HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

Reserved on: 30.05.2023
Pronounced on: 11 .07.2023

MA No. 155/2007
c/w
MA No. 152/2007
MA No. 153/2007
MA No. 154/2007
CCROS No. 9900001/2008
CCROS No. 9900002/2008
CCROS No. 9900003/2008
CCROS No. 9900004/2008

Mohd. Abdullah

….. Appellant(s)

Through: Mr. M.P. Gupta, Advocate

V/s

Manager, Trumboo Cement Industry Limited and Another

…..Respondent(s)

Through: Mr. Shafiq Ahmad Wani, Advocate with,
Ms. Damini Chauhan, Advocate for R-1
Mr. Vishnu Gupta, Advocate for R-2

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. Four persons namely Mohd Abdullah, Mohd Rafiq, Mohd Yousuf & Mr. Ab. Rashid Drabu claiming to be workmen of Trumboo Cement Industries Private Limited filed four different claim petitions under Section 3 of the Employees' Compensation Act, 1923 [" the Act for short"]. The claim petitions were filed against M/S Trumboo Cement Industries Private Limited ["the employer"], arraying also the United India Insurance Company Limited ["the insurer"] as party respondents.

2. The gravamen of their claim petition, to put it briefly, was that the workmen above named while being in the course of their employment with the employer received serious injuries on 26th July, 2004. The injuries were allegedly received by the workmen during blasting operations undertaken on the directions of the employer. The workman Mohd Abdullah sustained a fracture in his right arm, injury in left eye and some other physical injuries which rendered him permanently disabled. The workman Mohd Rafiq allegedly sustained injuries all over the body, face, legs, scalp and right hand etc. which also resulted in the permanent disablement. The workman Mohd Yousuf also allegedly sustained multiple injuries all over his body, arm, right eye and ear etc.etc., the injuries also resulted in permanent disablement of the workman. The workman Ab. Rashid Drabu also sustained multiple injuries in the same accident and was rendered permanently disabled.

3. The claim applications filed by the workmen were entertained by the Commissioner Workmens' Compensation ["the Commissioner"] Ramban.

4. On being put on notice, the employer as well as the insurer caused their appearance before the Commissioner and submitted their written objections, wherein the claim of the workmen was denied in Toto. To substantiate their claims, the workmen produced their witnesses namely Abdul Aziz, Abdul Rashid and Dr. Mohd Iqbal Bhat, Assistant Surgeon.

There was, however, no evidence in rebuttal lead either by the employer or the insurer. The employer had stopped appearing in the matter and, therefore, had already been proceeded exparte.

5. The Commissioner considered the claim of the workmen in the light of the evidence led by them and held all the four workmen entitled to different sums of compensation. An award for an amount of Rs. 12, 79,130/- (Rupees Twelve Lac Seventy-nine Thousand & one Hundred Thirty) in favour of all the four workmen came to be passed by the Commissioner vide its order dated 8th June, 2007. The insurer was directed to deposit the awarded amount of compensation with the Court of Assistant Labour Commissioner, Ramban, by way of indemnification to the employer.

6. The impugned award dated 8th June, 2007, is assailed by all the four workmen by filing appeals. The only ground of challenge urged by the learned counsel appearing for the appellant workmen is that though the Commissioner has allowed their claims for compensation, yet it has declined to pay interest for undisclosed reasons. The appeals preferred by the workmen are only restricted to the extent that the Commissioner has declined them interest which is mandatorily payable under Sub Section (a) of Section 4-A of the Act. It seems that when the notices of the appeals filed by the Workmen were served upon to the respondents including the insurer. The insurer also filed four cross objections which

were later on treated as appeals by this Court vide order dated 14th September, 2022.

7. I have heard learned counsel appearing on both sides and perused the material on record. Since both the sides i.e., the workmen as well as the insurer are in appeals against the impugned order, as such, it would be appropriate to first deal with the appeals filed by the insurer

Appeals by the Insurer:-

8. Mr. Vishnu Gupta, learned counsel appearing for the insurer has projected following substantial questions of law.

(i) That the award impugned in the present appeal is against the law and facts of the present case. The same is factually incorrect and has been passed in utter disregard to the legal and factual position without considering the policy in vogue and the objections filed by the appellant and in ignorance of the principles, law and legal parameters laid down by the Apex Court.

