

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

4 FIRST APPEAL NO. 780 OF 2017

THE STATE OF MAHARASHTRA AND ANOTHER
VERSUS
BAPURAO REVAN KSHIRSAGAR (DIED) THROUGH L.Rs.
PRABHAVATI BAPURAO KSHIRSAGAR AND ANOTHER

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AGP for Appellants : Mr. S. S. Dande.

Advocate for Respondent No.1 : Mr. Ramesh V. Naiknaware.

Advocate for Respondent No.2 : Mr. M. A. Thorbole.

...

CORAM : **V. K. JADHAV, J.**

DATE : 03rd July, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and order passed by the Commissioner for Employees Compensation and C.J.S.D., Osmanabad dated 21st September, 2014 in WCA No.36 of 2009, original Respondent Nos.1 and 2 preferred this appeal.

3 During the pendency of claim petition, the original Claimant deceased Bapurao died and as such, his legal heirs substituted him and prosecuted the claim petition further.

4 Brief facts giving rise to the present appeal are as follows:

- i) Deceased Bapurao was working as a porter in the Government Godown, Osmanabad. The Government has given the contract of loading and unloading the grains and to arrange the grains in the godown to Respondent No.3 Bajrang Karande. On 12th September, 2007, deceased Bapurao was unloading the gunny bags of grains from a truck owned by Respondent No.3 Bajrang which was kept stationary in the courtyard of the Government godown for that purpose and deceased Bapurao was to arrange the bags in the Government godown. However, the said gunny bags so arranged in the godown had fallen on the person of deceased Bapurao. In consequence of which, he sustained the injuries on spinal cord and other parts of the body. He was immediately shifted to Civil Hospital at Osmanabad and treated there as indoor patient till 7th October, 2007 and thereafter, in Sushrut Hospital, Osmanabad till 25th October, 2007. Deceased Bapurao had incurred huge medical expenses for his treatment. Thus, he had

approached the Commissioner for Workmens' Compensation by filing WCA No.36 of 2009 against the present Appellants and original Respondent No.3 Bajrang for grant of compensation. It has been contended in the said petition that deceased Bapurao was employed by Respondent No.3 Bajrang as a porter "Hamal" in the Government godown and Respondent No.3 Bajrang entered into a contract with Appellant Nos.1 and 2 to load and unload the goods in the said Government godown during the period of 2005 to 2008. Deceased Bapurao met with an incidental death out of and during the course of his employment. Thus, the Respondents including the present Appellant are jointly and severally liable to pay the compensation.

- ii) Appellants / original Respondent Nos.1 and 2 have not filed any written statement and therefore, hearing of the claim petition ordered to proceed without their written statement. So far as original Respondent No.3 Bajrang is concerned, even

though he was duly served, he did not appear before the Commissioner and as such, hearing of the claim petition ordered to proceed *ex-parte* against him.

- iii) The Claimants have adduced oral and documentary evidence in support of their contentions. Appellants / original Respondent Nos.1 and 2 have not adduced any evidence.
- iv) The Commissioner for Employees Compensation and C.J.S.D., Osmanabad, by the impugned judgment and order dated 21st September, 2014 partly allowed the petition with proportionate costs against the Appellants and directed the Appellants / original Respondent Nos.1 and 2 to pay Rs.2,39,700/- plus penalty of Rs.1,19,850/- = Rs.3,59,550/- alongwith 12% interest with effect from 12th September, 2007 till realization of the entire amount. The Commissioner has exonerated original Respondent No.3 Bajrang from the liability to pay the compensation.

- v) Being aggrieved by the same, the Appellants / original Respondent Nos.1 and 2 preferred this appeal.

5 The learned AGP submits that deceased Bapurao was not employed by the Appellants and admittedly deceased Bapurao was the employee of original Respondent No.3 Bajrang. Though deceased Bapurao was working as a porter in the Government Godown, Osmanabad, the Appellants are not liable to pay any compensation under the provisions of Workmen Compensation Act, 1923. The learned AGP in the alternate submits that even if it is assumed that deceased Bapurao was the employee of original Respondent No.3 Bajrang and said Respondent No.3 Bajrang entered into a contract with the Appellants for loading and unloading the goods in the Government godown, the Appellants / original Respondent Nos.1 and 2 may be liable to pay the compensation in view of the provisions of Section 12 of the Act of 1923 being the principal employer and in view of the provisions of sub-Section (2) of Section 12 of the Act of 1923, the principal employer is entitled to be indemnified by the contractor. The learned AGP submits that the Commissioner has erroneously exonerated original Respondent No.3 Bajrang from the liability to pay

the compensation. The learned AGP submits that so far as penalty is concerned, the principal employer is not at all liable to pay the penalty and it is entirely the responsibility of the contractor to pay the penalty. The learned AGP submits that the learned Commissioner has not framed the issues regarding the liability of the Appellants as principal employer and fastened the liability on the Appellants / original Respondent Nos.1 and 2 entirely exonerating original Respondent No.3 Bajrang from the liability to pay the compensation.

