Rajan Vs. Subramonian

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Court : Kerala

Decided On : Sep-26-1992

Reported in : II(1993)ACC312; (1993)IIILLJ890Ker

Judge : Vishwanatha Iyer and; Manoharan, JJ.

Acts : Workmen's Compensation Act, 1923 - Sections 4(3) and 4A(3); Workmen's Compensation Rules - Rule 28

Appeal No. : MFA No. 431 of 1992

Appellant : Rajan

Respondent : Subramonian

Advocate for Def. : M. Ramachandran and; P.V. Abraham, Advs.

Advocate for Pet/Ap. : C.C. Thomas and; M.G. Karthikeyan, Advs.

Disposition : Appeal allowed

Judgement :

Viswanatha Iyer, J.

1. In this appeal under Section 30 of the Workmen's Compensation Act, 1923 (the Act), the appellant is the employer. An amount of Rs. 26,880/- has been awarded to the respondent-workman by way of compensation for the injury caused to him in

the course of his employment under the appellant. The Commissioner for Workmen's Compensation (the Commissioner, for short) has also directed the appellant to make payment of an amount, equivalent to fifty per cent, of the compensation awarded, namely, Rs. 13,440/- as penalty under Section 4A(3) of the Act. The appellant was besides directed to pay interest at 6% per annum from December 19, 1979 on the compensation as well as the penalty. The appellant has deposited the entire amount awarded as required by the proviso to Section 30, and filed this appeal.

2. The incident happened on November 19, 1979. The respondent claimed to be a toddy tapper employed by the appellant in his toddy shop No. 71, the appellant being a contractor for toddy shops in the Pattamby Excise Range during the year 1979-80. He was a permanent tapper. He fell down from a coconut tree on which he had climbed for tapping at about 10 a.m. on November 19, 1979. He was admitted in a private hospital in the first instance, but was later referred to the Medical College Hospital, Kozhikode for better care and treatment. His right upper limb was amputated above the elbow level. He was thus incapacitated from doing toddy tapping work for which he had been employed. He claimed that he was getting wages of Rs. 300/ - per month from the appellant, who did not make payment of any amount by way of compensation. The respondent filed the petition under Section 22 of the Act in these circumstances, for award of compensation.

3. The appellant's written statement contained every conceivable plea. He claimed that the petition was not maintainable. He denied that the accident arose out of, or in the course of employment. He even denied that the respondent tell down from a tree while tapping toddy on November 19, 1979. He denied that the respondent was a workman, on monthly wages. He was only paid the price of the toddy brought by him. He denied each and every averment made in the application, and, therefore, his liability to pay any amount by way of compensation.

4. The matter went for trial. One of the points raised at the trial was that the tree from which the respondent fell down was one which had not been earmarked by the excise authorities, for tapping by the appellant, the contractor for that area. The contention was that the respondent had climbed the tree for his own

purposes, and since, such clandestine climbing, for own purposes, was not in the course of the respondent's employment, the appellant was not bound to compensate him for the injury. When the respondent was examined, he was asked to mention the number of the tree from which he fell down. He was unable to state it. This weighed with the Commissioner, who rejected the claim on the ground that the accident did not take place in the course of employment. The matter was taken up in appeal to this Court in M.F.A. No. 365 of 1983. This Court did not accept the finding of the Commissioner based solely on the fact that the respondent was allegedly not tapping from a tree marked by the excise department. This Court noted that the appellant had no specific case that the respondent had tapped an unnumbered tree and, therefore, the accident did not arise in the course of employment. His contention was that the respondent was not his workman at all. There was also no positive evidence to show that the respondent was tapping toddy from an unnumbered tree. In these circumstances, this Court held that the respondent was not expected to adduce any evidence on the aspect high-lighted by the Commissioner. The appeal was accordingly allowed. Since this Court felt that the matter required further consideration, the matter was remitted back to the Commissioner for fresh consideration.

