

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 349/2011**

% **23rd April, 2014**
DAYA KISHAN JOSHI &ORS. Appellants
Through: **Ms. Pratima N. Chauhan, Adv.**

VERSUS

DYNEMECH SYSTEMS PVT. LTD. Respondent
Through: **Ms. Amita Gupta, Adv.**

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. On 21.2.2014, after hearing counsel for the parties, the following order was passed:-

“1. Counsel for the parties would take instructions if without prejudice to the respective rights and contentions, the appellants/applicants can receive a further sum of Rs.1,50,000/- in full and final satisfaction of their claims with respect to the subject dispute under the Employees' Compensation Act, 1923. The aforesaid amount of Rs.1,50,000/- will be in addition to a sum of Rs. 1 lac which the appellants have received from the respondent company on account of the insurance claim.

2. List on 23rd April, 2014. In case, the compromise is acceptable, the amount be brought to Court on the next date of hearing.”

2. This order was passed because as per the evidence of Sh. Vikas

Sharma the co-worker of the deceased employee Sh. Ravi Shekhar Joshi, it

was found that the accident in question cannot be stated to have arisen out of and in the course of employment because the deceased Ravi Shekhar Joshi as also Vikas Sharma were both going home after completion of work. Such an accident cannot be an accident arising out of and in the course of employment in view of the judgment of the Supreme Court in the case of *Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja & Ors., AIR 1958 SC 881*.

3. Today, counsel for the appellant states that she has instructions to argue the matter because compromise is not acceptable. Appellant no.1 who is present in person also states that he has given such instructions to his advocate. I have therefore heard the counsel for the appellant on merits.

4. This first appeal is filed under Section 30 of the Employee's Compensation Act, 1923 (in short 'E.C.Act') by the dependants of the deceased employee Ravi Shekhar Joshi, and who died in a road accident on 8.9.2007. The Commissioner by the impugned judgment has dismissed the claim petition on the ground that the accident cannot be said to have arisen out of and in the course of employment.

5. As per Section 3(1) of the E. C. Act an employee is liable to pay compensation if injury is caused to an employee by an accident arising out of and in the course of employment. The meaning of expression 'arising

out of and in the course of employment' so far as an accident happening to an employee while he is commuting to and fro from the place of work is concerned, has been decided by the Supreme Court in the case of *Saurashtra Salt Manufacturing(supra*. It has been held in this judgment that when an employee is commuting to and fro from the place of work and there is an accident, such an accident cannot be said to have arisen out of and in the course of employment. The relevant paras of this judgment read as under:-

“7. As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. It is now well-settled, however, that this is subject to the theory of notional extension of the employer's premises so as to include an area which the workman passes and repasses in going to and in leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension.

8. It is unnecessary for the purposes of this appeal to refer to the various decisions in England and in India explaining the aforesaid theory because even if on such a basis a workman may be regarded as being in the course of his employment at point B either while on his way to the salt works or returning from it, the question for our decision is whether he was still in the course of his employment when

he was on his journey between points A and B of the map., Ext- 35. While the case was in the High Court attention of the learned judges was drawn to the failure of the Commissioner for Workmen's Compensation to examine witnesses to prove an alleged arrangement between the appellant and the Kharvas (ferry-walas) for the carrying of the workmen of the appellant by boat across the creek to enable them to be ferried to and from the salt works. The learned Judges of the High Court at first were inclined to order a remand for the recording of this evidence, but, having regard to the view which they took of the recent decisions of the House of Lords in England, they thought it unnecessary to have such evidence recorded. In their opinion, on the material as already on the record, it must be held that the accident arose out of and in the course of the employment of the deceased workmen. In this Court, as already stated, we considered it necessary to have evidence taken in this connection and findings recorded thereon. The findings, on the evidence so recorded, is quite clear that there was no arrangement between the appellant and the Kharvas to ferry to and from the salt works, across the creek, any workman of the appellant. According to the evidence, workmen of the salt works are charged by the Kharvas when they cross the creek in their boats. The only concession made by them on their own account is not to make such a charge in the case of any person who is a Kharva - a fellow caste man. It is also clear from the evidence on the record, both before and after remand, that the boats ferried across the creek are used by the public, every one of whom has to pay the charge for being ferried across the creek with the exception of a person of the Kharva caste. To reach point A on the map a workman has to proceed in the town of Porbander via a public road. A workman then uses at point A a boat, which is also used by the public, for which he has to pay the boatman's dues, to go to point B. From point B to the salt works there is an open sandy area 450 to 500 feet long and 200 to 250 feet wide. This sandy area is also open to the public. From this sandy area there is a footpath going to the salt jetty, point C and a foot-track going to the salt works, point D. There is no question that the foot-

track going to the salt works is a public way. The footpath from the sandy area to the salt jetty, point C, may or may not be used by the public. For the purpose of this case it may be assumed that a workman must necessarily use that footpath if he has to go to the salt jetty and from there to the various salt pans and salt reservoirs within the area of the salt works. It is well settled that when a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. A workman is not in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him. In the present case, even if it be assumed that the theory of notional extension extends upto point D, the theory cannot be extended beyond it. The moment a workman left point B in a boat or left point A but had not yet reached point B, he could not be said to be in the course of his employment and any accident happening to him on the journey between these two points could not be said to have arisen out of and in the course of his employment. Both the Commissioner for Workmen's Compensation and the High Court were in error in supposing that the deceased workmen in this case were still in the course of their employment when they were crossing the creek between points A and B. The accident which took place when the boat was almost at point A resulting in the death of so many workmen was unfortunate, but for that accident the appellant cannot be made liable.” (underlining added)

6. In the present case, as per the facts which have come on record, the deceased employee as per the instructions of the employer/respondent no.1 had gone to the factory of Hero Honda in Dharu Heda, Gurgaon in

Haryana and after completion of the work was going back to his house. This aspect is proved by the following statement of the co-worker Vikas Sharma which is given to the police and which statement has been filed and proved before the Commissioner.

