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United Engineering and Constructions Vs. Rajan

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Court : Kerala

Decided On : Aug-16-2001

Reported in : 2002ACJ856

Judge : K.A. Mohamed Shafi, J.

Acts : Workmen's Compensation Act, 1923 - Sections 4A, 4A(3)and 21(2)

Appeal No. : M.F.A. No. 177 of 1996

Appellant : United Engineering and Constructions

Respondent : Rajan

Advocate for Def. : Asok M. Cherian,; Santosh G. Prabhu,; T.R. Ranjith a

Advocate for Pet/Ap. : Mathew John, Adv.

Disposition : Appeal allowed

Judgement :

K.A. Mohamed Shafi, J.

1. This M.F.A. is preferred by the 2nd opposite party in W.C.C.21/94 in the court of Commissioner for Workmen's Compensation and Deputy Labour Commissioner, Kollam challenging the imposition of penalty of Rs. 10,000/- invoking the provisions of Sub-section 3 of Section 4A of the Workmen's Compensation Act.

2. The 1st respondent who was a workman under the appellant instituted the above claim for compensation before the Commissioner under the Workmen's Compensation Act, Dhalli, Shimla against the 2nd respondent in this appeal as the sole opposite party and that claim petition was transferred by the Commissioner for Workmen's Compensation and Deputy Labour Commissioner, Lollam by invoking Section 21(2) of the Workmen's Compensation Act for enquiry and disposal. Accordingly after enquiry the Commissioner for Workmen's Compensation, Kollam by the impugned order awarded Rs. 89,730/- with interest thereon at 6% per annum from 15.11.1991, the date of the accident and directed the appellant, the 2nd opposite party therein to pay Rs. 10,000/- as penalty as provided under Sub-section 4A of the Act.

3. The appellant has contended that they were not made party by the 1st respondent in the proceeding initiated him before the Commissioner, Shimla under Workmen's Compensation Act and the 2nd respondent herein alone was impleaded as opposite party therein and after the proceedings was transferred to the Commissioner for Workmen's Compensation and Deputy Labour Commissioner, Kollam, the appellant and the 3rd respondent insurer were impleaded in the proceeding and they were not served with any notice in the proceedings. Therefore, according to them, there was absolutely no wilful delay in payment of the compensation due to the 1st respondent herein, on the part of the appellant.

4. The contention of the appellant that no notice is served upon them from the court of the Commissioner for Workmen's Compensation after they were impleaded in the proceedings, is incorrect and untenable. It is seen from the records of the Court of the Commissioner for Workmen's Compensation and Deputy Labour Commissioner that the original opposite party filed counter raising contentions that they are not liable to pay compensation and the appellant herein is liable to pay compensation and accordingly the claimant filed application before the Commissioner to implead the appellant and the insurer as opposite parties 2 and 3 on 25.11.1994 and accordingly they were impleaded. After impleading additional opposite parties 2 and 3, the Commissioner issued notices to both the additional parties and the appellant was served with notice on 22.2.1995. In spite

of service of notice the appellant did not appear before the Commissioner. Therefore, the contention of the appellant that as no notice was served upon them regarding the proceedings they were not aware of the proceeding and therefore, it cannot be alleged that they were negligent or have caused delay in the matter of payment of compensation, cannot be accepted.

5. The counsel for the appellant submitted that since the risk of the 1st respondent was covered by valid insurance policy, the insurer is liable to pay whatever amount is payable to the worker as compensation and therefore, it was not necessary for the appellant to enter appearance and contest the matter before the Commissioner. According to him, whatever amount payable to the 1st respondent as compensation adjudged by the Commissioner is to be paid by the 3rd respondent-insurer and therefore, there is absolutely no justification in holding that the appellant delayed the payment of compensation, making them liable to pay penalty under Sub-section (3) of Section 4A of the Act. He has also substituted that the 1st respondent-injured had no case anywhere either in his petition or in his evidence that the appellant has delayed the payment of compensation. Therefore, he submitted that the imposition of penalty against the appellant in this case is absolutely unjust and improper.

