

**(2024) 02 DEL CK 0021****Delhi High Court**

**Case No:** First Appeal From Order No. 366 Of 2018, Civil Miscellaneous Application No. 31263, 31264 Of 2018

Iqbal Khan

APPELLANT

Vs

Surjee Devi &amp; Ors

RESPONDENT

**Date of Decision:** Feb. 7, 2024**Acts Referred:**

- Employee's Compensation Act, 1923 - Section 3, 4, 4A(3), 4A(3)(b), 10, 10(A), 10(B), 11, 17, 19, 30(1)(aa)
- Code of Civil Procedure, 1908 - Section 151

**Hon'ble Judges:** Dharmesh Sharma, J**Bench:** Single Bench**Advocate:** Madhu Sudan Bhayana, Madahv Shah, Pradhuman, Vikrant Rana, Arjun Khatri, Pankaj Gupta**Final Decision:** Dismissed**Judgement**

Dharmesh Sharma, J

1. This judgment shall decide an appeal preferred by the appellant/employer under Section 30(1) (aa) of the Employee's Compensation Act, 1923 [The Act] r/w Section 151 Code of Civil Procedure, 1908 [CPC] for setting aside the impugned judgment-cum-order dated 21.03.2018, whereby the learned Commissioner, Employee's Compensation imposed a penalty upon the appellant, in terms of Section 4A(3)(b) of The Act.

**FACTUAL BACKGROUND:**

2. Briefly stated that one workman, Pappu Kamti, died in the course of his employment as a driver of the truck, which is owned by the respondent No.1 and was insured by the insurance policy issued by the respondent No.2. A claim petition was filed by his wife/widow and four children bearing No. WCD299/North-West/15/238 dated 26.03.2018. After due enquiry, it was decided vide judgment-cum-award dated 30.01.2017, whereby the respondent No.2 i.e. M/s. Oriental Insurance Co. Ltd. was directed to pay the compensation of Rs. 8,31,920/- along with interest @ 12% p.a. from 08.08.2015 till

date of actual payment to the claimants.

3. Subsequently, the present complaint WCD299/North-West/15/238 dated 26.03.2018, was filed by the wife/widow of the deceased against employer/respondent No.1, as well as respondent No.2/Insurance Company, for consideration of imposition of penalty upon them in terms of Section 4A(3)(b) of The Act. This penalty is for the default in paying the compensation to the claimant on the death of her husband in the course of employment within one month from the date it fell due on them. The main challenged before the learned Compensation Commissioner by the respondent/employer, who is now the appellant, was that no independent proceedings can be launched for imposition or payment of penalty, as the said aspect was a part and parcel of the earlier judgment-cum-award dated 30.01.2017 passed by the learned Commissioner, Employee's Compensation. The appellant relied on the decision in the case of Delhi Development Authority v. Raju FAO 327/2016, decided on 27.10.2017.

4. The Learned Commissioner, Employee's Compensation referred to a preamble of the Act besides Section 3, 4, 10,10(A),10(B), 11, 17 and 19 of the Act, and it was observed that the Act was a piece of social beneficial legislature and has to be construed liberally in favour of the claimant. Holding that provisions of CPC are not applicable to the Act besides holding that the decision in Delhi Development Authority v. Raju was per incuriam, in view of the judgment of the State of Mysore v. SS. Makapur AIR 1963 SC 375, besides Engineering Mazdoor Sabha & Anr. v. Hind Cycles Ltd AIR 1963 SC 874., and the decision of the Delhi High Court in case of The New India Assurance Co. Ltd. v. Puran Lal & Ors. FAO No. 385/2013, the claim was allowed and it would be relevant to reproduce the operative part of the impugned judgment-cum-award dated 21.03.2018, wherein the following observations are made: -

*"28. From the above discussion I am of the opinion that Commissioner under the Act can issue show cause notice for imposition of penalty even suo moto i.e. even when the Claimants has not prayed for payment of penalty in their claim petition and the employer could not be excused from payment of penalty only because Claimant has not claimed the same in the claim petition as the principle of waiver/acquiescence is not applicable under the Act and also in a case where in the main order allowing the claim petition no order on prayer of the claimant for imposition of penalty upon the Respondents is passed. Otherwise also the facts of this case are different. In this case the Claimant has prayed for imposition of penalty upon the Respondents and it is a different matter that my Ld. Predecessor who passed the award granting compensation did not deal with said prayer of the Claimant in the award dated 30.01.2017. Consequently, the Claimant has been compelled to move another application dated 02.06.2017 for imposition of penalty upon the Respondents on which a notice for imposition of penalty has been separately issued on 16.06.2017 to the Respondents.*

