



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1854 OF 2013

Air India Charters Ltd,]
IInd Floor, Finance Bldg.,]
Old Airport, Santacruz (East),]
Mumbai - 400 029.] **...Appellant.**

Versus

1. Ms. Tanja Glusica]
2. Ms. Dunja Glusica. Jakovo,]
Savaska 112, Belgrade, Serbia]
3. Aleksander Glusica,]
Jakovo, Savaska 78, Belgrade, Serbia]
4. Merima Glusica]
Jakovo, Velimira Manica 16,]
Belgrade, Serbia]
Represented by Constituted Attorney]
Mr. Yeshwant Shenoy, 1003,]
Sarathi Palace, Plot 25 D,]
Sector 7, Kamothe,]
Navi Mumbai - 410 209.] **...Respondents.**

*Mr. Firoz Bharucha, Mr. Jehan Lalkaka, Faiyaz Khan i/b Mulla & Mulla and CBC
for the appellant.*

Mr. Rishi Ashok, Ms. Arya Krishnan i/b Bekay Legal for the respondents.

Coram : Sharmila U. Deshmukh, J.

Reserved on : October 16, 2024

Pronounced on : October 23, 2024.

Judgment :

1. The appeal is at the instance of original Respondents in Application (WCA) No. 336/B-65/2013 filed by the legal heirs of

deceased pilot Zlatko Glusica under Section 22 read with Sections 3, 4, 4A and 10 of the Employees Compensation Act, 1923 [for short "***EC Act***"].

FACTUAL MATRIX:

2. The Respondents are Serbian nationals and the family members and dependents of deceased Zlatko Glusica, who was working as pilot with the Appellant-Company and expired while on duty on 22nd May 2010 in an unfortunate accident which occurred at Mangalore. On 27th September, 2012 the Appellant-Company deposited with the office of Labour Commissioner (Workmen's Compensation) sum of Rs. 3,32,15,589/- along with relevant Form "A" prescribed under Rule 6(1) of Employees Compensation Act, 1923.

APPLICATION NO 336/B-65/2013:

3. From the record it appears that the application under Section 22 of Employees' Compensation Act, 1923 was filed on 11th October, 2012. The Appellant filed their reply dated 4th May, 2013 to the said application. The application filed on 11th October, 2012 was not pressed and subsequently on 3rd July, 2013 another application was filed by the Respondents claiming compensation amount of USD 745580, maximum penalty of 50% and maximum interest of 12%. The contentions raised was that the deceased was in employment with the Appellant-Company through a contract executed by the Appellant-Company with one Sigmar

Aviation Ltd. The services of deceased were made available to the Appellant-Company and the deceased was working under the direct supervision of Appellant-Company. The Appellant-Company had declared that the salary paid to the contractor, i.e., Sigmar Aviation Ltd was USD 11,000 per month and the Respondents were not aware as to what the actual salary was paid by the contractor to the deceased. The salary of the deceased is deemed to be USD 11,000 per month and the relevant multiplier is 135.56. The Respondents filed the claim through their constituted attorney pleading difficulty in coming to India. The Respondents, after meeting the Constituted Attorney became aware of their rights and through the Constituted Attorney lodged a claim with the Appellant-Company by e-mail on 21st May, 2012. There was no payment of interim compensation and no deposit by the Appellant-Company even after 2 years of accident.

APPLICATION UNDER SECTION 8 OF EC ACT:

4. An application came to be filed by the Respondents under Section 8 of EC Act on 11th October, 2012 for immediate distribution of deposited compensation amount to the Respondents. The Appellant-Company filed its composite reply dated 4th May, 2013 to the Section 8 Application as well as to the Application under Section 22 of EC Act contending that the Appellant-Company is not concerned with the issue of distribution and payment of compensation. It was contended that

deposit by the Appellant was on the basis of estimated salary of USD 11,000 and there was excess deposit as the salary of deceased as per the contract of 7th October, 2009 between the deceased and Sigmar Aviation Ltd was USD 9,170. The Appellant sought refund of the excess amount. The record indicates that on 20th December, 2012 the Employees Compensation Commissioner passed an order of distribution of compensation and apportionment between the legal heirs.

5. The Appellant-Company filed their reply dated 8th July, 2013 to the application dated 3rd July, 2013 filed by the Respondents under Section 22 read with Section 3, 4,4A and 10 of EC Act. It was contended that the accident in question had resulted in huge casualty and claims had to be settled on urgent basis after assessing separately proof of loss. They were not aware of the actual salary of the deceased so as to compute the requisite amount to be deposited as the deceased was employed through an external agency Sigmar Aviation Ltd. The deposit was ultimately made on basis of amount payable to Sigmar Aviation Ltd claiming however a refund of excess amount. They were not aware of the family members and persons to whom the interim compensation of Rs.10,00,000/- had to paid. There is sufficient cause for non deposit earlier and no penalty be imposed.

EVIDENCE:

6. The Constituted Attorney was examined on behalf of Respondents. Two Affidavits in lieu of examination in chief were filed on 4th May, 2013 and 6th July, 2013. The witness deposed that the deceased was 55 years old at the time of his death and was paid USD 11,000 and other allowances per month. He further deposed that the Appellants were principal employer and liable to pay compensation in same currency in which his salary was paid.