5. After the remand on July 12,1988, the matter underwent a large number of postings and adjournments, and the Commissioner eventually passed his order on January 30, 1992. It will been seen from his order that there were altogether fortysix sittings commencing from April 21, 1989, and that most of the large number of adjournments were at the instance of the appellant, to enable him to adduce evidence on his side. It was thereafer, and in the absence of any further evidence on his side, that the order was passed finally on January 30, 1992. As mentioned earlier, an amount of Rs. 26,880/- with interest thereon at 6% per annum was awarded to the respondent as compensation, besides imposing the maximum penalty of Rs. 13,440/- for the delay in making payment of the compenstion due. The Commissioner directed the appellant to pay interest at 6% per annum on the amount of penalty as well from December 19, 1979.

6. Though the challenge in the appeal is to the entirety of the award, when the petition for stay came on for hearing on July 29, 1992, counsel for the appellant

clarified that he was limiting the challenge to the imposition of the penalty, as also the levy of interest thereon. We are therefore considering only this part of the award in the appeal.

7. Appellant contends that Section 4A(3) does not authorise the levy of interest of the amount of penalty imposed thereunder and therefore the direction contained to that effect in the award of the Commissioner is illegal and has to be set aside. He also contends that the imposition of penalty, and that too the maximum amount imposable, is invalid for the reason that the appellant had no notice of the proposal to impose penalty, and he was not afforded an opportunity of being heard in the matter. Section 4A(3) provides for imposition of penalty only if there is no justification for the delay in making payment of the compenstion due, and therefore an opportunity should be afforded to the employer to place his version of the matter and to establish that there was really no case for imposition of the penalty, even if he was liable for the compensation. He also points out that Section 4A(3) vests a discretion in the Commissioner to impose penalty at an amount not exceeding 50% of the amount of compensation. The exercise of the discretion also requires that the employer should be heard in as much as he may have various reasons to put forth why he was not liable for the penalty at all, or even if liable, he was not liable for levy of the penalty to the maximum extent permitted by the section. Counsel points out that there was no issue framed in the proceedings relating to the levy of penalty, nor did the Commissioner hear the parties on that question either in the course of the trial or subsequently. Such notice and hearing are imperative before Section 4A(3) could be invoked, and the penalty imposed, that too at the maximum rate.

8. Counsel for the respondent contended on the other hand that the liability for penalty was a non-commitant of the award of compensation and therefore consideration thereof arose as a matter of course, which did not call for any separate notice to, or hearing, of the employer. The employer should be aware of the possibility of penalty being levied in appropriate cases and therefore should present mitigating factors, if any, before the Commissioner without being called upon to do so, and even without an issue being framed. So far as the interest on penalty is concerned, he sought to justify it, not on the terms of the section, but

relying on a decision of this Court reported as Case No. 129 in 1984 KLT (Short Notes) at page 79, which contains an observation in its last sentence that the employer is 'liable to pay interest on compensation and penalty''.

9. Counsel on both sides were however agreed that if for any reason this Court felt that notice and hearing on the question of imposition of penalty was necessary, the matter may be gone into in this Court itself without a remit to the Commissioner. They placed their respective cases before us, to which we shall advert later.

10. We shall extract Section 4A in the first instance:

'4A. 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 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 six 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 fifty per cent. of such amount, shall be recovered from the employer by way of penalty.'

11. We shall take up first the question of levy of interest on the amount of penalty. We have already mentioned that the Commissioner has directed the appellant to pay interest at 6% per annum on the amount of penalty, namely, Rs. 13,440/- from December 19, 1979.

