

(2019) 02 J&K CK 0090

In the Jammu And Kashmir High Court

Case No : Civil Ist Misc Appeals (MA) No. 160 Of 2016

Sunita And Ors

APPELLANT

Vs

Jammu Pigments Pvt. Ltd. And Ors

RESPONDENT

Date of Decision : 28-02-2019

Acts Referred:

Employees Compensation Act, 1923 — Section 4, 4A, 4(3)(a), 4A(3)(b)

Citation : (2019) 02 J&K CK 0090

Hon'ble Judges : Rajesh Bindal, J

Bench : Single Bench

Advocate : Rajinder Jamwal, Sanjay Dhar

Judgement

Rajesh Bindal, J

1. Widow of the deceased employee has filed the present appeal in this Court, impugning the award passed by the Assistant Labour Commissioner, Kathua (in short, 'the Commissioner') under the Employees Compensation Act, 1923 (hereinafter referred to as 'the Act'), seeking further enhancement of compensation and also for a direction to award statutory interest and penalty on the amount of compensation.

2. Learned counsel for the appellants submitted that the deceased husband of the appellant No. 1, namely, Sh. Shashi Paul was employed as a driver with private respondents, who died in a road accident on 27.07.2011, during the course of his employment. He was 38 years of age at the time of his death. His monthly salary was ₹ 10,000/-, however, the Commissioner has wrongly taken the same as ₹ 6,000/- per month and calculated the amount of compensation. Learned counsel for the appellants has referred to a voucher produced along with the present appeal, as Annexure A-1, showing the payment of ₹ 10,000/- as salary. He further submitted that in addition to the stand taken by the appellants before the Commissioner, which was supported by her oral evidence as well as the evidence of Mr. Yogesh Singh, who was working as Conductor on the Truck,

on which the husband of the appellant No. 1 was the driver, it was fully established that the deceased was getting salary of ₹ 10,000/-per month. In the light of the oral evidence led by the appellants, which was not controverted by the respondents by leading any evidence, the same deserves to be accepted and compensation assessed in terms of the formula provided in Section 4 of the Act. In support of the arguments, reliance was placed upon the judgment of Bombay High Court in Mallikarjun Gundappa Patil and ors. Vs. Ambadas Baburao Vardekara and ors., 2005 (1) ALL MR 21.

3. It was further submitted that in terms of Section 4 A of the Act on account of delay in payment of the compensation, the appellant is also entitled to interest and further if there was no justification for delay in payment of compensation to the victim, penalty of 50% can be imposed. The Commissioner has failed to exercise that jurisdiction. In the case in hand, the employer though had initially filed reply to the claim petition but thereafter failed to put in appearance. In support of the arguments, reliance was placed upon the judgments of Hon'ble the Supreme Court in Oriental Insurance Co. Ltd. Vs. Siby George and ors., AIR 2012 SC 3144 and Kerala State Electricity Board and another Vs. Valsala K. and another etc. etc., AIR 1999 SC 3502.

4. On the other hand, learned counsel for the insurance company submitted that it is a case, in which there was no material produced on record by the claimants to show that the deceased husband of the appellant No. 1 was drawing salary of ₹ 10,000/- per month. The Commissioner had assessed his salary at ₹ 6,000/- per month only on the basis of an admission made by the employer in the reply to the claim petition. Oral evidence cannot be given weight over the admission made by the employer. Onus to prove the same was on the appellants. Appellants could have summoned the record of the employer, even if it was not appearing after filing of the reply. He further submitted that the voucher produced by the appellants along with present appeal, does not lead the case of the appellants any further, as the same is dated 30.07.2011, showing payment of ₹ 10,000/- as salary, but the fact as to on whose Account that salary was paid and to whom and for what purpose, is totally missing. In fact, the husband of the appellant No. 1 had died on 27.07.2011. The person, who had allegedly paid the salary is also not evident. In the absence thereof, any document now produced by the appellants along with the present appeal cannot be relied upon.

5. He further referred to the cross-examination of the appellant as well as Mr. Yogesh Singh, who were cited as witnesses. In fact, from their own cross-examination, their claim that the salary was ₹ 10,000/-, was demolished. He further submitted that the liability to pay the interest falls on the insurance company in terms of judgment of Hon'ble the Supreme Court in Oriental Insurance Co. Ltd. Vs. Siby George and ors. case (supra), as cited by the learned counsel for the appellants, however, the burden of penalty is on the employer. The same can be imposed only after issuing notice by the Commissioner while recording a finding that there was intentional default in the payment of

compensation. In support of his arguments, reliance was placed upon judgment of High Court of Orrisa in National Insurance Co. Ltd. Vs. Bhan Singh, 1991 (1) ACJ 531.