7. In the cross examination, the Constituted Attorney stated that after the crash he had visited Belgrade and he received the agreements between the deceased and Sigmar Aviation Ltd and agreement between the deceased and Nightangle Aviation. He deposed that the agreements were taken out from the deceased's laptop and the agreements were unsigned and therefore its legality and reliability was not believed. He further deposed that he came to know about the deceased receiving salary of USD 11,000 on the basis of covering letter with which the Appellant had deposited the compensation before the Commissioner. He admitted that he confirmed with the Respondents about the deceased's salary based on the Appellant's letter dated 5th October, 2012. He has stated that the bank did not give the bank statement of deceased and he did not ask for the income tax return of deceased.

8. The Appellants examined their officer who deposed that the deceased was providing services by virtue of his agreement dated 7th October, 2009 with Sigmar Aviation Ltd, which was made available to the Appellant by Sigmar Aviation Ltd only after the plane crash. The Appellant was not aware of the actual salary earned by the deceased and therefore on 27th September, 2012, the compensation was deposited on basis of amount paid by the Appellant to Sigmar Aviation Ltd. The witness produced the emails sent by Appellant to Sigmar Aviation Ltd and the response enclosing the statement containing the breakdown of the deceased's payments showing the monthly salary at USD 9,170.

9. In the cross-examination, the witness admitted that the Appellant-Company does not have copy of the agreement between the deceased and Sigmar Aviation Ltd. He has admitted that as per the agreement between the Appellant and Sigmar Aviation Ltd, the Appellant was making payment of USD 11,000 to Sigmar Aviation Ltd against monthly salary of the deceased. The witness has deposed that Sigmar Aviation Ltd has been paid fees for providing manpower to Appellant.

10. By the impugned judgment dated 18th October 2013, the Commissioner for Employees Compensation passed the following order :

“1] It is hereby declared that late Captain Zlatko Glusica died of an injury in an accident arising out of and in the course of his employment on 22nd of May 2010.

2] Opponent Air India Charters Ltd is hereby directed to deposit in Court US Dollars 745580/-, i.e., INR 463,37,797/- together with 50% penalty of the amount of compensation and 12% interest per annum on aforesaid amount of compensation from the date of accident till the date of depositing said amount in Court.

3] The Opponent has deposited Rs.332,15,589/- in the office of the Court on 27-9-2012. Opponent to deposit in Court balance amount immediately.”

SUBSTANTIAL QUESTIONS OF LAW:

11. The First Appeal came to be admitted on 29th November, 2019 on the following substantial questions of law:

- “(i) Whether dependents of an employee engaged to provide services under a contract can be awarded compensation that is calculated at an amount higher than the amount actually payable to the deceased Captain under the contract?
- (ii) Whether the said compensation can be calculated on the basis of any agreement between the principal employer and the agent who supplies manpower, which the deceased employee was not privy to?
- (iii) When compensation payable under Section 4-A of Employee’s Compensation Act, 1923 falls due in cases where there is a bonafide dispute with respect to the amount of compensation payable?
- (iv) When compensation is payable in foreign currency whether the exchange rate at which the compensation is calculated in Indian Rupees can be of the date on which the payment is actually made or the date of the order?
- (v) Whether interest and penalty on the amount of compensation is payable at all, in cases where the amount of compensation is in fact

adjudicated pursuant to any inquiry conducted by the Labour Commissioner?

ADDITIONAL SUBSTANTIAL QUESTIONS OF LAW:

12. During the hearing of Appeal, following additional questions of law were framed and the parties were duly heard:

- (vi) Whether the findings of the Employees Compensation Commissioner with regard to the monthly salary drawn by the deceased suffers from perversity?
- (vii) Whether the liability to pay interest and penalty under Section 4-A(3)(b) of the EC Act, can be imposed on the Appellant, who is the principal employer and has been held liable to pay compensation by virtue of Section 12 of EC Act ?

SUBMISSIONS:

13. Mr. Barucha, learned counsel appearing for the Appellant would submit that it is undisputed that the deceased was employed with the Appellant-Company by virtue of his contract with Sigmar Aviation Ltd. He would further submit that the Appellant was paying USD 11,000 per month to Sigmar Aviation Ltd and the contract between the deceased and Sigmar Aviation Ltd was for USD 9,170 per month. Pointing out to Section 12 of EC Act, he submits that the amount of compensation is required to be calculated with reference to the wages of employee under the employer by whom he is immediately employed and the deceased was drawing salary of USD 9,170 from Sigmar Aviation Ltd. He

submits that by misconstruing the deposition of Appellant's witness that Sigmar Aviation Ltd has been paid fees for providing the manpower to the Appellant , the Employees Compensation Commissioner has come to a finding that separate fees were being paid to Sigmar Aviation Ltd by the Appellant apart from USD 11,000. He would further point out the case of the Respondents in the main application was based on the admission of Appellant that the monthly payment to the contractor i.e. Sigmar Aviation Ltd was USD 11,000 and therefore the salary of deceased has to be deemed to be USD 11,000 per month. He submits that in the cross-examination of Respondent's witness, the witness has admitted that he came to know about the salary of USD 11,000 per month on the basis of Appellant's covering letter while depositing the amount. Drawing attention of this Court to the admissions of the Respondent's witness, he submits that the Respondents are not aware of the salary of deceased and has not discharged the burden of proving that the monthly salary of the deceased was USD 11,000. He would further point out the agreement between the deceased and Sigmar Aviation Ltd which is annexed at page 114C of the compilation of documents and would point out that the deceased was paid salary of USD 9,170 per month by Sigmar Aviation Ltd. He would further point out that the agreement has been signed by the deceased and on behalf of the Sigmar Aviation Limited for and on behalf of the Colton

Enterprises Limited Assistant, Secretary of Sigmar Aviation Ltd. He submits that the same agreement was found by the Respondents on the laptop of deceased and the agreements are signed by both the parties. He would further point out that the contract between Sigmar Aviation Ltd and the deceased was marked as exhibit and although no objection was taken and no dispute about the signature was raised, the Employees Compensation Commissioner has held that the agreement was not authenticated by the original and had defective signature page. He would point out the emails exchanged between Sigmar Aviation Ltd and the present Appellant and would submit that the Sigmar Aviation Ltd has replied that the salary amount was USD 9,170 per month.