12. Section 4A(3) concerns three aspects, namely, the compensation due to the workman, the interest thereon, and penalty. The delay in making payment of the

compensation on the due date (which, as per the decision of the Supreme Court in Pratap Narain Singh Deo v. Shrinivas Sabata 1976-I LLJ 235 is the date on which the injury was caused to the workman), is taken care of by the provisions for award of interest at 6% per annum on the amount of compensation. The provision for penalty is intended to act as a deterrent on the employer from raising frivolous or contumacious pleas, and delaying the payment of the compensation without justification. Section 4A(3) advisedly does not provide for any interest on the penalty part of it. All that it says is that if in the opinion of the Commissioner, there was no justification for the delay in paying the compensation, a further sum not exceeding 50% of 'such amount' i.e. the amount of compensation shall be recovered from the employer by way of penalty. Counsel for the respondent had a contention at one stage that the expression such amount was the aggregate of the compensation and the interest thereon and that the penalty could be upto 50% of that amount. But he beat a hasty retreat and abandoned the plea, when the illogicality of it was pointed out, apart from the fact that it had no bearing on the question in issue regarding levy of interest on penalty.

13. The statute has specifically provided for interest on the compensation but not on the penalty. Even the interest awardable on the compensation is specific, and limited at 6% and no more. The Commissioner has to exercise his powers only in accordance with the section and can therefore award interest only on the amount of compensation, and that too at 6% but not on the penalty, for which there is no express provision. He can exercise only those powers which are conferred on him and no others. The mainstay of counsel for the respondent was the report of the decision in Kochu Velu v. Joseph 1984 KLT SN 79 Case No. 129, where the tell tale observations mentioned earlier appear and do support his contention. The relevant short notes reads:

'While compensation has to be paid as soon as it is due, the Commissioner may award interest if there is no justification for the delay in making the payment. In this case, the employer never made any provisional payment. Even after this Court held that he was liable to pay compensation, as early as 2.1.1980, he did not even make any offer of provisional payment. He has been really in default. He is thus liable to pay interest on compensation and penalty.'

This judgment is reported in full at page 630 of 1984 ACJ. We also verified with the original judgment. The full text of the judgment does not bear out the contention of the respondent. In fact, the Division Bench had directed payment of certain amounts as compensation and penalty, but did not direct payment of any interest on penalty as would appear from the extract in the Short Notes. This is what the Bench said after the words:

'He has really been in default'. He is thus liable to pay interest on the compensation amount of Rs. 1,400/- at the rate of 65%, per annum from 16-6-1972 till date of payment'. The Bench then considered the question of penalty and directed payment of an amount of Rs. 350/- by way of penalty without interest'

14. On the terms of the section, it is clear that no interest is payable on the penalty imposed under Section 4A(3). The amount is not given as compensation for the injury, but as penalty for the unjustifiable delay in making the payment. That certainly is not a payment which should carry interest, even in the normal course. Therefore the contention of the appellant that the direction to pay interest on the amount of penalty is unwarranted has to be accepted, and that part of the award vacated.

15. Now we come to the main question raised in this appeal, whether the imposition of penalty, and that too at the maximum rate, without framing an issue, or without affording the appellant an opportunity to be heard regarding imposition of the penalty or its quantum is valid in law. The question of framing an issue or putting the appellant on notice of the proposal are really matters of fairplay and fair procedure related to the principles of natural justice. Section 4A(3) on its terms does not contain any provision for framing an issue or for hearing an employer before imposing penalty, or regarding its quantum, but that is a requirement of natural justice. It was held in Kraipack v. Union of India 1970 SC 150, and reiterated in Union of India v. J.N. Simha 1970-II LLJ 284 that while the rules of natural justice do not supplant the law but supplement it, if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislature and the statutory authorities intend to act in accordance with the principles of natural justice. These rules being

rules of fairness should therefore be followed and read into every provision unless their application is excluded either expressly or by necessary implication. Section 4A(3) does not expressly exclude the application of the principles of natural justice, nor is there anything therein excluding their application by implication. In fact, as a quasi judicial authority exercising statutory powers involving determination of rights of parties, it is elementary that the Commissioner should observe the rules of natural justice in the performance of his functions. Though the Act or the Rules do not envisage a fullfledged trial, as in a Civil Court, a regular hearing and determination of rights is contemplated therein. In fact, Rule 28 of the rules framed under the Act requires the Commissioner to frame and record the issues upon which the right decision of the case appears to depend. This is evidently intended to put the parties on notice of the points arising for consideration and on which they are expected to adduce evidence. It is a matter for the Commissioner to decide whether penalty should be imposed or not. Therefore, the question of imposition of penalty may arise for consideration even without a specific plea in that behalf by the workman, as held by the High Court of Punjab & Haryana in Dalip Kaur v. Northern Railway 1992 I CLR 962. Since the question of imposition of penalty is thus a matter which will necessarily arise for consideration while passing an award, it will be prudent and advisable for the Commissioner to frame an issue as to whether penalty is imposable under Section 4A(3) and if so, the quantum thereof to enable the parties to address themselves on these aspects as well at the hearing.

