2023:BHC-AUG:15725

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
FIRST APPEAL NO.3517 OF 2022
WITH
CIVIL APPLICATION NO.15596 OF 2022
WITH
CIVIL APPLICATION NO.8433 OF 2023

1. Chief Executive Officer,
Zilla Parishad, Ahmednagar,
Ahmednagar.

2. Block Development Officer,
Panchayat Samiti, Akole.
Po. Tq. Akole, Dist. Ahmednagar ..Appellants
(Orig. Non-Applicant Nos.1 and 2)

Versus

1. Smt. Suraiyya Rafik Khalifa (Shaikh),
Age: 55 years, Occu. Nil,

2. Ku. Fairoza Rafil Khalita (Ansari)
Age:. 29 years, Occu. Nil,

3. Ku. Kainaat Rafik Khalifa (Ansari),
Age: 27 years, Occu. Nil,

4. Shri. Kaamran Rafik Khalifa (Shaikh)
Age: 28 Years, Occ: Nil

5. Shri. Imran Rafik Khalif (Shaikh)
Age:26 Years, Occ: Nil

6. Ku. Hujar Rafik Khalifa (Shaikh)
Age: 20 Years, Occ: Nil

7. Ku. Zoyab Rafrk Khalifa (Shaikh)
Age: l6 years, Occ: Nil
(Since Minor, through her Legal
Guardian i.e. Applicant No. 1)

8. Banobi Abdul Ajij Khalifa (Shaikh)
Age: 77 Years, Occ: Nil

All R/o: Kuran Road, Sangamner
Tq: Sangamner,

District: Ahmednagar.

9. The Chairman
Harshawardhan Patil Sahalari Motor

Vahatuk Sanstha Limited,
Tq: tndapur, District: Pune

10. Kadarkhan Kasamkhan Pathan
Age: Major, Occ: Service
Godavari Colony, Galli No. 3
Indiranagar, Tq. : Sangamner.
District: Ahmednagar. ..Respondents
(Orig. Applicant No.1 to 8 and Orig. Non-Applicant Nos.3 and 4)

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Mr. P. R. Kothari a/ Ms. Nandini Chittal, Advocate for the Appellants.
Mr. P. V. Barde, Advocate for Respondent Nos.1 to 7.
Mr. Girish K. Naik thigle, Advocate for Respondent No.9.

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WITH
CIVIL APPLICATION NO.198 OF 2023
IN
FIRST APPEAL NO.3517 OF 2022

1. Smt. Surayya Refik Khalifa (Shaikh)
Age: 55 Years, Occu: Nil

2. Faroza Rafik Khalifa (Ansari)
Age i 29 years, Occu.: Nil.

3. Kainaat Rafik Khalifa (Ansari)
Age t 27 years, Occu.: Nil

4. Kaamran Rafik Khalifa (Shaikh)
Age : 28 years, Occu.: Nil,

5. Imran Rafik Khalifa (Shaikh)
Age : 26 years, Occu.: Nil.

6. Hujar Rafik Khalifa (Shaikh)
Age : 20 years, Occu,: Nil.

7. Zoab Rafik Khalifa (Shaikh)
Age : 16 Years, Occu.: Nil.
(Since Minor Through for legal guardian i.e. Applicant No.1)

All r/o Kuran Road, Sangamner,
Tq. Sangamner, Dist. Ahmednagar. Applicants

Versus

1. Chief Executive Officer,
Zilla Parishad, Ahmednagar,
Ahmednagar.

2. Block Development Offrcer,
Panchayat Samiti, Akole.
Po. Tq. Akole, Dist. Ahmednagar.

3. The Chairman
Harshawardhan Patil Sahalari Motor
Vahatuk Sanstha Limited,
Tq: tndapur, District: Pune

4. Kadarkhan Kasamkhan Pathan
Age: Major, Occ: Service
Godavari Colony, Galli No. 3
Indiranagar, Tq. : Sangamner.
District: Ahmednagar. ..Respondents

...

Mr. P. V. Barde, Advocate for the Applicants.
Mr. P. R. Kothari a/ Ms. Nandini Chittal, Advocate for Respondent Nos.1 and 2.
Mr. Girish K. Naik thigle, Advocate for Respondent No.3.

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CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON : 12th JULY, 2023.
PRONOUNCED ON : 26th JULY, 2023.

