
(1995) 12 CAL CK 0019
In the Calcutta High Court
Case No : F.M.A. No. 1114 of 1992

Smt. Sarida Bibi

APPELLANT

Vs

Amar Prasad Gagari and Others

RESPONDENT

Date of Decision : 06-12-1995

Acts Referred:

Workmens Compensation Act, 1923 — Section 4, 4A

Citation : (1996) 3 LLJ 97

Hon'ble Judges : S. Narayan, J; Baboo Lal Jain, J

Bench : Division Bench

Advocate : Dulal Chandra Roy and Biswajit Choudhary, for the Appellant; Pariwal Kr. Pahari, for the Respondent

Final Decision : Allowed

Judgement

S. Narayan, J.—This is an appeal by the Appellant/Claim against the judgment award dated May 14, 1991 of the Court Commissioner for Workmen's Compensation, W.B., in claim case No. 566 of 1988. The award was passed for Rs. 43,382 as against a claim for Rs. 86,764 The claimant, being aggrieved of the quantum of compensation as per the award, has come up with the present appeal.

2. One Majaffer Ali Shek (Deceased, husband of the Claimant) was a driver of motor lorry, bearing Registration No. WBK-4390, under the Employment of the O.Ps./Respondents first party, who were the owner of the lorry. The O.Ps./ Respondents first party were members of a partnership firm; and the lorry was used for running the business of the firm. The lorry had the coverage of an Insurance Policy under the insurer. New India Assurance Co. Ltd. i.e. O.P./ Respondent No. 2. It so happened that on January 7, 1988 at about 8.00 a.m. the aforesaid lorry, while being driven by the Claimant's husband, met a road accident near New Nabeen Palli, Diamond Harbour Road on being collided with a delux bus bearing No. WBS 5263. The Claimant's husband sustained some serious injuries in the accident and, ultimately, died. Thereupon, a claim for

compensation was made before the Commissioner for Workmen's Compensation, Calcutta. It may be mentioned that the claimant asserted that her deceased husband was aged 35 years at the time of the accident and also that his monthly wages was amounting to Rs. 1,000/ i.e. @ Rs. 35 per day.

3. Both the O.Ps./Respondents parties contended the claim by filing separate written statements while contending inter-alia that the age of the deceased at the time of death was 35 years and his monthly salary was to the tune of only Rs. 500/-. It was further contended that the alleged accident was caused due to negligence of the other vehicle involved i.e. the bus No. WBS- 5263 belonging to Calcutta State Transport Bus.

4. The Learned Court below i.e. the Commissioner for Workmen's Compensation, on appreciation of the evidence on the record, arrived at a conclusion that the deceased was aged 25 years at the time of the death (as asserted by the claimant) and further that the monthly wage of the deceased at the time of the accident was to the tune of Rs. 500/-per month (as asserted on behalf of the O.Ps./ Respondents). Thus, on the basis of the assessment of the age and the monthly wage, the amount of compensation was reckoned at a sum of Rs. 43,382 with the help of the Schedule-IV referred to in Explanation I of the provision u/s 4 of the Workmen's Compensation Act, 1923.

5. Be it recorded at the very outset that the claimant's husband was admittedly under employment of the O.Ps/Respondents first parry as a driver of the lorry belonging to them and also that he sustained injuries in an accident, while driving the said lorry as a result of which he died. The relevant First Information Report (Ext. 1) and Post Mortem Examination Report (Ext. 2) were available on the record. What has been disputed is only with regard to the findings of the Court below, with respect to the amount of monthly wage, which was being paid to the deceased at the time of the accident. As against the version of the claimant of his monthly wages being Rs. 1000/-, it was contended on behalf of the respondents in their respective written statements that it was only Rupees 500/-. It may be mentioned here that the respondents had also challenged, the age of the deceased but the finding of the Court below on the point of age as per the School Leaving Certificate (Ex-3) produced on the record, has not been disputed any more and, accordingly, it has got to be accepted as 25 years.