16. In Mathura Prasad v. Saiyed Khursheed Ahmad 1981 LIC 1601 the High Court of Allahabad held that the Commissioner should normally pass an order regarding penalty also while disposing of the case, a proposition with which we agree. In Vijay Ram v. Janak Raj 1981 ACJ 84 the High Court of Jammu & Kashmir took the view that an order imposing penalty may be passed by the Commissioner after he has awarded the compensation, depending on the facts of a given case. The learned Judge then proceeded to observe:

'But in no case shall he impose a penalty under Section 4A, unless he has given to the employer a prior reasonable notice of his intention to do so, and thereby provided him an opportunity of showing cause for delayed payment of the

compensation. Obligation on the part of the Commissioner to hear the party to be adversely affected is implicit in Sub-section (3), for what was the reason for not making the payment without delay, can be known to that person alone who is required to make the payment, and to none else. Unless, therefore, he is called upon to show cause for the delayed payment, it is not reasonably possible for the Commissioner to come to a conclusion whether or not there was any justification for the delay. He cannot be allowed to reach his satisfaction at his whim and caprice simpliciter. In what form such a notice may be given will further depend upon the facts of each case. In one case an issue on the plea of penalty may constitute such a notice, whereas in another case such a notice may be reasonably inferred even from the pleadings of the parties coupled with their conduct during the trial.'

17. The Karnataka High Court dealt with the same question in their decision in Oriental Insurance Co. v. Jevaramma 1989 I CLR 228. The Division Bench followed an earlier decision of the same High Court in Pathan v. Julekhabi Pathan ILR 1986 Karat. 2413 in which it was held that what was necessary under Section 4A(3) was that the employer should know the case he is required to meet and has-is afforded a reasonable opportunity of meeting the case. The subsequent Bench observed that penalty cannot be imposed merely as a matter of course, and the discretion to levy penalty must be exercised judicially after due consideration of the relevant circumstances. This presupposes an opportunity to be given to explain the circumstances for the delay which entails material consequences.

18. Section 4A(3) is a penal provision imposing a penalty of the employer. The satisfaction of the Commissioner contemplated therein shouldbe based on materials. It has to be reached on a conspectus of all the facts and circumstances of the case. There may be umpteen reasons why the employer is not liable for the penalty. There can be various reasons for non-payment of the amount of compensation on the due date, or for its delayed payment. The employer may be able to point out justifiable reasons for the delay or the non-payment. In any case, he may also be able to make out sufficient reasons why the penalty should either be waived, or be fixed at a low amount. In fact, the section vests a discretion in the Commissioner in the matter of penalty, the prescription being only of the

maximum. The reasons made out by the employer may have an impact not only on the question of imposition of penalty, but also on its quantum. AH this cannot be effectively decided unless the attention of the parties is focussed on the question of imposition of penalty; and the exercise of the discretion, in which event the employer can place his materials in justification of the delay or at least plead in mitigation for a lesser amount of penalty. This he will not be able to do unless he is given an opportunity to be heard in the matter.

19. The hearing to be afforded need not necessarily have the trappings of a regular trial or hearing. The framing of an issue under Rule 28 will suffice, but that may not be obligatory, though desirable. The Commissioner may even in the course of the hearing draw the attention of the parties to the question of penalty and hear them. If such an opportunity to produce their materials and to be heard, is afforded, that will be sufficient to meet the requirements of natural justice. What is essential and what is required is compliance with the rules of natural justice, so that the affected party, namely, the employer, gets an opportunity to produce his materials and to plead that there was justification for the delay or for imposition of a lesser amount than the maximum prescribed. Essentially it is a question of complying with the rules of natural justice.