(ii) Whether it was mandatory on the part of the Commissioner below to properly appreciate and consider the policy and the objections filed by the appellant raising the legal pleas and the objections and decide the same by a reasoned order;

(iii) Whether the Commissioner below could pass an award without considering and deciding the

objections and the legal defences raised therein by the appellant that risk of employees of contractors of respondent No. 1 was specifically excluded under the policy;

(iv) Whether it was mandatory on the part of the Commissioner below to frame issues of fact and law as required under Rule 28 of the Workmen Compensation Rules 1924;

(v) Whether the Commissioner can arbitrarily fix wages without there being any salary certificate or without recording or examining the employer;

(vi) Whether MBBS doctor is competent to certify and assess the permanent disablement with regards to functions of an Orthopaedic Surgeon, physician and ENT specialist by examining the injured in the office of Commissioner below;

(vii) Whether an MBBS doctor after examining the petitioner in Court without any scientific instruments, depose about permanent disablement of left upper limb, weakness of lower limbs, general weakness, digestion problem etc. It is pertinent to mention here that the respondent No. 2 in the petition had only claimed injury to abdomen, arm, eye etc. in general terms and whether injury to one arm could result in the permanent disablement of

both upper limbs, weakness to lower limbs and general weakness and indigestion problem. It is also pertinent to mention here that disabilities stated by the doctor in his statement have no nexus with the injuries claimed by the workmen in the claim petition. 70% permanent disablement assessed by the doctor has no nexus with the injuries suffered and proves that the doctor had no knowledge about the assessment of percentage of disabilities;

9. Having heard Mr. Vishnu Gupta, learned counsel appearing for the insurer and Mr. M.P. Gupta learned counsel representing the workmen, I am of the considered opinion that the appeals preferred by the insurer raises following substantial questions of law in terms of Proviso first of Section 30(1) of the Act.

(a) Whether the Commissioner below was under an obligation to first frame issues of fact and law as required under Rule 28 of the Workmen Compensation Rules, 1924 (the Rules), and thereupon proceed to record the evidence.

(b) Whether the impugned award passed by the Commissioner is perverse, in that, it has failed to consider and dispose of the legal defence raised by the insurer that the risk of employees of the

employer was specifically excluded under the policy.

(c) Whether an MBBS qualified doctor is a competent witness to depose in respect of injuries of the workmen by examining them in the court of Commissioner for the first time.

10. Apart from the aforesaid questions, the other questions proposed on behalf of the insurer are factual and cannot be termed as substantial questions of law.

11. True it is that under Section30 of the Act, an appeal would lie to the High Court from an order awarding compensation etc. only if there is a substantial question of law involved in the appeal and the amount in dispute in the appeal is 10,000/- rupees or more. Mr. Vishnu Gupta, learned counsel appearing for the insurer has though pleaded in as many as seven substantial questions of law, but the same on scrutiny have been found to be either questions of fact or mere questions of law, except the three I have reproduced hereinabove. Mr. Vishnu Gupta, learned counsel appearing for the insurer was heard in extenso on the aforesaid questions of law.

12. Before, I embark upon considering the substantial questions of law formulated, I deem it appropriate to advert to the stand taken by the insurer before the Commissioner. It is clear from reading of preliminary objections of the insurer

that it had taken a specific plea that the employer had not taken any insurance cover for its employees/workmen working in quarry and that the policy of insurance obtained by the employer only covered the employees working in the cement plant of the employer at Khanmoh. Apart from the aforesaid preliminary objection, the insurer, in his objections, has also denied the injuries claimed to have been suffered by the workmen.

13. From the file of the Commissioner, it transpires that though the claim of the workmen was vehemently contested by the insurer, but no issues as are required under Rule 28 of the Rules were struck by the Commissioner so as to enable the parties to lead evidence in proper perspective. The question, therefore, arises as to whether framing of issues of fact or law in terms of Rule 28 of the Rules is mandatory and failure vitiates the entire proceedings? The answer to this question could be Yes or No, depending upon whether the party aggrieved has suffered any prejudice on such omission on the part of the Commissioner. Ordinarily and as is envisaged under Rule 28, when the parties are at variance on questions of fact or of law, the Commissioner shall frame specific issues. This would enable the parties to know the case they are supposed to prove by leading evidence, oral or documentary or both.

