

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

MISC. APPEAL NO. 113 OF 2005

1. Kapil Tiwari, S/o Late Shri Ramkawal Tiwari, aged about 28 years, Premnagar, Sikolabhata, Durg.
2. Raju Tiwari, S/o Late Shri Ramkawal Tiwari, aged about 25 years, Premnagar, Sikolabhata, Durg.

... Appellants

Versus

Smt. R.K. Agrawal and Sons Railway Catering Contractor, Railway Station, Durg, Resident at: Hanuman Mandir Road, Deepak Nagar, Durg.

... Respondent

For Appellants	:	Mr. Shikhar Bhakhtiyar, Advocate, under instructions of Mr. B.P. Singh, Advocate.
For Respondent	:	Mr. N.K. Vyas, Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

24/08/2017

1. The present is an appeal under Section 30 of the Workmen's Compensation Act. Under challenge is the judgment dated 6.3.2003 passed by the Commissioner for Workmen's Compensation-cum-Labour Court, Durg (in short, 'the Commissioner'), in Case No. 28/98/W.C.Act/Fatal.
2. The question of law involved for adjudication in the instant appeal is, whether the Commissioner was justified in rejecting the claim application having allowed the same in the first round and subsequently disallowing the same in the second round on the ground of there being want of sufficient evidence to establish the employment?
3. The other question of law also germane for disposal of the appeal is, whether the deceased Ramkawal Tiwari would fall within the definition of workman under the provisions of the Workmen's Compensation Act so as to bring him within the purview of the said Act and his legal representatives would be entitled for compensation?

4. Relevant facts at this juncture are that on 15.5.1997 the deceased Ramkawal Tiwari who is said to be working as a vendor at the Railway Station, Durg, under the Respondent, met with a train accident resulting in his death. The Appellants-Claimants, who are the two sons of the deceased Ramkawal Tiwari, filed a claim application before the Commissioner where the case was registered as Case No. 28/98/W.C.Act/Fatal. Initially, the Respondent did not enter appearance before the Commissioner though served and the Commissioner proceeded *ex parte* and an *ex parte* award was passed on 10.8.2001 awarding a compensation of Rs. 1,78,490/- payable to the Claimants.

5. Subsequently, the Respondent moved an application under Order IX Rule 13 of the Code of Civil Procedure and got the *ex parte* award set aside and the matter was put for fresh adjudication of the case. The Commissioner now vide the impugned judgment dated 6.3.2003 dismissed the claim application. While rejecting the claim application, the Commissioner reached to the conclusion that the Claimants have proved the employment, as the onus is casted upon the claimant to prove the employment first and it would not be the responsibility of the Respondent to prove the employer-employee relationship. In addition, the Commissioner also held that the Claimants were not in fact directly dependant upon the deceased.

6. It is this judgment which is under challenge in the instant appeal.

7. The ground of challenge to the impugned award is that the finding of the Commissioner is perverse to the extent that in the first round when an *ex parte* award was passed, the Commissioner had reached to the conclusion that the accident occurred arising out of and in the course of employment and had awarded a compensation of an amount of Rs.1,78,490/- to the Claimants. It was further contended that the

Commissioner also has failed to take into consideration the evidence of the witnesses recorded while the matter was decided in the first round when the *ex parte* award was passed. He further submits that the Commissioner has not properly appreciated the evidence which have been adduced by which it clearly establishes the accident to have occurred while the deceased Ramkawal Tiwari was working as a vendor as the accident arose while after selling the products of the Respondent inside the train when he was alighting the train he met with an accident resulting in his death. Thus, the finding of the Commissioner is erroneous and perverse.

8. Counsel for the Appellants refers to the judgment of a Division Bench of the Madhya Pradesh High Court in *Mangala Ben v. Dilip Motwani & Another*, 2000 ACJ 1388, wherein it was held that in a case under the Workmen's Compensation Act the onus is always upon the employer to establish the fact that the deceased person would come in the exclusion category of the definition of workman and the said responsibility is not casted upon the claimants. Thus, for all the reasons stated above, Counsel for the Appellants prayed for setting aside the impugned award and for grant of appropriate compensation to the Claimants.

