against the award denying interest and/or penalty is not maintainable.

6. So far as present case is concerned, as noted above, the factum of the

accident and the date of accident as well as the fact that the son of the Appellants died on account of the accident, are not in dispute.

7. Likewise, the fact that the Appellants' son was workman employed (as a labourer) by the opponent No. 1 is also not in dispute. Hence, the applicability of the Act and/or the liability to pay compensation and other statutory obligations in accordance with the provisions of the Act, are not in dispute. The learned Commissioner has, after taking into account, all relevant aspects, awarded Rs. 89,600/- towards compensation and the said award has not been challenged either by the opponent No. 1 or the opponent No. 2 insurance company.

8. It has been submitted that the award has been complied with. Thus, what survives is the grievance with regard to the claim for interest and penalty.

9. In view of the scheme of the Act, the compensation is to be paid when personal injury is caused to a workman on account of accident arising out of and in the course of his employment. If the compensation is not paid within time limit and the manner prescribed by the Act then in view of provision under Sub-section (3) of Section 4(A) provides that the employer who defaults in making the payment within 1 month from the date it fell due, the Commissioner shall direct the employer to pay, in addition to the amount of arrears, simple interest and if the employer fails to satisfy the Commissioner regarding justification for the delay then the Commissioner shall also award further amount, not exceeding 50%, by way of penalty.

9.1. Ordinarily in the cases where delay in making payment of compensation within time limit and the manner prescribed by the Act or in depositing the amount (to the extent of; undisputed amount) and any explanation to the satisfaction of learned Commissioner regarding the reasons which can explain the delay is not tendered then reasonable additional compensation by way of penalty also ought to be awarded.

9.2. However, in given case, depending on the facts and circumstances and/or in view of evidence on record or lack of evidence, the learned Commissioner may, in his discretion not award additional compensation as penalty. When the learned Commissioner exercises such discretion and does not award additional compensation towards penalty, the question which would arise is whether an appeal would lie against such refusal or not. Similar question would arise when for any reason interest is not awarded.

10. In present case, the learned Commissioner has not awarded additional compensation as penalty and has not awarded interest. The Appellant feels aggrieved. The opponent company supports the order. The Appellant contends that denial is bad in law opponent says that denial is justified. Opponent insurance company has ascribed the delay in conclusion of the proceedings to the Appellants alleging that the Appellants did not diligently prosecute the case before the learned Commissioner. He has also submitted that no fault can be placed at the door-steps of the insurance company as there was no award to be

satisfied. He has submitted that the Appellants have claimed interest at the rate of 12%, however, at the time of accident, the rate of interest as prescribed under the Act was 6% p.a. He also submitted that the learned Commissioner has rightly not awarded any amount towards interest and/or penalty. The counsel of the insurance company has opposed the submissions and the claims of the Appellants. The opponent insurance company also questioned the maintainability of the appeal.

11. If the opponent insurance company succeeds on the second contention that an appeal against the award not granting interest is not maintainable then it would not be necessary to enter into the controversy on other issues.

12. Hence, in present case, it appears appropriate to decide the second contention first. It is clarified that the issue about maintainability of appeal u/s 30 against order not awarding penalty and/or interest alone is considered, and other related aspects are not addressed and examined at this stage. If the opponent fails in its contention then only the occasion for examining other issues would arise.

13. The purport of the contention is that u/s 30 of the Act, Appeal only against award granting interest or penalty u/s 4(A) is contemplated and provided for, hence, by necessary implication, the Appeal against an award not granting interest and/or penalty is not contemplated. Hence, the Appeal is incompetent.

14. The said Section 30 provides for remedy of appeal against the award of the Commissioner and the grounds on which award can be challenged and appeal can be filed. Hence, The Section 30 reads thus :

30. Appeals. - (1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely :

(a) an order as awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

(aa) an order awarding interest or penalty u/s 4-A;)

(b) an order refusing to allow redemption of a half-monthly payment;

(c) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependant;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of Sub-section (2) of Section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions;

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and in the case of an order other than an order

such as is referred to in Clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees:

Provided further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties:

(Provided further that no appeal by an employer under Clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the Appellant has deposited with him the amount payable under the order appealed against.)

(2) The period of limitation for an appeal under this Section shall be sixty days.

(3) The provisions of Section 5 of (the Limitation Act, 1963 (36 of 1963)), shall be applicable to appeals under this Section.

(emphasis supplied)

15. The reading of the aforesaid provision brings out that the Legislature has made provision for appeal against an award granting interest or penalty u/s 4-A, however, the legislature has not provided for an appeal against an award declining to impose penalty and/or interest. By plain reading of the provisions, an award not granting interest and/or penalty is not appealable.

16. It is settled position that an appeal is a statutory right and such right would be available only to the extent and in the manner provided by the statute.

17. So far as Section-30 is concerned, under the said provision, appeal is available against the order awarding compensation in lump sum by way of redemption or otherwise, and against an order refusing to allow redemption and half monthly payment as well as an order providing for distribution of compensation amongst the dependents. The said Section also provides for appeal against an order refusing to register a memorandum of agreement, however, as noted above, the said Section does not provide for an appeal against an award refusing to grant relief of interest and/or penalty while it does provide appeal against an award granting the relief of interest or penalty. The absence of provision providing appeal against order refusing to grant penalty or interest is significant.