JUDGMENT:-

1. The appellants/original respondent nos.1 and 2 have approached this Court under Section 30 of the Employee's Compensation Act, 1923 impugning the judgment and award dated 22.07.2022 passed in Application (W.C.) No.4/2015 by the Commissioner for Employee's Compensation and Judge, Labour Court, Ahmednagar, by which application filed by respondent nos.1 to 8 seeking compensation under Section 4 (1) (a) of Employee's Compensation Act, 1923 has been allowed. (Hereinafter the parties are referred as per their original status before commissioner)

2. Respondent nos.1 to 8 herein (original applicants) had filed an Application (W.C.) No.4/2015 before the Commissioner for Employee's Compensation at Ahmednagar with contention that deceased Rafique Khalifa was employed as driver on water tanker owned by re-

spondent no.4. Respondent nos.1 and 2 (present appellants) had contract with respondent no.3 for water supply during the summer of 2013. Respondent no.3 had hired the services of tanker owned by respondent no.4 in pursuance contract with respondent nos.1 and 2. The deceased Rafique while performing his duty as driver on said tanker died on 23.04.2013 due to cardiac arrest/ heart attack. It is the contention of applicants that the deceased was on 24 hours duty. He was required to fill the water tanker from the distance of more than 60 kilometres and distribute the same in the wadis and villages. The work of water supply was continuous causing mental and physical stress to deceased consequently, he suffered heart attack. According to the applicants, the deceased died during the course and arising out of his employment as a driver on water tanker bearing Registration No.MH-11-A-2309. The applicants/dependents of deceased, therefore, approached the Commissioner, claiming the compensation of Rs.6,39,000/- alongwith interest at the rate of 12% per annum and also 50% penalty for default to pay the compensation within statutory period.

3. Inspite service of notice, none appeared for respondent nos.3 and 4 hence the application proceeded ex-parte against them. The respondent nos.1 and 2 caused appearance and filed written statement at Exhibit-C-8. It is admitted that respondent no.3 is their contractor and they had an agreement for water supply with him. However, they contend that the liability in respect of the employees of respondent no.3 or any person employed on the vehicle engaged by him for the supply of water was exclusively on the shoulder of respondent no.3. They denied any liability towards the employees on the tanker. It is further contention of the appellants/respondents that the applicants have no legal right to claim compensation from them, since there was no employer employee relationship between deceased with them.

4. The learned Commissioner framed the issues at Exhibit-10. The applicant no.1 Suraiyya and applicant no.4 Kaamran recorded their oral evidence and evidence of CW-3 Shravan Rengde in support of their claim. The respondents relied upon evidence of Dilip Sonkusle i.e. Block Development Officer, Panchayat Samiti, Akole in support of their claim. The Commissioner for Employee's Compensation after hearing the parties allowed the application and directed respondents to jointly and severally pay the compensation of Rs.6,39,000/- to the applicants alongwith interest at the rate of 12% per annum. The respondents are further directed to pay the penalty of 50% of the compensation amount i.e Rs.3,19,600/- in terms of Section 4-A (2) (b) of the Employee's Compensation Act, 1923.

5. Mr. Kothari, learned Advocate alongwith Ms. Nandini Chittal, learned Advocate appearing for the appellants would submit that no employer-employee relationship ever existed between deceased and appellants. He would submit that a copy of an agreement has been filed on record before the Commissioner at Exhibit-C-11, which shows that there was agreement for water supply between the District Collector at Ahmednagar and respondent no.3. The appellant Zilla Parishad was not party to it. The contents of agreement would show that it has been signed by the Chairman of respondent no.3 and District Collector at Ahmednagar. Therefore, without adding District Collector as party, the application could not have been entertained. Mr. Kothari would further urge that death of the deceased Rafique is natural. There is nothing to indicate that he died on account of employment causes. He would further urge that the postmortem report do not disclose the cause of death. Mr. Kothari would further urge that the interest and penalty can be awarded against the employer on account of his default to deposit compensation amount within statutory period. Such liability cannot be fur-

ther passed on principle employer, who can be made liable to pay compensation in pursuance of Section 12(1) of the Employee's Compensation Act. He submits that interest and penalty does not fall within the meaning of 'compensation' as defined under Section 2 (1) (c) of the Employee's Compensation Act, hence principle employer cannot be saddled with penalty and interest.