14. However, where in view of the clear pleading of both the sides, the parties know full well the case they are going to

meet and, accordingly, lead their respective evidence, they cannot be heard to say later that they have suffered prejudice because of non framing of issues of fact and law. In the instant case the points of difference or variance were well known to the parties. The workmen lead their evidence to prove that the accident had arisen out of and during the course of their employment with the employer and, therefore, they were entitled to be compensated under the Act. They did prove the injuries and the disablement suffered by them by producing a medical expert as their witness.

15. On the contrary, the insurer had sought to be excused from indemnifying the employer on the ground that the workmen working in the quarry and outside the cement plant were not covered by the insurance policy. The insurer knew that to sustain this objection it was obliged to produce evidence and prove the insurance policy, particularly the portion of the policy which would demonstrate that the employees working with the employer in a quarry which was though associated with the cement plant was not covered by the insurance policy. The insurer chose not to do so. I am, therefore, of the considered opinion that the omission on the part of the Commissioner not to frame issues in terms of Rule 28 has not prejudiced the insurer in any manner, more particularly when, the insurer had decided not to lead any evidence. The aforesaid discussion amply replies and settles the first two questions of law.

16. The next and the third substantial question of law is whether an MBBS qualified doctor is a competent witness to certify about the injuries sustained by the workmen in the accident by examining them only in the open court. To find answer of the question, I have gone through the record of the Commissioner and I find that the medical expert who may be having a qualification of MBBS only, has only certified and verified the certificates of disablement given in favour of the workmen by the Competent Medical Officers. There is no dispute with regard to the fact that there was a blasting accident that occurred in the quarry associated with the cement plant of the employer. It is also not in dispute that the workmen sustained multiple injuries on their bodies and vital parts in the accident. They were all admitted in the Government hospitals and were treated for a long. There is also no dispute that the Competent Medical Officers who attended the workmen issued the disability certificates in their favour. It needs to be appreciated that the workmen, having regard to their financial position, could not be expected to produce all those doctors as their witnesses before the Commissioner. A qualified MBBS doctor was thus produced to lend credence to the disability certificates issued by the competent doctors who deposed extensively before the Commissioner. The insurer got full opportunity to cross examine the said witness. The Commissioner has accepted the version of the expert witness.

17. In these circumstances, it is not open to the insurer to contend before this Court that an MBBS qualified doctor was not a competent witness to certify the injuries sustained by the workmen. There is not even a grain of truth in the submission made by Mr. Vishnu Gupta, learned counsel appearing for the insurer that the expert medical witness produced by the workmen deposed only on the basis of the physical inspection of the workmen in the court. The witness has actually relied upon the medical record and the disablement certificates issued by the doctors who had attended the injured workmen. I am, therefore, not inclined to accept the contention of the learned counsel for the insurer that the Commissioner should have ignored the testimony of the doctor on the grounds pleaded by the insurer.

18. Mr. Vishnu Gupta, learned counsel appearing for the insurer has relied upon some judgments passed by some other High Courts of the Country, which I do not find relevant to the controversy raised by him in these appeals. While it is not disputed that a contract of insurance is governed by the provisions of the Insurance Act unless it is provided to be governed by provisions of a statute like Section 147 of the Motor Vehicles Act and the parties are free to enter into a contract as per their own volition. This is exactly what is held by the Supreme Court in **"New India Assurance Company Limited Vs. Harshadbhai AmrutBhai Modhiya and Another 2006(4) Supreme 350."**

The other judgments relied upon by Mr. Vishnu Gupta learned counsel appearing for the insurer pertains to the working of quantum of compensation payable under the Act. Since the nature of injuries/disablement, the age of the workmen is factual in nature and, therefore, no appeal would lie against such finding of fact returned by the Commissioner. Section 30 of the Act is quite explicit and prohibits entertaining of an appeal against an award of the Commissioner, unless it raises substantial questions of law. At this juncture, I would like to set out paragraphs 9, 10 and 11 of the judgment passed by the Supreme Court in North East Karnataka Road Transport Corporation Vs. Smt. Sujatha AIR 2018 (SC) 5593.