9. Per contra, learned Counsel for the Respondent opposing the appeal submits that it is a case where the Commissioner has entertained their application under Order IX Rule 13 of the Code of Civil Procedure and has set aside the earlier *ex parte* award which by implication wipes out the entire findings in the said *ex parte* award and has now decided the claim afresh on the basis of the evidence which have been brought before it. Thus it cannot be said that the finding of the Commissioner is either perverse or contrary to the evidence which have come on record. It was further contended by the Counsel for the Respondent that the nature of employment of the deceased itself would establish the fact that he was not

a paid employee of the Respondent but was a vendor at the Railway Station, Durg, who was receiving the money from the Respondent as commission commensurate to the quantity of sale made. Thus he would not fall within the definition of a workman under the provisions of the Workmen's Compensation Act. It was also the contention of the Counsel for the Respondent that the finding of the Commissioner also to the extent of whether the Claimants before the Commissioner were in fact dependants of the deceased or not, has not been substantively proved or established for which also the finding of the Commissioner does not warrant any interference. He thus prayed for the rejection of the appeal.

10. Having heard the rival contentions put forth on either side and on perusal of the record, what is reflected is the fact that there is a document Exhibit A-4, which is a register maintained in respect of each of the vendors, where the quantity of sale is entered and subsequently it also reflects that the weekly payment paid to each of the vendors commensurate to the sale made. Further, there is also evidence of one Daya Shankar Tiwari who was examined earlier when the *ex parte* award was passed and subsequently also. The said Daya Shankar Tiwari is a person who had travelled on the train when the accident occurred and who while alighting from the train at Durg station saw the deceased having met with an accident and it was he who had taken the deceased to the hospital. Furthermore, there is also evidence of a Constable in the GRP, namely, Krishnalal, who, in his deposition, has accepted the fact regarding the accident which occurred at the platform of the Railway Station, Durg, a report was also lodged at the local police station i.e. Mohan Nagar Police Station at District Durg.

11. What also cannot be lost sight of is the evidence which were recorded when the *ex parte* award was passed. From the record it appears

that there were more than couple of witnesses examined who were co-vendors working in the Railway Station and who have deposed before the Court of the deceased also being a vendor working under the Respondent and that those persons also were performing similar nature of duties for a past couple of years during which they were knowing the deceased.

12. All the above facts put together would clearly establish that the deceased Ramkawal Tiwari was a person working under the Respondent. Even if his status is considered to be that of a vendor, directly or indirectly, he was working only for the Respondent, as the vendors were supposed to sale only the products which were prepared in the canteen and stalls owned exclusively by the Respondent and the vendors were not permitted to sale products prepared from any other stall or canteen. This would clearly establish the nature of employment or the nature of work being performed by the vendors. In addition, the view of the Commissioner stands negated in the light of the judgment of Division Bench of the Madhya Pradesh relied upon by the Appellants, i.e. Mangla Ben case (supra).

13. Thus, from the evidence which have come on record, there is sufficient material to show the employment part of the deceased under the Respondent. This is sufficient to decide that there was an employer-employee relationship between the Respondent and the deceased Ramkawal Tiwari and the issue in this regard is answered in favour of the Claimants.

14. So far as the dependency of the Appellants-Claimants is concerned, the statement of the Claimants sufficiently show that they were dependants of the deceased as admittedly they are the sons of the deceased and that there being no material which has been adduced by the Respondent to show that they were not the dependants of the deceased. In view of the

same, the issue in this regard decided by the Commissioner also deserves to be and is set aside and the same is decided in favour of the Claimants.

15. Now coming to the question of compensation part which the Claimants would be entitled for, this Court is accepting the calculation which was initially made by the Commissioner while quantifying the compensation fixing the compensation payable to the Claimants at Rs. 1,78,490/-. It is thus ordered that the Claimants shall be entitled for an amount of Rs.1,78,490/- as compensation accepting the calculation as was made by the Commissioner while passing the *ex parte* award on 10.8.2001. Considering the fact that this order is now being passed in the year 2017 and the accident in the instant case being of the year 1997, this Court is inclined to grant interest on the compensation awarded at the current rate of interest and quantifies it 6% per annum which shall be payable from the date of presentation of the claim application till the amount of compensation awarded is finally deposited.

16. The appeal stands allowed accordingly.

Sd/-
(P. Sam Koshy)
Judge