6. Per contra, Mr. Barde, learned Advocate appearing for the applicants relying on contents of written statement tendered by respondent nos.1 and 2 submits that no dispute on the point of agreement between respondent nos.1 and 2 with respondent no.3 is raised. He would submit that in view of the admitted position, it is not open for respondent nos.1 and 2 to raise contrary plea. In the alternative, he submits that the contents of agreement particularly clause no.22 clearly stipulates that the work of water supply was to be executed under the supervision and control of respondent nos.1 and 2. He would further submit that the nature of job of the deceased involves continuous exertion. No fixed duty hours were assigned to him. He was found dead beneath his vehicle while on duty. The postmortem report shows enlarged heart with infraction of left ventricle, which is sufficient to indicate that death on account of heart attack in absence of any other injury. Mr. Barde would further urge that the Commissioner has recorded the finding of facts based on evidence. The Appeal under Section 30 of the Employee's Compensation Act can be entertained only on substantial questions of law. The grounds raised in appeal assails the finding of facts that sans question of law. Hence, appeal cannot be entertained. He urged to dismiss the appeal.

7. Mr. Thigle, learned Advocate appearing for respondent no.9 supports the case of the appellants.

8. Having considered the arguments advanced by the learned Advocate appearing for the respective parties and after going through the record and proceedings following questions of law were proposed for consideration and the learned Advocate appearing for the respective parties were given opportunity to advance their submissions: -

1. Whether commissioner was justified in holding that deceased Rafique died during the course of the employment with Appellants-original respondents 1 and 2, particularly when appellants were not party to water supply agreement between the District Collector, Ahmednagar and respondent no.3 who had hired services of truck driven by deceased for execution of work under contract?

2. Whether death of the deceased Rafique can be attributed to the employment causes or whether there was causal connection between death of Rafique and his employment as a driver on water tanker?

3. Whether liability of interest and penalty under Section 4-A (3) (b) of the Employee's Compensation Act, 1923 can be imposed against the Appellants- original respondent No.1&2 / principle employer, who have been held liable to pay compensation in terms of Section 12 of the Act?

9. So far as first question of law regarding employment of the deceased is concerned, it is not disputed by the respondents that the deceased was employed as a driver on water tanker that was providing services of water supply in pursuance of contract undertaken by respondent no.3. Respondent nos.1 and 2 relying upon a copy of the agreement entered between the District Collector Ahmednagar and respondent no.3 contend that respondent nos.1 and 2 were no way concerned with the work of water supply undertaken by respondent no.3. Pertinently,

the pleading in written statement submitted by the respondent No. 1 and 2 shows that they have admitted existence of contract with respondent no.3 for water supply to the different villages so also fact that the water tanker in question was engaged by respondent no.3 for execution of the said work. In view of the specific admission on record, there is no reasons to look into any other material and draw the adverse conclusion against the applicants. The Commissioner has rightly relied upon the said admission while recording the finding that respondent nos.1 and 2 were principal employer for execution of work that was allotted to respondent no.3. Pertinently, an agreement at Exhibit-C/11 is not pleaded specifically in the written statement nor that has been relied upon by the respondents. It appears that, the copy of such agreement is placed on record during the course of evidence of Block Development Officer examined on behalf of respondent nos.1 and 2. Pertinently, during the oral evidence also said witness deposed that there was agreement of respondent nos.1 and 2 with respondent no.3 for water supply. It is also significant to note here that, the original agreement is not placed on record. Even otherwise, clause Clause 21 of the said agreement stipulates that the execution of the water supply work by respondent No. 3 was under control and supervision of respondent nos.1 and 2. In that view of the matter, respondent nos.1 and 2 cannot deny their liability as a principal employer in terms of Section 12 of the Employee's Compensation Act. The contention advanced on behalf of respondent nos.1 and 2 that the District Collector, Ahmednagar ought to have been added as party or he is necessary party cannot be accepted, particularly when such objection is not raised in the written statement and same is pressed into service first time before this court. Therefore, first question of law will have to be answered in affirmative in favour of applicants.