14. He would further submit that by relying on the provisions of the Contract Labour Act and the Payments of Wages Act, the Employees Compensation Commissioner has held that there are unauthorised deductions by presuming that the salary of deceased was USD 11,000 per month and after deductions, a sum of USD 9,170 per month was being paid.

15. He would further submit that the Employees Compensation Commissioner has levied interest at the rate of 12% which is not disputed due to the delay in deposit. He would however dispute the levy of penalty @ 50% of the amount of compensation from the date of accident till the date of depositing the amount in the Court for absence

of explanation for the delay, whereas in paragraph 5 of Appellant's reply, the delay has been explained. He would submit that being unaware of actual salary of deceased as he was employed through a contractor, when the deposit was ultimately made it was on the basis of amount paid to Sigmar Aviation Ltd however with a caveat to claim refund. He submits that it is clearly pleaded that an interim compensation of Rs.10,00,000/- which was paid to others could not be paid in the present case as the Appellant was not aware of the dependents of deceased. He submits that the copy of agreement of Sigmar Aviation Ltd and the deceased was obtained subsequently and therefore the Appellant was not aware about the whereabouts of the dependents of deceased as it was a contractual employment. He submits that it was open for the Respondents to withdraw the deposited amount, which has not been done and levy of penalty is unjustified.

16. He would further submit that while calculating the exchange rate the Employees Compensation Commissioner has considered the exchange rate which is one day prior to the judgment date, however, as the amount had been deposited prior to the judgment, the exchange rate as of that day will have to be considered.

17. *Per Contra*, Mr. Rishi Ashok, learned counsel appearing for the Respondents would submit that the issues involved in the present

appeal consists of 4 components i.e., amount of salary, interest, penalty and exchange rate. He would submit that as far as the salary is concerned the provisions of Section 4A(2) read with Section 8(1) the Employees Compensation Act, 1923 would indicate that the employer has to deposit the accepted liability before the commissioner under Form-A. He submits that the Appellants have deposited the amount by considering the monthly salary of deceased to be USD 11,000 and therefore there cannot be any further adjudication of the said amount. He submits that Section 4A(2) speaks about the extent of liability which the employer accepts and in the present case by depositing the salary at the rate of USD 11,000 per month, the Appellants have accepted the same. He would further submit that the witness for Appellants have repeatedly accepted that as per the agreement between the Appellant and Sigmar Aviation Ltd the payment of USD 11,000 per month was against the salary of pilot. He points out the admission of the Respondent's witness that Sigmar Aviation Ltd has been paid fees for providing manpower to the Appellant and would submit that apart from the salary of USD 11,000 per month paid by the Appellant to Sigmar Aviation Ltd , separate fees were paid for providing the manpower. He would further submit that the statutory provisions provides for levying of interest in case of delay in deposit and the explanation tendered that due to number of deaths there is delay is not acceptable. He submits

that there was no justifiable reason for the delay as it was a simple case of computation as the salary was known to the Appellant and the multiplier method was also known to the Appellant. He submits that as far as the penalty is concerned, the same is imposed by reason of delay and maximum penalty has been rightly imposed.

18. As far as the issue of exchange rate is concerned, he would submit that it is a settled position in law that the exchange rate will have to be calculated on the date when the judgment was delivered on the amount over and above what has been deposited by the Appellant. He draws support from the decision of the Apex Court in the case of *Triveni Kodkany v. Air India Limited*¹ which relates to the same unfortunate Mangalore air crash. He would further point out Page 136 of the Petition which is the cross examination of the Appellant's witness that they have paid the other employees compensation, interest and penalty. He submits that in view thereof the Appellant cannot deny the same to the present Respondent. He would further point out that the finding of the Commissioner about the exchange is based on decision of *Forasol vs Oil & Natural Gas Commission*² and *Renu Sagar Power Co. Ltd vs General Co. Ltd*³.

19. In rejoinder Mr. Bharucha would submit that the deposit under

1 SC Civil Appeal No.2914 of 2019 dtd. 3rd March 2020.

2 AIR 1984 SC 241.

3 (1994 Supp (1))(SCC 644)

Form-A is under Rule 6(1) of the Workmen's Compensation Rules, 1924 and the deposit is not under Section 4A of the EC Act. He submits that even assuming that deposit is made under section 4A of the EC Act, where the employer under a bonafide mistake deposits excess amount, it cannot be said that there cannot be any further adjudication. He submits that there cannot be any unjust enrichment and the compensation has to be distributed in accordance with the applicable salary of pilot. He would further submit that though the interest and penalty was paid to other employees, the same can be disputed on the ground that it is not legally payable.

20. In sur-rejoinder, Mr. Ashok would submit that Section 8 of the EC Act cannot be read in isolation of Section 4A and only by way of Form A under the provisions of section 4A or Section 8(1) of the Employees Compensation Act, 1923 the amount has been deposited.