> "*9. At the outset, we may take note of the fact, being a settled principle, that the question as to whether the employee met with an accident, whether the accident occurred during the course of employment, whether it arose out of an employment, how and in what manner the accident occurred, who was negligent in causing the accident, whether there existed any relationship of employee and employer, what was the age and monthly salary of the employee, how many are the dependents of the deceased employee, the extent of disability caused to the employee due to injuries suffered in an accident, whether there was any insurance coverage obtained by the employer to cover the incident etc. are some of the material issues which arise for the just decision of the Commissioner in a*

claim petition when an employee suffers any bodily injury or dies during the course of his employment and he/his LRs sue/s his employer to claim compensation under the Act.

10. The aforementioned questions are essentially the questions of fact and, therefore, they are required to be proved with the aid of evidence. Once they are proved either way, the findings recorded thereon are regarded as the findings of fact.

11. The appeal provided under Section 30 of the Act to the High Court against the order of the Commissioner lie only against the specific orders set out in clause (a) to (e) of Section 30 of the Act with a further rider contained in first proviso to the Section that the appeal must involve substantial question of law."

19. For the reasons given above, I do not find merit in the appeals filed by the insurer and the same are, accordingly, **dismissed**.

Appeals by Workmen:

20. These four appeals by the workmen, as stated above, are directed against the impugned award passed by the Commissioner only to the context and insofar as the Commissioner has declined to award interest and penalty as envisaged under Section 4-A of the Act. Mr. M.P. Gupta, learned counsel appearing for the workmen has proposed following two substantial questions of law.

(a) Whether the learned Commissioner is correct in not awarding an interest @ 12% per annum as envisaged under Section 4-A(3)(a) of the Act.

(b) Whether the learned Commissioner is correct in not awarding 50% of the amount of penalty in addition to the compensation and interest as envisaged under Section 4-A(3)(b) of the Act.

21. From reading of the impugned award passed by the Commissioner, it clearly transpires that the Commissioner has not disclosed any reason at all as to why payment of interest and penalty envisaged under Section 4-A of the Act is not awarded. I could not discern anything from the reading of the award which could justify such omission. Before I proceed, I deem it germane to set out Section 4-A of the Act.

> "[**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.

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22. From reading of the entire Section, it comes out very vividly that the compensation under Section 4 of the Act becomes payable as soon as it falls due. As has been

authoritatively held by the Supreme Court in **Sujatha** (supra), the compensation in favour of the workmen falls due on the date of the accident and not on the date adjudication is made by the Commissioner under Section 4 of the Act. In view of the law laid down by the four judge Bench of the Supreme Court in **"Pratap Narain Singh Deo Vs. Shrinivas Sabata and Another 1976(1 SCC 289)** and **Kerala State Electricity Board and Another Vs. Varsala K and Another 1999(8 SCC 254),"** it is no longer res-integra that the Compensation becomes payable to the injured/deceased workmen on the date he receives injuries in the accident. In case the employer commits a default in making the payment of compensation due under the Act within one month from the date it fell due, the Commission is under an obligation to direct the employer to pay in addition to the amount of compensation, the simple interest @ 12% 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 a notification in the official gazette. The Commissioner if finds that there is no justification for the delay in making the compensation, it shall direct the employer to pay in addition to the amount of arrears of compensation and interest thereupon a further sum not exceeding 50% of such amount by way of penalty. Proviso first to Sub Section 3 of Section 4-A, however, prescribes that no order of payment of penalty shall be passed without

giving a reasonable opportunity to the employer to show cause why it should not be passed.

23. From reading of the Section 4-A and in the light of settled legal position, I am of the considered opinion that the Commissioner has without any reason or justification omitted to consider the claim of the workmen for payment of interest. Indisputably, in the instant case the employer had not offered any compensation to the workmen nor had it even requested the insurer to pay such compensation to the workmen by way of indemnification undertaken by the insurer under the policy of insurance. The employer, thus, admittedly failed to meet its obligation of payment of compensation to the workmen under Section 4 immediately when it fell due i.e., the date on which the workmen received injuries in the blasting accident. The employer committed default in making the payment of compensation within one month from the date it fell due and, therefore, became statutorily liable to compensate the workmen by payment of interest @ 12% per annum, in addition to the amount of arrears of compensation from the date of the accident itself. In the view I have taken, I am fortified by the latest judgment passed by the Hon'ble Supreme Court in the case of **"P. Meenaraj VS. P. Adigurusamy and another Civil Appeal No. 209/2022 decided on 06.01.2022."**

