

**Telecom (General Manager) Vs. Vidya Devi and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/891326](http://sooperkanoon.com/891326)

**Court :** Himachal Pradesh

**Decided On :** Apr-27-2005

**Reported in :** II(2006)ACC65,[2005(107)FLR686]

**Judge :** Deepak Gupta, J.

**Appellant :** Telecom (General Manager)

**Respondent :** Vidya Devi and ors.

**Judgement :**

**Deepak Gupta, J.**

1. This is an appeal under Section 30 of the Workmen's Compensation Act filed against the award of the Commissioner, Workmen's Compensation, Shimla whereby he has awarded a compensation of Rs. 2,90,950 along with penalty of Rs. 1,09,975 and interest at the rate of 12% per annum.

2. The facts which are not in dispute are that, deceased Rajinder Kumar was employed as a driver with the present appellant. It is also not denied that he died while on duty as the vehicle which he was driving met with an accident. It is in the context of these admitted facts that the contention raised by the appellant has to be considered.

3. At the time when the appeal was admitted, no substantial question of law was formulated. At the time of hearing of the appeal I have asked the learned Counsel for the appellant to point out what are the substantial questions of law which arise in the appeal. After considering his submissions, I find that the only substantial questions of law which arise in this appeal are as follows:

(1) Who, if any of the claimants, are dependant on the deceased?

(2) Whether the Workmen's Compensation Commissioner has closed the evidence of the appellant without any justifiable cause?

3. Whether the Workmen's Compensation Commissioner could have imposed the penalty without notice to the appellant and if so, at what rate?

4. The claim petition was filed by the mother, father, one major brother and one minor brother. There can be no dispute that the mother is a dependant within the meaning of Section 2(n) of the Workmen's Compensation Act.

5. PW-2 claimant in her statement has stated that the deceased was aged about 24 years. She also states that her son, Prem Lal, is 19 years of age and has studied upto class 9. The younger son Rakesh was 14 years and studying in class 4. According to her the deceased Rajinder Kumar was drawing Rs. 2,200 per month and was giving her Rs. 1800-1900 for meeting day-to-day expenses. She has further stated that her husband had retired from the Electricity Department and that all the claimants were dependant on the deceased-Rajinder Kumar. She has admitted that her husband was drawing pension of Rs. 1,500 per month.

6. In view of the statement of the mother, it is proved on record that atleast she and Rakesh Kumar, were dependant on the deceased.

7. The next question is whether the evidence of the respondent has been wrongly closed by the Workmen's Compensation Commissioner. From the proceedings of the Commissioner, I find that the present appellant appeared in Court and filed reply. Rejoinder was filed and issues framed on 14th January, 1997. On 29th April, 1997 the present appellant was not present. Their statements were recorded. Thereafter the present appellant moved an application under Order IX Rule 7

which was allowed on 4th September, 1997 and the appellant was permitted to cross-examine the witnesses. The appellant did not take steps to summon the witnesses who were to be cross-examined on four occasions on 23rd September, 1997, 10th October, 1997, 6th November, 1997 and 8th December, 1997. It was only on 24th December, 1997 that the said witnesses could be cross-examined. Thereafter, the case was fixed for the evidence of the appellant on 26th March, 1998. No steps were taken for summoning the witnesses. The case was adjourned at the request of the appellant on 27th April, 1998. Again no steps had been taken and it was ordered that the evidence, if any, be produced on self responsibility on the next date which was 27th May, 1998. Again on 27th May, 1998 no evidence was present and the case was adjourned to 8th June, 1998. It was on 8th June, 1998 that the evidence was closed. As many as four opportunities were given to the appellant to lead evidence. No steps were taken by the appellant to summon or produce its evidence. No fault can be found with the order of the Commissioner closing the evidence of the appellant.