FINDINGS:

SUBSTANTIAL QUESTIONS OF LAW NO (i), (ii) and (vi):

- (i) Whether dependents of an employee engaged to provide services under a contract can be awarded compensation that is calculated at an amount higher than the amount actually payable to the deceased Captain under the contract?
- (ii) Whether the said compensation can be calculated on the basis of any agreement between the principal employer and the agent who supplies manpower, which the deceased employee was not privy to?
- (vi) Whether the findings of the Employees Compensation Commissioner with regard to the monthly salary drawn by the deceased suffers from

perversity?

21. These three questions are interlinked and are therefore considered together. The undisputed fact is that the services of deceased were obtained by the Appellant-Company through an external agency Sigmar Aviation Ltd. Section 12 of the EC Act imposes the liability on principal employer for payment of compensation to the employee of the contractor with right to recover the same from the contractor and reads thus:

"12. Contracting.—(1) Where any person hereinafter in this section referred to as the principal in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any employee employed in the execution of the work any compensation which he would have been liable to pay if that employee had been immediately employed by him; and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the employee under the employer by whom he is immediately employed.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor, or any other person, from whom the employee could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the employee could have recovered compensation and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.

(3) Nothing in this section shall be construed as preventing an employee from recovering compensation from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on

which the principal has undertaken or usually undertakes, as the case may be, to execute the work or which are otherwise under his control or management”

22. Sub-Section (1) of Section 12 EC Act makes it clear that the amount of compensation payable by the principal employer shall be calculated with reference to the wages of employee under the employer by whom he is immediately employed. To put it simply, the basis for computation of compensation in cases of payment of compensation to the employee of contractor is the wages of employee which is paid by the contractor to the employee.

23. It is an admitted position in the present case, that the services of the deceased was made available to the Appellant by Sigmar Aviation Ltd which would make the Appellant the principle employer and under Section 12 of EC Act, the basis for compensation would be the salary that the deceased was drawing from his immediate employer i.e. Sigmar Aviation Ltd. Whether the monthly salary was USD 11,000 or USD, 9170 is the pivotal issue to be determined on the evidence which has come on record. On the aspect of salary of deceased, the oral evidence of the Appellant’s witness is that by virtue of the agreement of deceased with Sigmar Aviation Ltd dated 7th October, 2009, his services were provided to the Appellant-Company. He has further deposed that as the witness for the Respondents had disputed the authenticity of agreement dated 7th October, 2009, confirmation was sought about the actual amount of

salary paid to the deceased by email from Sigmar Aviation Ltd. The witness has produced the copy of the emails exchanged between the Appellant and Sigmar Aviation Ltd, which are marked as Exhibit U-5.

24. In the cross-examination, the witness has admitted that as per the agreement with Sigmar Aviation Ltd, the Appellant was making payment of USD 11,000 against salary of the deceased per month. He has further admitted that Sigmar Aviation Ltd has been paid fees for providing manpower to the Appellant. He has admitted that he is not aware as to how much amount was being paid to the deceased by Sigmar Aviation Ltd.

25. Coming to the evidence of the Respondents, the Respondents has examined their Constituted Attorney who has admitted in the cross-examination that he had not seen the deceased and had met the dependents of deceased for the first time after the death of deceased. He has admitted that when he went to Belgrade, Serbia, he received two agreements, one executed between the deceased and Sigmar Aviation Ltd and the other between the deceased and Nightangale Aviation. He has further admitted that he came to know about the salary of deceased being USD 11,000 based on the covering letter of the Appellant accompanying the deposit of compensation in the Court. He has further admitted that he confirmed from the Respondents about the wages paid to the deceased based on the covering letter of deposit

by the Appellant. He has deposed that the bank refused to give bank statement of the deceased and he had not asked for income tax returns of the deceased. He has further admitted that the agreement Exhibit C-1-B is the copy of agreement between the deceased and Sigmar Aviation Ltd which was found unsigned on the laptop of the deceased and were taken out from the laptop of the deceased in Belgrade.

26. The evidence on record discloses that the Respondents claim compensation calculated on monthly salary of USD 11,000 based on the Appellant's covering letter while depositing the amount in the Court. The Respondents were in possession of best evidence available in the form of bank statements and income tax returns of the deceased which would have proved the monthly remittances by the Sigmar Aviation Ltd to the deceased. However no such documents has been produced by the Respondents to establish the salary of the deceased.

27. The documentary evidence on record is the agreement dated 7th October, 2009 between Sigmar Aviation Ltd and deceased with which the Respondent's witness was confronted and he has admitted that the said document Exhibit C-1-B is copy of the agreement found unsigned on laptop of deceased. The Appellant's witness has produced the emails exchanged between the Appellant and Sigmar Aviation Ltd. The Respondents have not produced any documentary evidence on record. The oral evidence is by the Constituted Attorney who was not

acquainted with the deceased and has no personal knowledge about the monthly salary of the deceased. The Respondents solely relies upon the deposit made by the Appellant treating the monthly salary at USD 11,000. On the other hand, the Appellant's witness has produced the emails exchanged between Sigmar Aviation Ltd and the Appellant giving the breakup of the salary paid to the deceased. There is no cross-examination on these emails and the deposition of the Appellant's witness remains uncontroverted. The emails establishes that on 24th July, 2013, the Appellant has communicated with Sigmar Aviation Ltd seeking clarification about the actual salary being remitted to the deceased. In that email there is reference to the signed contract forwarded by Sigmar Aviation Ltd with the Respondents showing the salary of deceased at USD 9,170. The reply email of Sigmar Aviation Ltd confirms that the salary amount is correct as per the contract dated 7th October, 2009 and the email of 24th July, 2013 sent by Sigmar Aviation Ltd to the Appellant encloses the break up of payment showing the monthly remittance of USD 9,170 to the deceased as salary from Sigmar Aviation Ltd .

