

Executive Engineer, Electrical Division Vs. Commissioner for Workmen's Compensation

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Court : Orissa

Decided On : May-16-1991

Reported in : 1992ACJ633; (1992)IILLJ807Ori; 1992(II)OLR489

Judge : A. Pasayat, J.

Acts : Workmen's Compensation Act, 1923 - Sections 4(1)

Appeal No. : Misc. Appeal No. 256/1986

Appellant : Executive Engineer, Electrical Division

Respondent : Commissioner for Workmen's Compensation

Advocate for Def. : Addl. Standing Counsel for Respondent No.1 and ;P. Palit, Adv. for Respondent No. 2

Advocate for Pet/Ap. : G. Rath, Adv.

Disposition : Appeal dismissed

Judgement :

A. Pasayat, J.

1. The challenge in this appeal is to legality of the order passed by the Commissioner under Workmen's Compensation-cum-Asst. Labour Commissioner, Balasore (in short the 'Commissioner'), by which an award of Rs. 10,080/-was made in favour of the respondent No. 2

2. The background facts are that an application was filed by the respondent No. 2 (described hereinafter as the 'workman') on January 10, 1985 alleging that he sustained injuries on February 2, 1975 while performing duties under the present appellant (described hereinafter as the 'employer'). He claimed compensation of Rs. 30,000/- alleging that at the relevant time he was in the wage group of Rs. 300/- to Rs. 400/-and due to the accident he sustained injuries and lost his right hand. The employer in its return accepted that there was an accident, but took the plea that the workman sustained injuries while doing a work which exceeded the work schedule allotted to him, and therefore it was not liable for any payment. The undisputed position is that the injured had gone upto level of 33 K.V. line including A.B. switch of 33/11 K.V.Transformer, and came in contact with the 33K.V. line and fell down due to shock. He was hospitalised, and there was amputation of right arm. The employer stated that the monthly wage that was being earned by the injured was Rs. 249.90. The maintainability of the claim was also challenged by the employer, on the ground that the same having been filed after about ten years of the accident was hopelessly barred by time and in the absence of any plausible explanation for delay, the claim petition was liable to be rejected. It was pointed out that the period of limitation for lodging the claim is two years in terms of Section 10(1) of the Workmen's Compensation Act, 1923 (in short the 'Act').

3. During trial the employer attempted to justify its stand that the act of the injured was unauthorised and therefore, the accident did not arise out of and in course of his employment in order to entitle the latter to any compensation.

4. The Commissioner did not accept the plea of unauthorised action. He also condoned the delay, on the ground that there was probably assurance of payment of compensation, which dissuaded the claimant from coming before the authority. A specific plea was also raised by the employer that there was no loss of income and even after the accident, the authorities on sympathetic consideration permitted

the injured to work in a different post and there being no loss of earning, the claim petition was not maintainable.

This aspect does not appear to have been specifically dealt with by the Commissioner. The Commissioner did not award any interest, because the application was presented nearly after ten years of the date of accident.

5. In appeal, two points are primarily urged by the employer namely, there being no loss of earning, the claim petition was not maintainable, and there being no explanation for delayed presentation of the claim petition, the condonation of delay was not justified since the same was condoned on unsustainable premises. A foible attempt was also made to impress that the claimant-workman having exceeded the work schedule allotted to him, the accident did not take place out of and in course of employment.

The learned counsel appearing for the workman submitted that submissions made by the employer are not acceptable both in law and on facts.

6. I shall deal with the contentions sequentially. The Commissioner has dealt with the plea of unauthorised action at a great length and has concluded that the contentions have been disproved by evidence brought on record. This essentially being a conclusion on facts, I do not want to interfere because there is no perversity in the conclusion.

7. Coming to the question of entitlement of a claimant in case there is no loss of earning and there is continuance of engagement a reference to Section 4(1)(c)(ii) of the Act is necessary. The plea of employers that in case of continuance of engagement and non-reduction in earning, compensation is not payable, has not found favour with the Courts. As observed by the House of Lords in the case of *Ball v. William Hunt and Sons Ltd.* (1912 A.C. 496,) the Act regarded a workman only as a wage-earner and was concerned not with any physical pain or suffering or disfigurement to which a workman might be subjected by accident, but only with the loss of power to earn wages resulting from the injury. Lord Denning M.R. in *Fairley v. John Thomson*: (1973) 2 Lloyd's Rep. 40 observed as follows:-

'It is important to realize that there is a difference between an award for loss of earnings as distinct from compensations for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.'

This view has also been taken by the Court of Appeal, Civil Division, England in *Moeliker v. Reycolle and Co. Ltd.*, 1977 S.C.J. 364. 'Incapacity for work' is not the same thing as 'incapacity to work'. It means the loss or diminution of wage-earning capacity and it includes inability to work if that be the result of the accident. Similar view has been taken by Calcutta High Court in the case of *Ram Naresh Singh v. Lodhna Colliery Co. (1920) Ltd.*, 1973 Lab. I.C. 1656, *Sarat Chatterjee & Co. (P) Ltd. v. Mohd Khalil*: 1979 A.C.J. 106, and the Rajasthan High Court in *Executive Engineer P.W.D., Udaipur v. Narain Lal*, (1978-I-LLJ-141). In considering loss of earning capacity in the case of a 'permanent partial disablement', the comparison between the wages drawn by the workman before and after the accident, from his employer at the time of the accident, is not a determinative factor. If that be so, a cunning employer to tide over liability may offer a temporary employment to the claimant-workman to deprive the latter his entitlements under the Act. That would be against the legislative intent. This Court had also occasion to deal with an almost similar case where plea of existing job allotment and non-reduction in wages was involved. The employer-appellant was the employer in that case. A view similar to one taken by me was taken. See *Debaki Swain and Anr. v. Executive Engineer Electrical Division, Bhawanipatna Orissa State Electricity Board*, 1988 A.C. J. 836. Therefore, the plea that there being no loss in the wages, compensation could not have been awarded is not acceptable.

8. The residual question is whether delayed approach disentitled the claimant -- workman from any relief. Undisputedly the application was filed ten years after the accident. While it is well known that technicality should not stand in the way of substantive justice, it is also to be considered whether a stale claim lying in cold storage for a very long period should be permitted to be revived. It is well settled that when a discretion vests in a judicial or quasi-judicial authority, it has to be exercised in accordance with well settled principles of justice and not in an

arbitrary manner. It is equally well settled that when discretionary jurisdiction has been exercised in favour of a party, the same should not be lightly interfered with and much less in a case of this nature. Here the order sheet of the Commissioner shows that on March 16, 1985 it was indicated to the Commissioner that sanction for payment was awaited from the concerned authority. In other words, the stand of the claimant-workman that assurance was given for payment appears plausible. The condonation of delay does not suffer from any infirmity.

9. The appeal is devoid of merit and is accordingly dismissed.

No costs.

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