18. So as to appreciate the absence of right to appeal against award refusing to grant interest and/or penalty, a close look at the provisions under Sub-clause (a), Sub-clause (c), and Sub-clause (d) is necessary.

19. The said provisions bring out the contradistinction and also highlight the intention of the Legislature.

From the reading of Sub-clauses (a), (c) and (d), it becomes clear, particularly in view of the use of the phrase or disallowing any claim that wherever the Legislature intended to provide for an appeal against an award disallowing any

claim, the Legislature has so provided.

20. The said phrase in Sub-clauses (a), (c) and (d) makes the absence of similar provision in Sub-clause (aa) conspicuous. Where the language of a provision gives rise to apparent contradiction between the effect of the provision and the object of the statute, the Court would tend to lean in favour of and try to give effect to the obvious intention of the Legislature. True it is that the Act of 1923 is a beneficial Legislature and the provisions under the statute should be read and construed by keeping in focus the said object of the statute. However, while doing so, the Court cannot add something which is not provided by the statute, particularly a right which can be provided only by way of statute by the legislature, cannot be created or provided for by the Court with aid and tool of interpretation purposive or constructive. There is always the presumption that the Legislature has not made mistake and was conscious about the omission or addition of a particular situation, in the provision.

21. As noticed earlier, the Sub-clause (a) provides for an appeal against an order awarding as compensation a lump sum or disallowing a claim in full or in part for a lump sum. Likewise, Sub-clause (c) provides for an appeal against order providing for distribution of compensation or disallowing any claim of a person alleging himself to be dependent. Similarly, Sub-clause (e) provides for an appeal against an order refusing to register an agreement or registering the agreement.

21.1 On closure examination of the aforesaid sub-clauses, it becomes clear that wherever the Legislature intended to make, along with positive provision, negative provision as well, it has consciously made such provision which is evident from the fact that where the Legislature intended to provide appeal against order providing for distribution of compensation and also against an order disallowing the claim of a person for such distribution (Sub-clause (c)), it has provided for appeal in both the situations. In the like manner, by virtue of Sub-clause (e), where the Legislature intended to provide for an appeal against an order declining to register an agreement as well as against an order registering an agreement, it has expressly done so. When Sub-clause (aa) is read in juxtaposition with other clauses of Section 30, it becomes clear that the Legislature did not intend to provide for an appeal against an order declining to impose penalty or refusing to award interest.

21.2 It is pertinent to note that the Sub-clause (aa) came to be inserted in Section 30 w.e.f. June 1, 1959. The said provision came to be introduced in view of the addition of Section 4A (which provision also came to be inserted w.e.f. June 1, 1959) conferring authority on the Commissioner to award additional compensation by way of penalty and to also direct payment of interest. When the aforesaid aspect is taken into account, it becomes clear that the Legislature has consciously not provided for an appeal against the order refusing to impose penalty and/or declining to grant interest.

21.3 What is not provided for, and that too consciously, by the Legislature,

cannot be included by the Court. In case where there is any ambiguity, the Court can step in and remove the ambiguity, but it cannot legislate in the guise of interpretation. A statutory right, like right to appeal, when not provided by the statute, cannot be conferred by the Court on the ground that it is a beneficial legislation or on the ground that such right is implied and/or co-existing with the right of appeal against order granting interest or imposing penalty as provided for u/s 30. Even if the lacuna is a mistake, it is for the Legislature to correct it. (See *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*,

22. In light of the aforesaid discussion, present appeal is not maintainable and cannot be entertained. The appeal, therefore, fails and is hereby rejected. No costs.

23. At this stage, Mr. Trivedi, learned Counsel for the Appellants has submitted that there is manifest error in the award passed by the learned Commissioner so far as the denial of relief of interest and penalty is concerned. According to the advocate for the Appellants, in the facts and circumstances of the present case it is ex facie evident that the delay in paying the compensation was on account of negligence which was neither explained nor any justification was given and that therefore, the award granting interest as well as penalty should have followed the award of compensation. The learned advocate, therefore, submitted that though in view of the provisions u/s 30 the appeal against award not granting interest and/or penalty is not maintainable, in the facts of the case, the Appellants may be permitted to convert present appeal into a writ petition under Article 227 of the Constitution of India.

24. Having regard to the facts of the case, the request deserves to be granted. The said request cannot be outrightly rejected as unjustified or improper, particularly in view of the facts of the present appeal. Hence, considering the fact that the learned Commissioner has not awarded any interest and has not considered the prayer for additional compensation towards penalty, I am inclined to accept the request made by the Appellants. The Appellants are permitted to convert present appeal into a special civil application. The Appellants shall carry out necessary amendments and file (amended) memo of petition in accordance with the rules applicable to the special civil applications. Such amended memo shall be filed within two weeks from the receipt of the order. The registry shall convert present appeal into a special civil application and register the same accordingly.