6. So far as the monthly wage of the deceased was concerned, by the employers and the other by the Insurer that the salary of the deceased was Rs. 500/- per month in support of this contention one of the two employers, namely, Amal Prasad (O.P./ Respondent No. 1) deposed that the salary of the deceased as paid by him was Rs. 400/- per month and besides that he used to pay him a sum of Rs. 225/-per month for his Jalpaan in addition to his salary. The oral evidence was thus quite contrary to what has been contended in the two written statements of the O.P.s./Respondents. It may be added here that the aforesaid employer (O.P. No. 1) examined himself again on recall to produce certain books of account of his firm so as to disclose the actual amount of salary paid to the

deceased. Those books of accounts were sought to be admitted into evidence but no exact number could be given to those, and it was surprising to note that those were not even available on the Lower Court records. From the judgment of the Court below, it would be simply derived that those books of account had been produced in support of the contention of the monthly salary being Rs. 500/- but the Court had no occasion to actually peruse the books of account so as to notice therein that the monthly salary paid to the deceased was Rs. 500/-. Even as to the authenticity of the entries in the books of account, the deposing O.P. No. 1 stated that he had no personal knowledge of any such entries. In any view of the matter, there being a sharp contradiction between the pleadings in the written statement and the oral evidence and the books of account, it can't but be held that there was no basis for a finding that the monthly salary of the deceased was only Rs. 500/-. Obviously, there was a futile attempt made on behalf of both the sets of the O.Ps./Respondents to controvert the oral evidence of the claimant that the monthly salary was Rs. 1,000/-. Since, the salary was being paid out of the funds of a Registered Partnership Firm, it was accepted at least of the employers i.e. the O.Ps./ Respondents, first party to have produced the endorsement of receipt of salary by the deceased either in his own pen or bearing his L.T.I. to determine the actual amount of his salary, and filing that not even the pay-roll or the monthly salary chart could be produced.

7. In the light of the evidence what has been noticed in the preceding paragraph, there was no alternative left than to place reliance on the oral evidence of the claimant as per which the monthly salary of the deceased at the time of the accident was Rs. 1000/ per month, which being @ Rs. 35/-per day also stands to one's reasonings in the face of the nature of service rendered by the deceased to his employers,

8. We are, therefore, of considered opinion that for the purpose of reckoning the compensation the i monthly wage of the claimant's husband has to be accepted as Rs. 1000/-.

9. Apart from the quantum of compensation admissible u/s 4 of the Act, the contesting parties to the appeal i.e. the claimant and the insurer also joined issue on the point of payment of interest and penalty on account of default/delay in payment of the compensation as contemplated u/s 4A of the Act. The relevant facts in this context were that the death of the claimant's husband took place long back as on January 7, 1988 and the claimant preferred claim before the Commissioner on May 19, 1988. It was only after a lapse of about 3 years that the award was passed on May 14, 1991. The amount of compensation being Rs. 43,382/- as awarded by the Commissioner was deposited by the insurer i.e. the O.P/respondent No. 2 on January 13, 1992. It was however, made to understand that no amount of compensation out of the awarded money, deposited by the insurer, has been actually paid to the claimant. Obviously, the claimant has been deprived of any sort of compensation even after a lapse of a little less than 7 years. It was really very unfortunate that the claim though based on

compassionate ground of death could not be paid for one or the other reason even after a lapse of about 7 years for which the Section 4A of the Act as introduced in the year 1959 made a special provision for payment of some amount of compensation within one month from the date it fell due i.e. on the day the injury/death was caused.

10. In order to better appreciate the contention on the either side it would be apposite that Section 4A of the Act be extracted" as follows:-

"Section 4A - Compensation to be paid when 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 may direct that, in addition to the amount of the arrears, simple interest at the rate of 6 per cent per annum on the amount due together with, if in the opinion of the Commissioner there is no justification for the delay, a further sum not exceeding 50 per cent of such amount, shall be recovered from the employer by way of penalty."