6. Heard learned counsel for the parties and perused the paper book.

7. As far as the contention raised by the learned counsel for the appellants regarding salary of the deceased husband of the appellant No. 1 is concerned, I do not find any merit in the submissions made. It is well settled that the Act is a welfare legislation, enacted for the benefit of the workmen, hence, strict proof may not be required. But that does not mean that claim can be accepted merely on saying without any material on record. Some convincing material has to be placed before the Court to enable it to record a finding in his favour. In the claim petition filed, she had claimed that monthly salary of the deceased was ₹ 10,000/- per month. The employer in his reply to the claim petition submitted that his salary was ₹ 6,000/- per month. That was the basis taken by the Commissioner for assessing compensation. Even in her statement recorded before the Commissioner, she had categorically admitted that she did not have any record of the wages being paid to her husband, as she never visited to receive his wages. As against that, now a voucher dated 30.07.2011 has been produced on record with the appeal to claim that the same was on account of salary paid to her husband. The aforesaid voucher is a photocopy. It does not contain the name of the person or the company, who had paid the amount and further the payment on whose account. This receipt was issued after the husband of the appellant No. 1 had already expired in an accident on 27.07.2011. Hence, the same on the face of it is an afterthought and created evidence. The statement of another oral witness-Yogesh Singh, who claimed himself to be conductor on the truck is that he was employee with the private respondents only for a period of twenty days. He further sought to claim that he was also in the same truck in which the deceased husband of the appellant No. 1 had died on account of fire in the truck, whereas he survived and suffered injuries. But no medical evidence in support has been referred to. He had not even produced any record pertaining to his appointment by the private respondents. No proof for payment of wages has been annexed. Hence, even his testimony to prove that the deceased husband of the appellant No. 1 was drawing salary of ₹ 10, 000/-per month, does not have any legs to stand. Hence, there is no error in the findings recorded by the Commissioner in assessing income of the deceased @ 6,000/- per month.

8. Now coming to the issue of grant of interest and penalty on the amount of compensation to the appellant is concerned, it would be relevant to refer to provisions of Section 4-A of the Act, the same is extracted below:-

"4-A. Compensation to be paid when due and penalty for default.

(1) Compensation under section 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 *[employee], as the case may be, without prejudice to the right of the*[employee] 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 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.

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).(3A) The interest and the penalty payable under sub-section (3) shall be paid to the *[employee] or his dependant, as the case may be."

9. The issue regarding payment of interest on the compensation awarded under the Act was considered by Hon'ble the Supreme Court in Siby George and other's case (supra) and it was opined that in view of Section 4(3)(a) of the Act, the payment of interest is a consequence of default in payment of compensation without going into the reasons for delay. In the aforesaid judgment, even the question was considered as to when the payment of compensation falls due for the purpose of calculation of interest. It was opined that the payment of compensation will not fall due only after determination thereof by the Commissioner or with reference to the date on which claim application was filed. Rather it would be the date of accident. Hence, the appellant in the present case would be entitled to payment of interest @ 12% per annum on the amount of compensation determined from the date of accident till its payment.

10. As far as levy of penalty is concerned, a perusal of Section 4A(3)(b) provides that penalty can be imposed by the Commissioner only when there was no justification for delay. Before imposing penalty, the Commissioner is required to give the employer a reasonable opportunity to show cause. The employer may be able to point out justifiable reasons for delay or non-payment of compensation or may make out a case for waiver or imposition of lesser amount of penalty, as the Section fixes maximum limit of 50% of the amount of compensation, as penalty.

The issue regarding penalty or the quantum thereof cannot be effectively decided unless a specific notice to that extent had been issued to the employer. This is in compliance to the principles of natural justice. Nothing has been pointed out by the appellants at the time of hearing that any specific notice was issued by the Commissioner to the employer regarding imposition of penalty. Keeping that fact in view, I do not find that any case is made out for imposition of penalty at this stage especially when the employer is not even represented before this Court.

11. For the reasons mentioned above, the present appeal is partially accepted while modifying the award of the Commissioner.

12. As far as amount of compensation is concerned, no interference is called for. However, the appellants shall be entitled to interest @ 12% per annum on the amount of compensation from the date of accident till its payment.