28. There is no discussion in the impugned judgment on the documentary evidence produced in the form of emails which contains the break up of the remittances. The statement annexed to the emails establishes that the deceased was being paid monthly salary of USD

9,170 by Sigmar Aviation Ltd and medical fees of USD 100.

29. Section 8 of the EC Act deals with the distribution of compensation and provides that no payment of compensation shall be made otherwise than by deposit with the Commissioner and no such payment made directly by an employer shall be deemed to be payment of compensation with the exception of making of payment of advances on account of compensation in case of deceased employee to the extent of three months wages. Under Rule 6 of the EC Rules, the employer depositing compensation under Section 8(1) is required to furnish statement in Form "A". Perusal of the prescribed Form "A" indicates that the same includes a statement about the estimated monthly wages of the deceased. Form "A" is the prescribed form whether the deposit is made by the immediate employer or the principal employer. Where the deposit is made by the principal employer, the possibility of the monthly salary paid by the contractor to the employee not being within the knowledge of the principal employer cannot be ruled out. Form "A" especially in cases where the principal employer deposit the compensation cannot be stated to form the basis of the computation of compensation without being corroborated by cogent evidence.

30. In the present case, the witness for the Respondents has deposed that he became aware of the salary of USD 11,000 on the basis of Form

“A”. The estimation of the wages was on the basis of the payment which were made by the Appellant to Sigmar Aviation Ltd which was USD 11,000 and the witness for Appellant has deposed that they were not aware as to how much amount was being paid to the deceased by Sigmar Aviation Ltd. The prescribed format of Form “A” includes a statement about the estimation of the monthly wages. Perusal of Form “A” filed by the Appellant-Company shows that the Appellant estimated the monthly wages at USD 11,000 and it is stated that the deceased was hired through other agency M/s Sigmar Aviation Ltd and the payment was made to them. The deposit with Form “A” was made on 25th September, 2012 and immediately on 5th October, 2012, communication was addressed to the Commissioner for Employee’s Compensation that the monthly wages are only estimated and that there would have been some charges retained by Sigmar Aviation Ltd. It is further stated that they have deposited the full amount of USD 11,000 as they do not have information about the actual wages received by the deceased from Sigmar Aviation Ltd and sought credit for the amount overpaid by them. In light of this communication it cannot be said that the liability was an admitted liability under Section 4-A(2) of EC Act.

31. The Employees Workmen Commissioner has not considered the uncontroverted emails exchanged between Sigmar Aviation Ltd and the Appellant-Company produced on record by the Appellant-Company

which enclosed the statement of remittances to the deceased by Sigmar Aviation Ltd showing the monthly remittance of USD 9,170.

32. Under Section 12 of EC Act, it is not the payment made by the principal employer to the contractor which would form the basis of computation but the actual salary drawn by the deceased from his immediate employer. In the present case, there is no evidence brought on record by the Respondents to show that the deceased was drawing a salary of USD 11,000 from Sigmar Aviation Ltd. There is nothing to demonstrate that apart from USD 11,000 separate payments were made by the Appellant to Sigmar Aviation Ltd for providing manpower. The agreement for supply of manpower was not a tripartite agreement executed between Appellant, Sigmar Aviation Ltd and deceased and therefore the amount mentioned in the said agreement cannot constitute the monthly salary of the deceased to form the basis of computation of compensation.

33. The Employees Compensation Commissioner while accepting the monthly wages to be USD 11,000 has misconstrued the admission of the witness for the Appellant that Sigmar Aviation Ltd has been paid fees for providing manpower to the Appellant-Company as a payment of fees apart from USD 11,000. There is no pleading to that effect and nobody's case that apart from USD 11,000 any separate payment was made to Sigmar Aviation Ltd by the Appellant-Company.

34. The Employees Compensation Commissioner has supported the finding of monthly salary being USD 11,000 per month by considering that under Section 21 of the Contract Labour Act read with the Rules and under the provisions of Section 7 of the Payment of Wages Act, 1936, unauthorised deductions are not permissible and it is not explained by the Appellant that the deductions are authorised by law. There is no pleading to that effect and no evidence on record to support the said finding.

35. In light of the above discussion, the findings of fact by the Commissioner suffers from perversity and warrants interference. Accordingly Question Nos. (i), (ii) and (vi) are answered thus:

(i) The undisputed position being that the services of the deceased were made available by Sigmar Aviation Ltd to the Appellant-Company, Section 12 of EC Act provides for computation of compensation based on the actual salary paid by Sigmar Aviation Ltd to the deceased. The provisions of Section 12 of EC Act makes it clear that the dependents of the deceased are not entitled to compensation computed on basis of an amount which is higher than the salary paid to the deceased by the contractor i.e., Sigmar Aviation Ltd . The evidence on record establishes that the monthly remittances by Sigmar Aviation Ltd to the deceased was USD 9,170 per month and the compensation

had to be calculated on the basis of USD 9,170 which was the monthly salary paid by Sigmar Aviation Ltd to the deceased and not on USD 11,000 which was the amount which was paid by the Appellant to Sigmar Aviation Ltd.

(ii) In the absence of deceased being a party to the manpower supply agreement executed between the principal employer and the contractor, the consideration payable by the Appellant for supply for manpower cannot constitute the basis for computation of monthly salary of the deceased especially when there is no cogent evidence to arrive at a conclusion that apart from the consideration of USD 11,000 there were separate charges paid by the Appellant to Sigmar Aviation Ltd for their services.