24. Having held that the workmen are entitled to payment of interest in terms of Section 4-A of the Act, it is now

necessary for the Court to decide as to whether the liability on account of interest component is to be discharged by the employer or the insurer who has undertaken to indemnify the employer under a policy of insurance. The contention of Mr. Vishnu Gupta, learned counsel appearing for the insurer is that the interest and penalty as envisaged under Sub Section 3 of Section 4-A of the Act is recoverable only from the employer. He has relied upon a full Bench judgment of High Court of Orissa in the case of **"Divisional Manager, New India Assurance Company Ltd. and Ors Vs. Bishit Barman and others".** To the similar extent is the Division Bench judgment passed by the High Court of Himachal Pradesh in the case of **"United India Insurance Co. Ltd. Vs. Faroz Begum and Ors., 1998 ACJ 42",** wherein it is categorically held that the insurance company shall not be liable to indemnify the insured employer for payment of interest and penalty, unless there is a contract between the employer and the insurance company in this regard.

25. I have given my thoughtful consideration to the rival contentions made by the learned counsel appearing for the parties and I am also of the considered opinion that the liability to pay interest or penalty as envisaged under Sub Section 3of Section 4-A of the Act arises on account of omission made by the employer to fulfil its statutory duty of compensating the injured employee by affording him the compensation in terms of Section 4 of the Act within a period

of one month from the date of accident. It is true that under the policy of insurance covering the injuries and death of the workmen working under the employer, the insurer undertakes to indemnify the employer in respect of any compensation payable to such injured/deceased workmen during the course of his employment, but such contract to indemnify the employer in respect of payment of compensation cannot *ipso facto* extend to the payment of interest and penalty that becomes due from the employer only in case he commits default in payment of compensation due within a period of one month. Unless there is a specific contract of insurance between the employer and the insurer, that the insurer would indemnify the employer in respect of interest and penalty also, no liability can be fastened on the insurer to indemnify the employer for the amount of interest and penalty that may become payable by the employer for committing a default in making the payment of compensation due under the Act within one month from the date of accident.

26. Viewed thus, I am of the view that the appellant insurance company cannot be held liable to indemnify the employer in case later is directed to pay interest and penalty as envisaged under Sub Section 3 of Section 4-A of the Act.

27. In the instant case, the Commissioner by omitting to consider the impact of Sub Section 3 of Section 4-A and not making an order for payment of interest and penalty has acted contrary to the statute which renders the award to the

aforesaid extent perverse in law. This is thus a substantial question of law.

28. For the foregoing discussion and the clear legal position obtaining on the subject, the appeals filed by the workmen are allowed and they are held entitled to interest @ 12% per annum on the amount of compensation adjudicated by the Commissioner w.e.f. 26th July, 2004, i.e., the date of accident. Since there is no adjudication by the Commissioner with regard to justification, if any, for not paying/depositing the compensation due to the workmen within a period of one month from the date of accident, as such, it would be difficult for me to come to the conclusion as to whether the employer is required to be penalized by directing him to pay the penalty or not. The remand of the matter at this stage i.e., 19 years after the accident would not serve the ends of justice.

29. Having regard to the facts and circumstances of the case and for the reasons explained above, I would like to put a lid on the litigation by providing that the employer, in addition to the interest as directed above, shall also be liable to pay a penalty @ 10% of the awarded amount. Ordered accordingly.

30. The employer i.e., M/S Trumboo Cement Industries Private Limited is directed to deposit the interest @ 12% per annum on the awarded amount to be reckoned from the date of accident i.e., 26th July, 2004, in the Registry of this Court within a period of two months from the date of judgment.

The employer shall also deposit in addition to the interest, as directed above, further sum by way of penalty @ 10% of the amount awarded by the Commissioner within the aforesaid period. The amount of compensation, if any, deposited in this Court shall be released in favour of the workmen after proper verification and identification.

31. With the aforesaid observations and the directions, the appeals preferred by the workmen are **disposed of**.

(Sanjeev Kumar)
Judge

JAMMU:
11 .07.2023
"Mir Arif"

Whether judgment is speaking: Yes
Whether judgment is reportable: Yes