“(Translated Copy)”

Statement-I, Vikas Sharma S/o Sh. Bal Kishan Sharma, Caste Brahman, R/o H. No. 248, Shahbad Daulatpur, Delhi – 42.

It is stated that I am residing at the above stated address and I am employed in M/S Dynemech Systems Pvt. Ltd, Rohini, Prashant Vihar, Delhi – 85 and my another colleague Sh. Ravi Joshi S/o Sh. D.K. Joshi, R/o H. No. JG-3/181 C, Vikas Puri, New Delhi is also employed as engineer. We, both are working as ‘Sales Executive’. We, both were deputed for a filter test in Hero Honda which was filled on 07-09-07. To conduct its checking today morning we went on our respective motor cycles & we met near Hero Honda at about 1:30 p.m. and both checked the filter which was installed on 07-09-07 **and we started for Delhi for houses** on our motor cycles at about 4:30 p.m. As we came out of gate of Hero Honda and we had covered a short distance for Delhi a breaker was confronted and **speed was slightly faster** we both fell down and Ravi Joshi who was ahead of me just crossed the breaker & fell down at a distance and I was following him and **speed being faster** my bike was hit by a truck parked there and my colleague also fell down and he sustained grievous injuries. We were put in Hero Honda Company’s vehicle & were taken to Raman Munja Memorial Hospital. My colleague, Ravi Shanker Joshi was dead. No body is to be blamed for this & **it happened due to slightly faster speed &** instant emergence of a speed breaker in the road. I could not see the number of parked truck.

7. Two aspects become clear from the aforesaid statement. First is that the employee Ravi Shekhar Joshi alongwith co-worker Sh. Vikas Sharma, who is an eye witness after completing their work were going back

to their houses. The second aspect is that the accident took place because speed was high and suddenly, in front of the motor cycle of the deceased there came a speed breaker.

8. So far as the second aspect is concerned, though counsel for the respondent no.1 sought to argue before this Court that as per Section 3(1)(b)(ii) and (iii) of the E.C.Act, the respondent no.1 is not liable because by high speed the motor vehicles rules are violated, however, counsel for the appellant contends that besides no such specific defence having been raised before the Commissioner, the provision relied upon by the respondent no.1 cannot apply in case death results from the accident. Counsel for the appellant in this regard placed reliance upon the language of Section 3(1)(b) of the E.C.Act to argue that in case where the injury does not result in the death only, then the violation of rules by an employee becomes relevant.

9. I need not dilate on this aspect with respect to interpretation of Section 3(1)(b) as is argued before me on behalf of counsel for the appellant because I am of the opinion that the respondent no.1 cannot argue this point for the first time in appeal before this Court because no such specific defence was raised before the Commissioner and no such issue was framed. This argument urged is a factual defence and if a factual defence has to be argued, it must be specifically pleaded so that it is brought to the notice of

the other side who can lead appropriate evidence. In this case, since no pleading was made before the Commissioner on behalf of respondent no.1, consequently no issue in this regard was framed with respect to the non-liability of the respondent no.1/employer by virtue of Section 3(1)(b)(ii) and (iii), I hence refuse to allow the respondent no.1 to raise this issue for the first time in this first appeal.

10. So far as the first aspect is concerned, I agree with the conclusion of the Commissioner because of the ratio of the judgment of the Supreme Court in the case of *Saurashtra Salt Manufacturing (supra)* and which clearly lays down that when an employee is travelling back from the place of work to his home or travelling from his home to the place of work, if an accident takes place at such time of travel, such an accident cannot be said to have arisen out of and in the course of employment.

11. I may note that though the respondent no.1 had pleaded before the Commissioner that the deceased employee Ravi Shekhar Joshi was on leave on the subject date, however, I do not agree with this argument because respondent no.1 ought to have filed the attendance register or other documents to show that the deceased employee was on leave on the date of the accident i.e 8.9.2007, but since the respondent no.1 failed to do so, I do not find that any substantial question of law arises under Section 30 of the

E.C.Act for this Court to hold that the deceased employee was on leave and not on duty as is the case of the appellants.

12. Learned counsel for the appellant placed reliance upon the judgment of the Supreme Court in the case of ***Machinnon Mackenzie & Co. Pvt. Ltd. Vs. Ibrahim Mahmmod Issak 1969 A.C.J. 422*** to argue that if an employee because of the scope of his duties is on the road or outside the area of work, then such an accident arises out of and in the course of employment. To this argument, all that is required to be observed is that no doubt when a person is outside the work premises of the employer, and doing the work of his employer, when while doing the work of the employer an accident takes place, that accident will arise out of and in the course of employment, but, the facts of the present case show that the deceased employee had completed his work and was going back home i.e accident took place when the deceased was not doing any work of the employer. Accordingly, the judgment in the case of ***Machinnon Mackenzie*** (supra) relied upon by the appellant will have no application in the facts of the present case.

13. In view of the above, the findings and conclusions of the Commissioner are upheld that the death of the deceased did not take place from an accident arising out of and in the course of employment. No

substantial question of law therefore arises in view of the categorical ratio of the judgment of the Supreme Court in the case of *Saurashtra Salt Manufacturing (supra)*.

14. In view of the above, the appeal is dismissed, leaving the parties to bear their own costs.

APRIL 23, 2014
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VALMIKI J. MEHTA, J.