(vi) The finding of the Employees Compensation Commissioner that the monthly salary of the deceased was USD 11,000 suffers from perversity for the following reasons:

(a) There is no evidence on record to support the finding that separate fees was paid by Appellant to Sigmar Aviation Ltd for supplying manpower.

(b) Form "A" contains statement by the employer about the estimation of the monthly salary and cannot form basis for a conclusive finding of monthly salary of deceased without the same being substantiated by cogent evidence.

(c) The finding that there were unauthorised statutory deductions as the monthly salary was USD 11,000 and the

deceased was paid USD 9,170 is without any pleading or evidence to that effect.

Substantial Question No (iii):

- (iii) When compensation payable under Section 4-A of Employee's Compensation Act, 1923 falls due in cases where there is a bonafide dispute with respect to the amount of compensation payable?

36. The provisions of Section 4-A of EC Act sets out the due date for payment of compensation and provides for interest and penalty for default in compliance. Section 4A of EC Act reads thus:

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 employee, as the case may be, without prejudice to the right of the employee 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 shall—

(a) direct that the employer shall, in addition to the amount of the 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.

Explanation.--For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

(3A) The interest and the penalty payable under sub-section (3) shall be paid to the employee or his dependant, as the case may be."

37. Section 19 of EC Act provides for reference to Commissioners where any question arises in any proceedings under the EC Act as to the liability of any person to pay compensation or as to the amount or duration of compensation. The Apex Court in ***Pratap Narain Singh Deo Vs Shrinivas Sabata***⁴ in the context of the submission raised that penalty cannot be imposed under Section 4-A(3) as the compensation had not fallen due until it was settled by the Commissioner under Section 19 of EC Act held as under:

"Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of [section 3](#) because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due with after the Commissioner's order dated May 6, 1969 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the

4. AIR 1976 SC 222.

liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of a agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under section 3, in respect of the injury, was suspended until after the settlement contemplated by section.

. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.”(Emphasis supplied)

38. The Four Judge Bench of the Apex Court in unequivocal words has settled the position that the employer’s liability to pay compensation is not suspended till settlement of the dispute by Commissioner under Section 19 of EC Act.

39. Considering the well settled position in law, it cannot be debated that liability of the employer to pay compensation arises as soon as the personal injury is caused to the workmen by the accident. Coming now to the provisions of Section 4A of EC Act, Sub-Section (3) provides for payment of interest and penalty in event of default on part of the employer to pay the compensation due within one month from the date it falls due. The statutory mandate is to make the payment of compensation within period of one month from the date of accident. Sub Section (2) permits the employer to make the payment of the admitted liability in case of dispute about the extent of the liability, however, the same does not carve out any exception to the due date for payment of compensation which is on date of accident and the

period for payment of compensation which is within one month from date of accident.

40. Hence, irrespective of a bonafide dispute as to the amount of compensation payable, the employer is statutorily mandated to make the payment of the admitted liability within period of one month from the date of compensation and the making of payment is not suspended till adjudication of the claim by the Commissioners under Section 19 of EC Act.

SUBSTANTIAL QUESTION OF LAW NO.(iv):

“(iv) When compensation is payable in foreign currency whether the exchange rate at which the compensation is calculated in Indian Rupees can be of the date on which the payment is actually made or the date of the order?

41. In the present case, the accident has occurred on 22nd May 2010 whereas the amount has been deposited on 5th December, 2012 in Indian currency which was calculated in accordance with the exchange rate as on the date of accident. The Employees Compensation Commissioner has relied upon the decision of the Apex court in the case of **Forasol** (supra) and **Renu Sagar Power** (supra) to grant compensation at the exchange rate prevailing on the day before the date of judgment.

42. In **Forasol** (supra), a drilling contract was entered into between a French Company and ONGC. The proceedings arose out of arbitration award and the Apex Court observed that in an action to recover an

amount payable in foreign currency, five dates compete for selection by the Court as the proper date for fixing the rate of exchange at which the foreign currency amount has to be converted into the currency of the country in which the action has been commenced and decided. These dates are:

- (1) the date when the amount became due and payable;
- (2) the date of commencement of the action;
- (3) the date of the decree;
- (4) the date when the court orders execution to issue; and
- (5) the date when the decretal amount is paid or realized.

In a case where a decree had been passed by the court in terms of an award made in a foreign currency a sixth date also enters the competition, namely, the date of the award.

43. The Apex Court held that the Court must select a date which puts the Plaintiff in the same position in which he would have been, had the defendant discharged his obligation when he ought to have done. The Apex Court held that in cases where the Plaintiff has made a prayer for a decree to be paid to him in foreign currency and the payment is not made in foreign currency, the rate of exchange applicable would be the rate prevailing at the time of the judgment. In ***Renu Sagar Power*** (supra), the three judge Bench affirmed the application of law laid down in ***Forasol*** (supra).

44. In ***Forasol*** (supra), the issue arose in the context of the rate of

exchange applicable to an Award passed under the Arbitration Act, 1949. The Arbitration Act does not provide for mandatory deposit of the amount of claim or the period for the deposit. Considering the nature of claim, the Court was tasked with the duty of deciding the applicable date for computing the rate of exchange in case of Award in foreign currency. The said issue arises where there are different dates in zone of consideration as enumerated in *Forasol* (supra). Whereas under the EC Act, Section 4-A itself provides for the date on which the compensation is due and payable and the mandated deposit period. Even in case of *Forasol* (supra), what weighed with the Apex Court was the principle that the Plaintiff must be put in the same position in which he would have been had the Defendant discharged his obligation when he ought to have done. The crucial observation is the discharge by the Defendant of his obligation when the same falls due.