6 The learned counsel for Respondent / original Claimants submits that deceased Bapurao though employed by original Respondent No.3 Bajrang, he was working in the Government Godown, Osmanabad under the directions of the Appellants herein. He was discharging his duties as directed to him by the Appellants. Respondents / original Claimants have also examined two porters working in the Government godown and they have supported the case of the Claimants. Furthermore, there are certain documents placed before the Commissioner, which demonstrate that original Respondent No.3 Bajrang had entered into a contract with Appellants herein for loading and unloading the goods in the said Government godown for a period of 2005 to 2008 and as such, in terms of the provisions of Section 12 of the Act of 1923, the Appellants herein are the principal

employer whereas original Respondent No.3 Bajrang is the contractor. Thus, all the Respondents are jointly and severally liable to pay the compensation. The learned counsel submits that in terms of the provisions of Section 4-A of the Act of 1923, all the Respondents including the present Appellants have not accepted their liability to pay the compensation and they are in default in paying the compensation due under the Act and as such, all of them are liable to pay the penalty as directed by the Commissioner. The learned counsel submits that deceased Bapurao met with an accidental death in the year 2007 and till this date, the Respondents / original Claimants have not received any compensation amount. The learned counsel submits that the Appellants have not disputed before the Commissioner about their status as principal employer and on the other hand, the communications sent to the Commissioner by the Appellants unmistakably point out that original Respondent No.3 Bajrang entered into a contract with the Appellants for loading and unloading the goods in the Government godown. The learned counsel submits that no purpose would be served by remanding the matter and further directing the Commissioner to frame the issues and record the finding.

7 The learned counsel for original Respondent No.3 Bajrang submits that deceased Bapurao was the employee of Appellants /

original Respondent Nos.1 and 2 and his monthly wages were being paid by the Appellants. The learned counsel submits that original Respondent No.3 Bajrang is not at all liable to pay the compensation. The Commissioner has therefore, rightly exonerated original Respondent No.3 Bajrang from the liability to pay the compensation. No interference is required.

8 On perusal of the pleadings, evidence and the impugned judgment and award passed by the Commissioner, it appears that deceased Bapurao who was alive at the time of filing of the claim petition, approached to the Commissioner under the Workmen's Compensation Act with a specific pleading that he was employed by original Respondent No.3 Bajrang as a porter "Hamal" in the Government godown and he was doing that work under the instructions and directions of the Appellants as well as original Respondent No.3 Bajrang. The Appellants and original Respondent No.3 Bajrang have not contested the claim petition by filing the written statement. On the other hand, in response to the order passed by the Commissioner directing the Appellants to produce on record the documents showing the status of deceased Bapurao and original Respondent No.3 Bapurao in respect of the loading and unloading work in the Government Godown, the Appellants herein have

produced before the Commissioner the tender submitted by original Respondent No.3 Bajrang Exhibit 43 and further Exhibit 44 is the allotment of the work to original Respondent No.3 Bajrang for loading and unloading work in the Government godown from 1st July, 2005 to 31st May, 2008. It is thus, clear that the Appellants have not disputed their status as the principal employer and further the employer-employee relationship between original Respondent No.3 Bajrang and deceased Bapurao. In view of this matter, no purpose would be served by remanding the matter on this point. It is clear that Respondent No.3 Bajrang was allotted the work for certain period in connection with loading and unloading work in the Government Godown, Osmanabad and out of and during the course of employment of original Respondent No.3 Bajrang, deceased Bapurao met with an accidental death. Thus, in terms of the provisions of Section 12 of the Act of 1923, the Appellants / original Respondent Nos.1 and 2 are liable to pay the compensation as a principal employer.

9 The learned AGP has vehemently submitted that in terms of the provisions of Section 12 of the Act of 1923, the principal employer is liable to pay the compensation in respect of any work, which is ordinarily part of the trade or business of the principal employer. The learned AGP submits that in the instant case, the

Appellants being State is not carrying out any trade or business in connection with loading and unloading activities in the Government godown. I do not find any substance in the submissions made on behalf of the Appellants by the learned AGP for the reason that in a welfare state any activity by the State for the welfare of the people even though cannot be termed as a trade, it will come within the definition of "business". The Appellants / State is supplying the food grains to the people, who are below the poverty line on subsidized rates through the fair price shops and as such, this activity comes within the term "business".