10. Second contention raised on behalf of appellants/respondent nos.1 and 2 that the death of deceased cannot be attributed to employment causes. It is not in dispute that the deceased was driver on water tanker and his dead body was found beneath his vehicle. The copy of panchanama is placed on record in support of such contention. The Commissioner on appreciation of the evidence on record concluded that the deceased Rafique died on account of employment cause. The deceased was discharging his duty as driver on water tanker. The CW-3 Shravan Rengde a witness examined on behalf of the applicants deposed that the deceased was required to fetch water from the distance of 60 kilometres and distribute the same in the villages and wadis. It was continuous job involving physical and mental stress. Even the witness of respondents Dilip Sonkusle, Block Development Officer specifically admitted in the cross-examination that during the summer season the services of water supply goes on for 24 hours. He admits that the water supply was required to be made within the 60 kilometre radius at wadies and villages. All these circumstances are sufficient to conclude that the work of deceased was involving physical and mental stress. Although, learned Advocate appearing for the appellants/original respondent nos.1 and 2 submits that the cause of death is not proved for want of opinion in post-mortem report, the circumstances figured on record including Accident Death report, inquest panchanama and contents of postmortem report depicting condition of heart of deceased, establish that probable cause of death was heart attack. The finding of the fact arrived at by the Commissioner on this aspect cannot be disturbed in absence of contra evidence. The respondents did not make any attempt to bring on record report showing some different cause of death or viscera report with contra finding that will dislodge contention of the applicants.

11. Mr. Kothari, learned Advocate relies upon the observations of the Hon'ble Supreme Court of India in the matter of ***Shakuntala Chandrakant Shreshti Vs. Prabhakar Maruti Garvali & Anr*** reported in ***(2007) 11 SCC 668*** to contend that only because the cause of death was due to heart attack, the same by itself may not be a ground to arrive at a conclusion that an accident had occurred resulting in employment injury. However, such observations are to be viewed in the backdrop of the factual matrix of the matter. In that case, the deceased was employed as helper. The Court observed that such employment *per se* would not be such that could cause stress and strain. In the present case, there is ample material to establish the nature of job that was undertaken by the deceased being the driver of water supply tanker. Pertinently, Supreme Court of India in the subsequent judgment in the case of ***Mst. Param Pal Singh Vs. M/s National Insurance Co.*** while dealing with the case of the death of a driver on account of heart failure observed thus:

> *"27. Applying the various principles laid down in the above decisions to the facts of this case, we can validly conclude that there was CAUSAL CONNECTION to the death of the deceased with that of his employment as a truck driver. We cannot lose sight of the fact that a 45 years old driver meets with his unexpected death, may be due to heart failure while driving the vehicle from Delhi to a distant place called Nimiaghat near Jharkhand which is about 1152 kms. away from Delhi, would have definitely undergone grave strain and stress due to such long distance driving. The deceased being a professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such constant driving of heavy vehicle, being dependant solely upon his physical and mental resources & endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his life span. Such an 'untoward mishap' can therefore be reasonably described as an 'accident' as having been caused solely attributable to the nature of employment indulged in with his employer which was in the course of such employer's trade or business.*

28. Having regard to the evidence placed on record there was no scope to hold that the deceased was simply travelling in the vehicle and that there was no obligation for him to undertake the work of driving. On the other hand, the evidence as stood established proved the fact that the deceased was actually driving the truck and that in the course of such driving activity as he felt uncomfortable he safely parked the vehicle on the side of the road near a hotel soon whereafter he breathed his last. In such circumstances, we are convinced that the conclusion of the Commissioner of Workmen's Compensation that the death of the deceased was in an accident arising out of and in the course of his employment with the second respondent was perfectly justified and the conclusion to the contrary reached by the learned Judge of the High Court in the order impugned in this appeal deserves to be set aside. The appeal stands allowed. The order impugned is set aside. The order of the Commissioner for Workmen's Compensation shall stand restored and there shall be no order as to costs."

12. Similarly, in the case of ***Daya Kishan Joshi & Anr. Vs. Dynemech Systems Pvt. Ltd.*** observed in paragraph no.20 as under:-

"20. From the aforementioned, it is clear that the presence of the deceased on the road in question was incidental to his employment as a sales engineer. As he had to go to the Hero Honda Factory to conduct a filter test, he was merely doing what was required of him as an employee. Thus, his accidental death on the way back after completing his work falls squarely within Section 3(1) of the Act."