45. Under the EC Act, where the employer duly complies with the legislative mandate and discharges his obligation by depositing the amount within the prescribed period, the applicable rate of exchange would be the rate prevailing on the prescribed date i.e. within one month from date of the personal injury.

46. Coming to the present case, the compensation had to be deposited within one month from 22nd May, 2010 , whereas it has been deposited on 5th December, 2012. If the compensation would have been

deposited within the period of one month, upon the obligation being discharged as per the statute, then there would be no occasion for the Commissioner to consider the applicable rate of exchange. The principle applicable is that the party should be placed in the same position in which he would be if the obligation is discharged by the Appellant on the due date. However, in the present case, the deposit is after a period of about two years and six months.

47. Considering that the obligation has been discharged though with delay, the dates which would be compete for consideration of rate of exchange under the EC Act is the date on which the obligation ought to have been discharged and the date on which it was actually discharged. In no event, the date of passing of judgment would be a relevant date for consideration as the obligation already stood discharged by the deposit. The applicability of rate of exchange on the date of judgment would apply firstly where the statute does not provide for any such mandatory deposit and secondly where in spite of the statute prescribing the due date for deposit, there is total non compliance by the party bound to make the deposit. In my opinion, the higher of the rate of exchange prevailing on the due date of deposit i.e. one month of the accident and the date of deposit would be applicable for the reason that if the rate of exchange had fluctuated from the due date to the date of deposit on the lower side, the employer cannot be permitted to

take advantage of its default in depositing the amount on due date. As far as the submission raised that the exchange rate will have to be calculated on the date of judgment on amount payable over and above deposited, during the hearing Mr. Bharucha, had tendered a comparative chart showing the amount deposited on basis of USD 9,170 and USD 11,000. The compensation deposited if calculated on the basis of USD 9,170 covers the amount due and therefore there is no question of any amount due and payable over and above the deposited amount.

SUBSTANTIAL QUESTIONS OF LAW NO. (v) and (vi):

- (v) Whether interest and/penalty on the amount of compensation is payable at all, in cases where the amount of compensation is in fact adjudicated pursuant to an inquiry conducted by the Labour Commissioner ?
- (vi) Whether the liability of interest and penalty under Section 4-A(3)(b) of EC Act can be imposed against the Principal Employer who is held liable under Section 12 of EC Act ?

48. The Employees Compensation Commissioner has levied interest @ 12% from the date of accident till the date of deposit of compensation in Court. This levying of interest is not disputed by Mr. Bharucha. He would however dispute the imposition of penalty @50% from date of accident till date of depositing said amount in Court without considering the explanation tendered for the delay. The question of law which has been framed is as regards the liability for payment of interest and penalty where the amount is adjudicated

pursuant to an inquiry conducted by the Labour Commissioner and the liability of the principal employer to pay the penalty and interest under Section 12 of EC Act.

49. The submissions canvassed by Mr. Bharucha dwell on the sufficiency of explanation tendered and are in the realm of re-appreciation of evidence as is permissible for final fact finding authority in usual First Appeals. However, the present case is an Appeal under Section 30 of the EC Act which provides for an appeal to the High Court on substantial question of law and will carry the same meaning as is commonly understood and there is no distinction between substantial question of law for purpose of first appeal and one for second appeal. (***See Om Parkash Batish vs Ranjit Alias Ranbir Kaur***⁵).

50. Reverting to the questions of law framed, the levying of penalty and interest is a legal consequence of failure to deposit the compensation within the period prescribed under Section 4A of the Employees Compensation Act, 1923. I have already held in answer to Point No (iv), that irrespective of a bonafide dispute as to the amount of compensation payable, the employer is statutorily mandated to make the payment of the admitted liability within the period of one month from the date of compensation and the making of payment is not suspended till adjudication of the claim by the Commissioners under

5. (2008) 12 SCC 212.

Section 19 of EC Act.

51. As regards the liability of payment of interest, Section 3 of the EC Act provides that if personal injury is caused to the workman, his employer shall be liable to pay compensation in accordance with provisions of Chapter II. Sub Section 3 of Section 4-A provides for payment of interest and penalty. There are thus three different components recognised by the statute. Compensation has been defined in Section 2(1) (c) of EC Act as compensation as provided for by EC Act which is referable to compensation payable under Section 3 which is to be awarded under Section 4 and is different from interest and penalty. In the context of liability of Insurance Company, it has been held by the Apex Court in ***Ved Prakash Garg v. Premi Devi***⁶; that the Insurance Company is liable to pay not only the principal amount of compensation payable by the insurer employer but also interest thereon if ordered by the Commissioner to be paid by the employer. The Insurance company is liable to meet claim for compensation along with interest as imposed on insurer employer by the Act on conjoint operation of Section 3 and 4A(3)(a) of the Act. The relevant para of the aforesaid judgment is reproduced as under :-

“On a conjoint operation of the relevant schemes of the aforesaid twin Acts, in our view, there is no escape from the conclusion that the insurance companies will be liable to make good not only the principal amounts of compensation payable