6. The facts that the above proceedings was instituted by the 1st respondent before the Commissioner under the Workmen's Compensation, Shimla against the 2nd respondent alone and after it was transferred to the Commissioner for Workmen's Compensation and Deputy Labour Commissioner, Kollam the appellant and the 3rd respondent were impleaded on the basis of the contention raised by the 22nd respondent and it is thereafter the matter was enquired into by the Commissioner and the impugned order was passed, are not disputed. There was valid insurance policy in this case and the liability of the 3rd respondent - insurer to pay the compensation is also not in dispute. Therefore, due to the mere fact that the appellant did not enter appearance in the proceedings before the Commissioner and the Commissioner has passed the order awarding compensation, setting the appellant ex parte, it cannot be contended that the appellant has caused delay in payment of the compensation in this case.

7. Section 4A deals with compensation to be paid when due and penalty for default. Sub-section (2) of Section 4A stipulates that 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 when 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. Sub-section (3) of Section 4A deals with employer who is in default in paying the compensation due under the Act within one month from the date it fell due. Clause (a) of Sub-section(3) stipulates that the employer should pay interest at the rate of 12% per annum or such higher rate not exceeding the maximum of the lending rates of any scheduled bank on the amount due. Clause (b) of Sub-section (3) empowers the Commissioner to impose penalty not exceeding 50% of the sum awarded, if there is no justification for the delay in payment of compensation. Proviso to Clause (b) of Sub-section (3) stipulates that an order for 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.

8. In this case it is clear that the Commissioner has not given an opportunity to the appellant-employer to show cause why such penalty should not be imposed upon them as provided under clause (b) of Sub-section (3) of Section 4A of the Act.

9. In the impugned order the learned Commissioner has stated as follows:

'In this case, the 2nd opposite party, who was the immediate employer of the applicant did not turn up and he was set ex part. It is also seen from the records of the case that none of the opposite parties has any valid dispute against the claim for compensation. Thus, it appears to me that there is no justification for the delay caused in paying the compensation to the application within the prescribed time. The 2nd opposite party is, therefore, directed to pay a sum of Rs. 10,000/- (Rupees Ten Thousand only) as penalty as provided under Sub-section (3) of Section 4A of the Act.'

It is nowhere stated in the impugned order nor there is anything on record in the records of the Commissioner to indicated that any notice is issued to the appellant

giving them an opportunity to show cause why the penalty under Clause (b) of Sub-section(3) of Section 4A of the Act should not be imposed.

10. In the decision in Rajan v. Subramonian (1992 (2) KLT 719) a Division Bench of this Court has held that 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.

11. In this case it is clear from the impugned award that no such issue regarding the liability or quantum of penalty, if any, payable by the appellant is raised. In the decision in 1992 (2) KLT 719 referred to above, the Division Bench has observed as follows:

'18. Section 4A(3) is a penal provision in imposing a penalty of the employer. The satisfaction of the Commissioner contemplated therein should be 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. All this cannot be effectively decided unless the attention of the parties is focused 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'.

12. The above dictum as laid down by the Division Bench is based on the necessity to comply with the rules of natural justice in exercising the discretion

vested in the Commissioner in the matter of imposition of penalty on the employer for the delayed payment of compensation. As already noted the records in this case go to show that the learned Commissioner has not complied with the above requirement of natural justice of giving an opportunity to the appellant to be heard regarding the matter of imposition of penalty and its quantum under Clause(b) of Sub-section(3) of Section 4A of the Act. Therefore, the penalty imposed by the learned Commissioner against the appellant in this case under Clause (b) of Sub-section (3) of Section 4A of the Act is not sustainable. It is also clear from the facts and circumstances of the case that there is no justifiable reason to impose penalty against the appellant in this case.

13. Even though the applicant- 1st respondent preferred the claim before the Commissioner for Workmen's Compensation, Dhalli, Shimla against the ultimate employer and after the matter was transferred to the Commissioner for Workmen's Compensation, Kollam the appellant and the insurer were impleaded as additional parties as per the application filed by the applicant- 1st respondent on the basis of the contention raised by the 2nd respondent ultimate employer that they are not liable to pay compensation. It is true that the appellant did not appear before the learned Commissioner on getting notice impleading them as 2nd opposite party in the case and orders were passed by the Commissioner setting the appellant ex parte. That fact alone is absolutely insufficient to hold that the appellant was negligent in paying the compensation within the stipulated time under the Act, especially when there was valid insurance coverage and the liability to compensate the insured employee is admitted and accepted by the 3rd respondent - insurer. Under the circumstances the impugned order passed by the learned Commissioner imposing penalty is not sustainable under law.

14. Hence the appeal is allowed and the penalty imposed against the appellant is set aside.

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