11. Be it recorded that the claim petition as referred before the Commissioner does not bear the level either of Section 4 or Section 4A of the Act, but it most certainly made request for an award for compensation of a lumpsum payment of Rs. 86,664/- or any other compensation to which the claimant may be determined to be entitled. The prayer of the claimant as such, would, therefore, not deprive her from the relief to which she would be legally entitled besides the specific lump sum amount of compensation, referred to in her claim petition. All that was required of the claimant is to put in a petition as per specific provision laid down in Section 22 of the Act, read together with, Rule 20 of Workmen's Compensation Rules, 1924. In the instant case the claimant did put in a petition for claim in form "G" as provided under the aforesaid Rule 20. Therefore, it was for the legal provision of the Act to take care of all such interests of the claimant, which was permissible under law.

12. The learned counsel for the respondents, however, asked before this Court that so far as the claim of interest and penalty was concerned, this appeal in itself was not maintainable u/s 30(1) of the Workmen's Compensation Act, 1923, which has categorically prescribed the nature of orders of a Commissioner against which an appeal would lie. It was, however, emphatically urged that an appeal is a creature of the statute and, therefore, if the statute does not make any provision for an appeal against a particular order, no such appeal could be

entertained While taking us through the provision of Section 30(1) of the Act it has been pointed out that there was mention under Sub-clause (aa) that an order awarding interest or penalty u/s 4A was appealable. There was no mention in any of the categories prescribed u/s 30(1) that an order of refusal of awarding interest or penalty u/s 4A would also be appealable. In this context, an authority reported in *Krishna Bai and Others Vs. Krishanlal and Another*, was referred to as per which the Single Bench of the High Court of Madhya Pradesh, Gwalior Bench took a decision that no appeal was maintainable against an order of refusal of interest u/s 4A of the Act. The ratio of this case was, therefore, distinguishable with the present one in as much as the appeal before the High Court of Madhya Pradesh was preferred to claim only the interest (vide para 10 of the decision) whereas in the present appeal the parties have joined issue with regard to the quantum of lump sum compensation as well.

13. As against the above contention of the respondent, the appellant's counsel has sought to place reliance on the single Bench decision of Punjab and Haryana High Court in the case of *Smt. Lajwanti v. Haryana Railways*, reported in 1993 (1) AJR 119. In this case, though the accident took place on August 13, 1986, the compensation was not paid till the filing of an appeal. The Commissioner had awarded a lump sum of Rs. 71,396/- and, in addition to that, a sum of Rs. 8,604/- was also awarded as penalty. Though there was no order for payment of any interest on the amount of compensation, the High Court, taking into account the delay in making provisional payment based on admitted liability of the employer, directed for payment of interest at the rate of 6 per cent on the amount of compensation from the date of the accident. The amount of penalty also was enhanced to the extent of 25 per cent of the compensation amount.

14. On a careful consideration of the two reported authorities both the Single Bench, one standing in favour of the appellant and the other in favour of the respondent, we felt more inclined to accept the view point as taken by the Punjab and Haryana High Court in 1993(1) AIR 119 (supra), which supports the contention of the appellant. The reasoning which have weighed much with us, can be enumerated as follows:-

(i) Whereas Section 4A of the Act provides for a lump sum of compensation, Section 4A of the Act provides for payment of interest and penalty on account of non-payment of the agreed portion of the compensation within one month from the date it fell due. The provision of Section 4A of the Act was coextensive of the earlier provision u/s 4 of the Act, and, therefore, due care has to be taken of the default provision u/s 4A of the Act while granting relief u/s 4 of the Act.

(ii) The purpose of Section 4A of the Act was to ensure an early payment of the compensation to the extent it was undisputed, and that being, more certainly, based on compassionate ground, it has got to be taken as mandatory in nature.

(iii) In dealing with the determination of the compensation, the Court can't keep itself in oblivion of the delay caused in payment of the provisional compensation

and it has got to be regarded as statutory dues and, therefore, the Court is under obligation to exercise jurisdiction u/s 4A of the Act.

(iv) An order as contemplated u/s 4A of the Act can be passed along with the order u/s 4 of the Act in the same proceeding and no separate proceeding was required to deal with the default provision of the Act. In the same proceeding, an opportunity can be provided to put-forward explanation for the delay, if any, and if no satisfactory cause is shown for the default or the delay in making provisional payment, the Court is expected to deal with the matter on the individual merit of the case.