13. Further this Court in recent judgment in the matter of ***Harvinder Kaur Vishakha Singh and Others Vs. Tarvinder Singh K. Singh and Others*** reported in ***2022 (2) AIR Bom R 187*** while dealing with the case of death of spare driver, after considering the law on the subject, concluded that the 'death by heart attack is an accident' is now well established by series of judicial pronouncement from time to time. If the workman dies of heart attack, there was a pre-existing heart condition which was aggravated by the strain of work of the deceased while performing his duties which resulted in his death and as such there is a causal connection between the injury and the ac-

cident. It has been construed in wider sense as a mishap external or internal not expected or designed by the victim. The accident in the instant case was failure of heart.

14. This Court placed reliance on the observations made in the case of ***Subhadrabai Suraywanshi & Ors Vs. Maharashtra State Road Transport Corporation*** reported in ***2003 (11) LJSOFT 83***. Keeping in mind the aforesaid exposition of law with factual aspect emerged in the present case, there is no difficulty to conclude that the death of the deceased was attributable to the employment causes. Hence, second question of law will have to be answered in affirmative.

15. The third and last contention raised on behalf of the appellants is regarding the liability of principal employer in terms of Section 12 of the Employee's Compensations Act, particularly in respect of penalty and interest under Section 4 (A) (3) (b). The Section 2 (1) (c) of the Employee's Compensation Act defines 'Compensation'. That would mean the compensation payable under Section 3 that can be awarded under Section 4 of the Employee's Compensation Act. The liability under Section 12 can be fastened against the principal employer to the extent of compensation. However, the interest and penalty can be awarded only towards the default of employer to deposit compensation amount in terms of statutory requirements within specified period. Such, default would attract the penalty upto 50% of the compensation amount so also interest at the rate of 12% per annum.

16. Mr. Kothari, learned Advocate appearing for the appellants draw the attention of this Court to the observations of this court in case of ***Sarjerao Unkar Jadhav Vs. Gurindar Singh and Ors.*** reported in ***1990 Mh. L. J. 790***, particularly paragraph no.11 to contend that the statute has recognized three components independently i.e. compensa-

tion, interest and penalty. The fundamental liability of employer is to deposit compensation within one month from the date when it becomes due. Add-on liability to pay interest and penalty are the consequences of default or failure of discharge of the fundamental liability. It is, therefore, clear that for failure to comply with statutory obligation on the part of the employer he can be saddled with additional liability to pay interest and penalty, however the principal employer, who is made liable to pay compensation by extended arm under Section 12 of the Employee's Compensation Act cannot be mulcted with the liability to pay the interest and penalty. Such liability would remain on employer only for his default. In that view of the matter, the third question of law will have to be regarded as substantial one and will have to be answered in negative. The order of commissioner to the extent of imposing penalty and interest of appellant deserves to be quashed and set aside.

17. The result of the aforesaid discussion leads this Court to partly allow the appeal as under: -

ORDER

A. Appeal is partly allowed.

B. The impugned judgment and order dated 22.07.2022 passed in Application (W.C.) No.4/2015 by the Commissioner for Employee's Compensation and Judge, Labour Court, Ahmednagar is modified as under: -

1. The applicants (respondent nos.1 to 8 herein) are held entitled for compensation amount to the tune of Rs.6,39,000/- (Rs. Six Lakhs Thirty Nine Thousand Only) under Section 4 (1) (a) of the Employee's Compensation Act, 1923 jointly and severally from original respondent nos.1 to 4.

2. Respondent nos.3 and 4 shall be liable to pay the interest at the rate of 12% per annum on the compensation amount to the applicants from 23.04.2013 till realization along with penalty at the rate of 50% of the compensation amount.

3 The principle compensation amount deposited by the appellants shall be released to respondent nos.1 to 8 in terms of this order along with accrued interest.

4. The balance of the amount, if any, may be refunded to the appellant/original respondent No. 1&2.

18. All pending civil applications are disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

19. At this stage, Mr. Kothari, learned Advocate appearing for the appellants requests that the operation of the order be stayed for a further period of eight weeks.

20. For the reasons stated in the order and the fact that the original applicants are awaiting for compensation from eight years, such request cannot be accepted. Hence, the prayer for stay of this order is rejected.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/July-2023