6. [AIR 1997 SC 3854.](#)

by insured employers but also interest thereon, if ordered by the Commissioner to be paid by the insured employers. Reason for this conclusion is obvious. As we have noted earlier the liability to pay compensation under the Compensation Act gets foisted on the employer provided it is shown that the workman concerned suffered from personal injury, fatal or otherwise, by any motor accident arising out of and in the course of his employment. Such an accident is also covered by the statutory coverage contemplated by Section 147 of the M.V. Act read with the identical provisions under the very contracts of insurance reflected by the policy which would made the insurance company liable to cover all such claims for compensation for which statutory liability is imposed on the employer under Section 3 read with Section 4-A of the Compensation Act. All these provisions represent a well-knit scheme for computing the statutory liability of the employers in cases of such accidents to their workmen. As we have seen earlier while discussing the scheme of Section 4-A of the Compensation Act the legislative intent is clearly discernible that once compensation falls due and within one month it is not paid by the employer then as per Section 4-A(3)(a) interest at the permissible rate gets added to the said principal amount of compensation as the claimants would stand deprived of their legally due compensation for a period beyond one month which is statutorily granted to the employer concerned to make good his liability for the benefit of the claimants whose breadwinner might have either been seriously injured or might have lost his life. Thus so far as interest is concerned it is almost automatic once default, on the part of the employer in paying the compensation due, takes place beyond the permissible limit of one month. No element of penalty is involved therein. It is a statutory elongation of the liability of the employer to make good the principal amount of compensation within permissible time-limit during which interest may not run but otherwise liability of paying interest on delayed compensation will ipso facto follow. Even though the Commissioner under these circumstances can impose a further liability on the employer under circumstances and within limits contemplated by Section 4-A(3)(a) still the liability to pay interest on the principal amount under the said provision remains a part and parcel of the statutory liability which is legally liable to be discharged by the insured employer. Consequently such imposition of interest on the principal amount would certainly partake the character of the legal liability of the insured employer to pay the compensation amount with due interest as imposed upon him under the Compensation Act. Thus the principal amount as well as the interest made payable thereon would remain part and parcel of the legal liability of the insured to be discharged under the Compensation Act and not de hors it. it, therefore, cannot be said by the insurance company that when it is statutorily and even contractually liable to reimburse the employer qua his statutory liability to pay compensation to the claimants in case of such motor accidents to his workmen, the

interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part of the insured liability of the employer. No question of justification by the insured employer for the delay in such circumstances would arise for consideration. It is of course true that one month's period as contemplated under Section 4-A(3) may start running for the purpose of attracting interest under sub-clause (a) thereof in case where provisional payment has to be made by the insured employer as per Section 4-A(2) of the Compensation Act from the date such provisional payment becomes due. But when the employer does not accept his liability as a whole under circumstances enumerated by us earlier then section 4-A(2) would not get attracted and one month's period would start running from the date on which due compensation payable by the employer is adjudicated upon by the Commissioner and in either case the Commissioner would be justified in directing payment of interest in such contingencies not only from the date of the award but also from the date of the accident concerned. Such an order passed by the Commissioner would remain perfectly justified on the scheme of Section 4-A(3)(a) of the Compensation Act."

52. As regards grant of penalty, the Supreme Court in ***Ved Prakash Garg*** (supra) held as under:

"But similar consequence will not follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by [Section 4A\(3\)\(b\)](#) of the Compensation Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay in payment of the compensation amount he is not liable for this penalty. However if ultimately the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then the penalty would get imposed on him. That would add a further sum upto 50% on the principal amount by way of penalty to be made good by the defaulting employer. So far as this penalty amount is concerned it cannot be said that it automatically flows from the main liability incurred by the insured employer under the [Workmen's Compensation Act](#).

53. The provisions of Section 12(1) of EC Act under which the liability is imposed on principal employer is limited to the payment of compensation which has been defined under Section 2(1)(c) of the EC Act. As held in **Ved Prakash Garg** (supra), the imposition of interest is statutory elongation of the liability of the employer to make good the principal amount of compensation within permissible time-limit during which interest may not run but otherwise liability of paying interest on delayed compensation will *ipso facto* follow.

54. As said by the Apex Court, the penalty does not automatically flow from the main liability incurred by the employer. It is only if the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is justifiable reason for delay on part of the employer that the penalty would get imposed on him. In the decision in **Chief Executive Officer vs Suraiyya Rafik Khalifa** (supra), the decision of **Ved Prakash Garg** (supra) which has held that interest is statutory elongation of compensation was not brought to the notice of the learned Single Judge.

55. In my view, irrespective of whether the adjudication of compensation is pursuant to inquiry conducted by the Commissioner, the interest is liable to be paid in default of deposit of the admitted liability within period of one month from date of accident. The payment of interest is not suspended till adjudication of the claim by the

Commissioners under Section 19 of EC Act. The Appellant is therefore liable to pay interest about which no dispute has been raised by Mr. Bharucha.

56. As far as payment of penalty is concerned, the decision of Apex Court *Ved Prakash Garg* (supra) makes it evident that penalty does not automatically flow from compensation. As Section 12(1) of EC Act makes the principal employer liable for compensation, the principal employer has been held liable for payment of compensation which would include the imposition of interest but no penalty can be imposed on principal employer. The admission in the cross examination that the Appellant had paid compensation, interest and penalty to the other employees would not deviate from the legal position that the liability to pay penalty cannot be imposed on the principal employer.

57. The substantial questions of law are answered accordingly. Resultantly, the First Appeal is allowed in following terms:

(a) The compensation is to be computed on the basis of USD 9,170 multiplied by the relevant multiplier of 135.56.

(b) The rate of exchange will be the higher of the rate of exchange on the date of accident or the date of deposit by the Appellant-Company in accordance with Section 4-A of the EC Act.

(c) The Appellant will be liable to pay interest @ 12% from the date of accident till the date of

depositing compensation amount before the Commissioner under Section 4-A(3)(a) of EC Act.

(d) As per Section 12(1) of EC Act , there cannot be any imposition of penalty upon the principal employer.

[Sharmila U. Deshmukh, J.]