8. The next question is with regard to the penalty. Mr. Mahajan has relied upon a judgment of the Supreme Court in Ved Prakash Garg v. Premi Devi and Ors. : AIR 1997 SC3854 , and contends that since no notice was given to the employer with regard to the imposition of penalty and no opportunity was given to the employer to explain the reason for delay, if any, in making the payment, the penalty could not have been imposed on the employer. He further submits that even if the penalty is to be imposed, the question at what rate the same should be imposed has to be considered by the Commissioner after taking into consideration the stand of the employer. Reference in this behalf may be made to the relevant portion of the aforesaid judgment which reads as follows:

9. xxx xxx xxx xxx This is further highlighted by the proviso to Section 4-A(3) as substituted by Act 30 of 1995 which clearly indicates that a penalty amount under Clause (b) cannot be imposed against the employer without giving him reasonable opportunity to show cause. No such show cause notice is contemplated while imposing interest on default of payment of the principal amount on the part of the employer as per Section 4-A(3)(a). Absence of this provision is obviously based on the legislative intent that interest on principal amount is not by way of penalty.

Therefore, the employer need not be heard in this connection. A simplicitor default in' payment of compensation within the time of one month from the date it fell due would automatically attract the provision for simple interest under Section 4-A(3) as per the rate prescribed therein and for such imposition of interest no question of justification for the delay is countenanced by the Legislature. But while imposing penalty justification for delay would be a good defence for the employer for meeting claim for penalty. The same aspect is further highlighted by Section 4-A(3)(a) of the Compensation Act as existing on the book at present which shows that the nearest payable under Sub-section (3-A) is to be paid to the workman or his dependant while the penalty imposed is to be credited to the State Government. It is in the light of the aforesaid statutory scheme of Section 4-A that the question posed for our consideration has to be resolved. xxx xxx xxx xxx

9. A perusal of the above quoted portion of the judgment shows that the Apex Court held that the penalty can be imposed upon the employer if the Commissioner is of the opinion that there is no justifiable reason for not paying or depositing the compensation amount. Mr. Mahajan has relied upon the portion of the judgment where it has been observed that the penalty amount under Clause (b) cannot be imposed against the employer without giving him reasonable opportunity to show cause. This is also apparent from the reading of Section 4-A(3) of the Act which reads as follows:

Section 4-A(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 a 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.

10. A perusal of the aforementioned provision of the Act shows that the penalty can be imposed by the Commissioner only after giving reasonable opportunity to the employer to show because why such an order imposing penalty should not be passed. In the light of the observations of the Apex Court and bare provisions of the Act, it must be held that the Commissioner should give an opportunity to the employer to show cause why the penalty should not be imposed. However, there is no specific method of giving this opportunity. It is not necessary that a notice in this regard has to be issued to the employer. In some cases the Commissioner may frame an issue whether the claimant is entitled to penalty or not. This itself would amount giving sufficient opportunity to the employer. The pleadings, issues and evidence led before the Commissioner can reveal whether the parties were aware that imposition of penalty is also an issue to be decided in the case. The question whether the opportunity has been given or not would depend on the facts and circumstances of each case.

11. In the present case on the face of it, it does appear that any opportunity was given to the employer. In normal circumstances this Court would have remanded the cases to the Commissioner to decide this issue. However, in the facts of the present case I find that the conduct of the respondent is such, that it is not entitled to get any benefit from this Court. A perusal of the reply filed before the Commissioner shows that it was admitted that the deceased was an employee and died while on duty. It is expected of any employer in such circumstances to deposit the compensation by itself without forcing the legal representatives/dependants to take recourse to legal proceedings. In this case this was not done. Even during the course of proceeding the employer did not deem it fit to either deposit the compensation which, in its estimation was the compensation due. There are no mitigating circumstances in favour of the employer. Even a perusal of the zimni order shows that the employer has delayed the day-to-day proceedings. In such circumstances no useful purpose would be served by remanding the case since the employer on the face of it can have no

justification for not depositing the amount of compensation. The penalty of 50% imposed is just and reasonable keeping in view the fact that the accident had occurred on 1st June, 1995 and no amount was deposited till the decision of the case by the Commissioner in the year 1999.

12. The amount of compensation is apportioned as follows:

Rs. 50,000 in all to respondent No. 4.

The balance amount along with penalty and interest shall be paid to the mother, respondent No. 1.

13. In view of the above discussion, the appeal is devoid of any merit and is dismissed with no order as to costs.

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