(v) While exercising jurisdiction u/s 4A of the Act, the Court may choose to refuse granting interest on the compensation amount or imposing penalty but that should be by a speaking and reasoned order.

(vi) The Liability of the insurer is coextensive with that of the employer unless the default is considered to be the exclusive act on the part of the employer. The insurer, in an ordinary course, undertakes to cover up all the liabilities arising out of legal obligation of the employer as contemplated in the Act. If the violation of the statutory provision is exclusively on the part of the employer, the insurer may, however, come forward with a plea of bona fide.

(vii) The Appellate Court cannot be, in an ordinary course, precluded from passing an appropriate order which the Original Court could have passed in exercise of jurisdiction vested in it.

15. In the background of the above legal propositions, what was most significant to take note of in the instant case was that the Court below i.e. the Commissioner failed to exercise jurisdiction u/s 4A of the Act and thereby to consider whether any amount would be payable as interest and /or penalty along with the lump sum of compensation. The impugned award was however silent on the point, and there was no speaking order as to why the claimant was not entitled to any amount of interest on the compensation money or the penalty for default in making provisional payment within the time limit as thereon provided u/s 4A of the Act.

16. Further, the employer and the insurer (both sets of the O.Ps./Respondents) in the instant case were sailing in the same boat and they had of course filed separate written statements before the Commissioner challenging the quantum of compensation, but on common grounds as to the age and the salary of the deceased. According to their case, his age was 35 years (not 25 years) and his monthly salary was Rs. 500/ (not Rs. 1000/-). Thus, on a claim being made for compensation, it was expected that the compensation as assessed on the admitted extent of age and salary, should have been deposited with the Commissioner within one month of the date, when the injury/death occurred and failing that, at least, within a reasonable time limit with suitable explanation for the delay. The default on this score was almost an admitted truth. May it be added here that since the insurer (O.P/Respondent No. 2) had joined hands with

the employer right from the very beginning of the claim proceeding and litigated the matter on some issues which ultimately proved to be not acceptable, it can't but be held that the violation of statutory provision of the Act was not the exclusive act of the employer. In any view of the matter the role of the insurer in the instant case does not appear to be bona fide so as to exonerating him from liability to indemnify the assured i.e. the employer. On the basis of a decision of the High Court of Gujarat at Ahmedabad in Gautam Transport, Bhavnagar v. Jiluben Huseinbhai, 1989 Accident Claim Journal 587 the learned counsel for the respondent contended that since the penalty arises on account of clear violation of statutory provision of the Act by the employer, no liability for penalty can be fastened upon the insurer. The ratio of this case was. however, not applicable in the instant case for the simple reason as noticed above that the insurer had joined hands in withholding payment and litigating the issue for long.

17. In the premises, this appeal must succeed and accordingly, it is allowed. The claimant/appellant would be entitled to a lumpsum of compensation to the tune of Rs. 86,764/- and also to interest thereon at the rate of 6 per cent per annum from the date of accident to realisation. The claimant would also be entitled to penalty of 25 per cent of the compensation amount, which is determined as Rs. 21,500/-. A sum of Rs. 43,382/- already deposited by the respondent No. 2 with the Commissioner and the interest accrued if any, would, however, be set off from the total amount payable to the claimant under this award. The Commissioner is directed to pay the said deposit of Rs. 43,382/- as referred to above to the claimants appellants along with accrued interest if any thereon. Such payment is to be made by crossed account payee cheque drawn in favour of the claimant, to be made over to the claimant against the signature of the claimant to be duly identified by the Advocate-on-record of the claimant. Upon such payment being made by the Commissioner, the award in this appeal will stand satisfied only to the extent of the payment made on pro-tanto basis and the claimant will be entitled to execute the award for the balance outstanding amount. The balance amount shall be paid by the respondent No. 2 i.e. the insurer, within two months from today. The claimant shall also be entitled to receive costs, which are assessed at Rs. 500/-.

Baboolal Jai, J.

18. I agree.