20. The Law Commission of India had in its Sixty Second Report rendered in October, 1974 on the Workmen's Compensation Act, suggested the addition of a proviso to Section 4A(3) to provide for a reasonable opportunity to the employer to show cause why an order for payment of penalty should not be passed. The Act has not yet been amended pursuant thereto, but we are of the view that the recommendation of the Law Commission was only to make explicit what otherwise was implicit in the section.

21. So far as this case is concerned, there was no issue framed on the point. There is also no case that the Commissioner heard the parties on the question of penalty after apprising them of his proposal to impose the same or about the quantum. The order impugned therefore suffers from the vice of violation of the principles of natural justice in so far as it relates to the imposition of penalty. This would normally require a remit to the Commissioner, but for the fact that the

parties are agreed that this question may be decided here itself to avoid further protracted proceedings before the Commissioner.

22. Counsel for the appellants pleads that the appellant had acted bona fide. He had a plea of non-liability. That found acceptance with the Commissioner in the first instance, though not with this Court. In such a case, it cannot be said that this conduct was so contumacious or unreasonable as to require being penalised under Section 4A(3). A parallel case in the High Court of Punjab & Haryana in Shiv Lal v. Punjab State Electricity Board 1991 ACJ 443 is relied on. It is also stated that the respondent is now employed elsewhere, a fact which is referred to in the appeal memorandum, though no evidence was tendered about it before the Commissioner. Counsel submits, on these premises, that the penalty, if at all it is to be sustained, should be minimal.

23. On the other hand, counsel for the respondent points out that the appellant had taken a totally false plea that the respondent was not his workman at all. He succeeded in the first instance on an irrelevant ground not raised in the written statement, which was perversely accepted by the Commissioner when the poor todday tapper could not give the number of the trees from which he fell down. He also refers to the fact that the appellant behaved in a most cruel manner in that he did not even arrange for the proper treatment of the respondent in the hospital and he had to fend his way all alone. His right hand has been amputated and he is disabled for life. But he has been delayed in getting the compensation - even the pittance provided by the Act-for thirteen years.

24. Exercise of the discretion regarding imposition of penalty has to be related to all these circumstances. Normally the exercise of discretion has to be done by the authority who is vested with that power. We have however thought it proper to deal with the matter in this Court having regard to the request made by the parties and the fact that we are exercising an appellate power. The exercise of the discretion depends upon the facts and circumstances of each case. Precedents like the decision of the Punjab & Haryana High Court relied on by the appellant rendered on their own facts cannot furnish any true guidance for the exercise of the discretion in this case. The facts in this case are clear. The accident took place on

November 19, 1979. The appellant did not deposit the whole or any portion of the amount of compensation due to the respondent till the order impugned was passed. On the other hand, he took up every conceivable plea to defeat the claims of the respondent. He could not sustain any of them eventually. By this contumacious conduct, the respondent who has lost a valuable limb, was deprived of the compensation due for well over twelve years. The compensation is payable on the very dale on which the accident occurs though the employer is given one month's time to make deposit of the amount. On the facts above stated we are satisfied that there was no justification for the delay in the payment of compensation. The Commissioner has imposed the penalty at 50% of the amount of compensation. But having regard to the fact that the Commissioner himself contributed in part, to the delay by his first legal order, we feel that a penalty of 75% of the amount fixed by the Commissioner, namely Rs. 10,080/- will meet the ends of justice.

The appeal is therefore allowed in part. The award of Rs. 26,880/- as compensation and interest thereon at 6% per annum is confirmed. The penalty under Section 4A(3) of the Act is reduced from Rs. 13,440/- to Rs. 10,080/-. This amount will not bear any interest. The Commissioner shall disburse the amount due to the respondent in accordance with this judgment, out of the amount lying in deposit with him, without any further delay.

There will be no order as to costs in this appeal.