*29. To my opinion this is a clear case where penalty is required to be imposed upon as the Respondents have failed to pay the amount of compensation to the dependents when the amount fell due. Now the question would be who should pay the penalty: the employer or the insurer. In this case there is a piquant, situation as my Ld. Predecessor passed an award against Respondent No. 2 i.e insurer and the name of the employer / Respondent No. 1 does not figure in the award but to my mind this cannot be a ground for considering imposition of penalty upon the Respondent No. 1 as the principal liability of payment of compensation is that of the employer and the insurer is only liable to indemnify the insured. The employer / Respondent No. 1 has taken the defence that he intimated M/s Oriental Insurance Co. Ltd., / Respondent No. 2 immediately after the occurrence of the alleged accident of deceased Pappu Kamat but he has not led any evidence to prove his said statement. Further that the deceased driver was negligent in driving and he suffered death due to his own negligence for which Respondent No. 1 has not led any evidence. I find that in written statement filed by Respondent No. 1 it has not been said that insurance company was informed about the insurance company immediately after the accident. Even otherwise Respondent No. 1 has not examined himself as a witness and thus written statement filed by him is of no help to him. Further it is not a case of Respondent No. 1 that he has taken a comprehensive policy from Respondent No. 2 wherein Respondent No. 2 was required to indemnify the Respondent No. 1 even for payment of penalty to the dependents of deceased employee under the Employee's Compensation Act. Similar view has been taken by the Hon'ble Apex Court in the case of Ved Prakash Garg Vs. Premi Devi cited at AIR 1997 SC 3854. Accordingly to my opinion penalty has to be imposed upon the employer. In the facts and circumstances of the case and in the interest! of justice to my opinion a penalty equal to 40% of the amount of compensation awarded in the award dated 30.01.2017 i.e. Rs. 8,31,920/-would meet the end of justice. Accordingly Respondent No. 1 / employer is directed to deposit amount of Rs. 3,32,768/- (Rupees Three Lacs Thirty Two Thousand Seven Hundred Sixty Eight Only) with further interest @ 12% per annum from the date of this order through demand draft in favour of "Commissioner Employee's Compensation, District North-West" within a period of thirty (30) days from the date Of issue of this order, failing which the amount of penalty*

*as above shall be recovered as arrears of revenue under the Revenue Recovery Act.”*

5. On filing of the present appeal, the operation of the impugned judgment-cum-award dated 07.08.2018 was stayed by this Court. Further vide order dated 13.02.2020, the appellant was directed to deposit the entire amount of compensation with the Commissioner and produce the certificate on the next date of hearing. It appears that the said order has not been complied with. Nevertheless, on notice to the respondents, except for the insurance company which is now arrayed as respondent No.6, no other party has appeared.

## **ANALYSIS AND DECISION**

6. I have given my thoughtful consideration to the submissions advanced by the learned counsels for the rival parties at the Bar and on perusal of the record, besides the written submissions filed on behalf of respondent Nos. 1 to 5 [Written Submissions filed on 12.01.2024], I find that the present appeal is bereft of any merits.

7. First things first, although a prayer for invoking the penalty clause was indeed made in the earlier claim petition filed by the claimants, it appears that the said relief was overlooked when passing the judgment-cum-award dated 30.10.2017. However, since there was an “error apparent on the face of record”, a curative claim petition was filed, indeed in the nature of a review, which culminated in the impugned judgment-cum-award. It was rightly canvassed by the learned counsel for respondent Nos. 1 to 5, that it is not that such relief was rejected, but rather it was not discussed, which was not in conformity with the penalty clause vide Section 4A(3)(b) of the Act.

8. In any case, it is now well ordained in compensatory jurisprudence, insofar as Employees Compensation Act is concerned, that the issue of imposing a penalty would only arise after the main claim for compensation is determined by the competent Authority. Reference in this context can be invited to the decision in the case of *The Oriental Insurance Company Ltd. v. Siby George & Ors.* (2012) 12 SCC 540, wherein it was held as under:-

*“5. I am unable to agree with the aforesaid argument urged on behalf of the appellant because the Supreme Court in the case of Siby George (supra) has clarified that penalty proceedings cannot take place simultaneously along with adjudication of compensation to be awarded to the employee, and penalty proceedings are only post/subsequent to awarding of Compensation and after giving a specific show cause notice for the penalty aspect. The observations of the Supreme Court in Siby George's case (supra) in view of the language of the proviso to Section 4A(3) of the Act which requires a specific show cause notice on the aspect of penalty upto 50% if the penalty is proposed to be imposed. Therefore, the contention of the appellant is misconceived that since the original order of compensation dated 13.11.2013 did not award penalty, in spite of the same having been prayed in the main petition, there could hence not take place subsequent proceedings for imposition of penalty post the passing of the main order of compensation on 13.11.2013.”*

9. Incidentally, the aforementioned view has been upheld by this Court in the cases of *M/s. Focus Energy Limited v. Neelam Devi & Ors.* FAO No. 168/2014 and *The New India Assurance Co. Ltd. v. Puran Lal & Ors.* FAO No. 385/2013.

10. In view of the forgoing discussion, I find that the learned Commissioner, Employees Compensation has not committed any illegality, perversity, nor has taken any incorrect approach in law. Hence, the present appeal is dismissed. All the pending applications are disposed of accordingly.