10 In terms of the provisions of Section 12 of the Act of 1923, when the principal employer is made liable to pay the compensation, the question that arose whether the principal employer is also liable to pay the penalty as directed by the Commissioner? Section 12 of the Act of 1923 is reproduced hereinbelow:

"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 a 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.”

11 As per the provisions of Section 12 sub-Section (1), the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him, is sufficient to say that the principal employer is also liable to pay the penalty.

 However, it further appears that the learned Commissioner has not followed the provisions of sub-Section (2) of Section 12 of the Act of 1923. Even though the Commissioner has referred the said communications sent by the Appellants Exhibits 43 and 44 respectively, exonerated original Respondent No.3 Bajrang for no reason. On the other hand, in terms of the provisions of sub-Section (2) of Section 12 of the Act of 1923, the principal employer is entitled to be indemnified by the contractor. In the instant case, though the Commissioner held that the Appellants are liable to pay the compensation, the Commissioner should have directed that the Appellants being principal employer shall be entitled to be indemnified

by the contractor.

12 So far as the question of penalty is concerned, it appears that the Commissioner has not followed the procedure in terms of the ratio laid down by the Supreme Court in the case of **Ved Prakash Garg Vs. Premi Devi and others**, reported in, **(1997) 8 SCC 1**, a show cause notice is required to be issued to the employer calling upon him to furnish the explanation for the delay caused in making the payment of arrears. Upon receipt of the explanation from the employer, if the Commissioner is not satisfied then the penalty to the extent of maximum 50 per cent of the amount of compensation determined is required to be paid by the employer. It is thus, clear that after issuing notice to the employer and after giving opportunity of being heard to the employer in the matter, the Commissioner may pass an appropriate order in respect of the penalty. In absence of any such notice issued to the Appellants and original Respondent No.3 Bajrang, the order of penalty would not stand and the same is liable to be quashed and set aside with further directions to the Commissioner to issue notice and further follow the procedure as mandated by the Supreme Court in the case of *Ved Prakash Garg Vs. Premi Devi and others* (supra).

13 So far as the principal amount is concerned, in the given set of admitted facts, the Appellants being principal employer is liable to pay the compensation alongwith interest as directed by the Commissioner and in terms of sub-Section (2) of Section 12 of the Act of 1923 and the Appellants / principal employer is entitled to be indemnified by the contractor. Needless to say that after hearing, in case, the penalty is imposed upon the Appellants, the Appellants are entitled to be indemnified by Respondent No.3 / contractor.

14 In view of the discussions above, the judgment and order passed by the Commissioner Workman's Compensation requires modification to that extent. So far as the quantum of compensation is concerned, the same is not disputed. Hence, the following order:

ORDER

- I. The appeal is hereby partly allowed. No costs.
- II. The judgment and order passed by the Commissioner for Employees Compensation and C.J.S.D., Osmanabad dated 21st September, 2014 in WCA No.36 of 2009, is hereby modified in the following manner:

- a) The petition stands partly allowed with proportionate costs against Respondent Nos.1 to 3.
- b) Respondent Nos.1 and 2 jointly and severally shall pay to Petitioner No.1 a compensation of Rs.2,39,700/- (Rupees Two Lacs Thirty-Nine Thousand and Seven-Hundred only) with 12% interest per annum from the date of application i.e. 12th September, 2007 till realization of the entire amount.
- c) The Respondent Nos. 1 and 2 are entitled to be indemnified by Respondent No.3 for which no independent proceedings are required to be initiated.
- d) Notice shall be issued to the Respondents calling upon their explanation as to why the penalty should not be imposed in terms of the provisions of Section 4-A Sub-Section (3) of the Act of 1923 and after giving an opportunity of being heard to the Respondents, the learned Commissioner shall pass an appropriate order about the penalty.

- III. Rest of the judgment and award stands confirmed.
- IV. Award be drawn up as per the above modification.
- V. The Respondents / Claimants are permitted to withdraw the principal amount of Rs.2,39,700/- (Rupees Two Lacs Thirty-Nine Thousand and Seven-Hundred only) alongwith accrued interest lying before the Commissioner Workmens' Compensation, Osmanabad and the Commissioner shall pass an appropriate order after following due procedure in respect of the amount of penalty.
- VI. Appeal is accordingly disposed of.
- VII. Pending civil applications stand disposed of.

[V. K. JADHAV, J.]