

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.2701 OF 2009
IN
FIRST APPEAL (ST) NO.15390 OF 2009
WITH
CIVIL APPLICATION NO.2702 OF 2009
IN
FIRST APPEAL (ST) NO.15390 OF 2009**

The New India Assurance Co. Ltd. ...Applicant/Appellant

Versus

Dnaynoba Nanji Nagargoje & Ors. ...Respondents

Mr.Ramesh Cheulkar for the Applicant/Appellant.

Mr.T.J. Mendon for the Respondent Nos.1 & 2.

CORAM : M. S. SONAK, J.

DATE : 27 MARCH 2017

P.C.

1. The Registrar Judicial, by order dated 21-03-2010, has directed the applicant to take steps against the unserved respondent Nos.1 to 4, failing which, it was made clear that the Civil Application will stand dismissed as against respondent Nos.1 to 4. On 02-05-2011 there is an endorsement that since no steps were taken, the Civil Application seeking condonation of delay of 164 days stands dismissed as against respondent Nos. 1 to 4.

2. Today, when the matter is called out, the learned counsel for the appellant points out that Mr.Mendon appears for

respondent Nos.1 and 2 who are infact the parents of the minor children respondent Nos.3 and 4. The record indicates that respondent Nos.5 and 6 who are the parents of the deceased have expired.

3. Mr.Cheulkar, the learned counsel for the appellant points out that since Mr.Mendon appears for respondent Nos.1 and 2, it cannot be said that no steps were taken for service upon respondent Nos.1 and 2 and consequently, also upon respondent Nos.3 and 4. He, therefore, submits that the order dismissing the Civil Application as against respondent Nos.1 to 4 should be recalled. Since, Mr.Mendon has filed appearance for respondent Nos.1 and 2 and since respondent Nos.3 and 4 are only minors, the submission of the Mr.Cheulkar is required to be accepted. The order of Registrar Judicial dismissing the application for non-prosecution is recalled. The Civil Application is restored.

4. In the Civil Application No.2701 of 2009, the applicant has sought for condonation of delay of 69 days in instituting the appeal. Upon perusal of the reason set out in the Civil Application, the same is allowed. The delay of 69 days in instituting the appeal is hereby condoned subject to payment of cost of Rs.2,500/-.

5. The appeal under Section 30 of the Employees Compensation Act, 1923 is taken up for consideration, now that the delay in institution of the appeal is condoned. Mr.Cheulkar the learned counsel for the appellant submits that there is no employer-employee relationship between the Prabhakar Nagargoje (Since deceased) and Mrs.Parvati Asawale, respondent No.7 in the present

appeal. The employer of Prabhakar Nagargoje was one Mrs.Pratibha Paniya. Mr.Cheulkar points out that the said Mrs.Pratibha Paniya transferred the motor vehicle which was involved in the accident to Mrs.Parvati Asawale, the respondent No.7. He submits that by such a transfer, the employer-employee relationship does not stand transferred. As long as deceased Prabhakar was not the employee of the respondent No.7, the claimants i.e. respondent Nos.1 to 4, could have never been maintained as a claim under the provisions of the Employees Compensation Act, 1923 against respondent No.7, and consequently against the appellant.

6. On the other hand, Mr.Mendon relies upon the decision of the Hon'ble Apex Court in the case of *Mallamma (Dead) by L.R.s V/s. National Insurance Co. Ltd. & Ors (2014-6-SCJ-304)* submits that the issue now sought to be raised by the learned counsel for the appellant, stands answered against the appellant. He further points out that in this case, neither was any issue as regards the question now raised by the appellant, framed by the Commissioner nor did the appellant lead any evidence before the Commissioner in support of the issue. He points out that the issue as to whether there was employer employee relationship is a pure question of fact and in case the appellant was serious in contesting this position, then the appellant should have at least led evidence if necessary, by summoning the respondent No.7 in the matter. Mr.Mendon also points out that respondent No.7, though summoned before the Commissioner, chose not to file any written statement or oppose the claim of the respondent Nos.1 to 4 and others.

7. In terms of Section 30 of the Employees Compensation

Act, 1923, an appeal can be entertained only if raises a substantial question of law. In this case, it cannot be said that a proper foundation was led in respect of the issue which the appellant now seeks to raise before this Court. It is true that the appellant, in his written statement had raised such an issue. However, no such issue was framed by the Commissioner at all. No objection was raised by the appellant as regards non framing of such an issue. Assuming that the non-framing of the issue by the Commissioner is not required to be held against the appellant, still, nothing prevented the appellant from leading evidence, including, by way of summoning respondent No.7 in order to establish that there was no employer-employee relationship between the deceased and respondent No.7. In such circumstances it cannot be said that the appellants have a right to raise this issue in this Court in an Appeal under Section 30 of the said Act. As noted earlier, appeal under Section 30 of the said Act lies only on a substantial question of law.

8. In any case, there is merit in the contention of the Mr.Mendon that the issue now sought to be raised by the appellant stands covered in the case of Hon'ble Apex Court in the case of *Mallamma (Supra)*.

9. The learned counsel for the appellant, now raises the issue that age of deceased was also not proved. Again, this is a factual dispute which raises no question of law, much less, any substantial question of law.

10. In this case, the appellant has not complied with the provisions of Section 30 of the Employees Compensation Act, 1923,

in as much as it provides that, no appeal by an employer under clause A shall lie unless the memorandum of appeal is accompanied by a certificate of the Commissioner to the effect that, the appellant has deposited with him the amount payable under the order appealed against.

11. The learned counsel for the appellant submits that in this case, there is a dispute as to whether there was an employer and employee relationship and therefore, the proviso is inapplicable. The learned counsel for the appellant further submits that in any case, the proviso also does not apply to appeals by Insurance Company. Since, the appeal is being dismissed on the ground that it raises no substantial question of law, at this stage, this question is not required to be decided, however, *prima-facie*, the contention of the learned counsel for the appellant does not appear to be consistent with the spirit of the proviso to Section 30(1) of the Employees Compensation Act, 1923.

12. The appeal is accordingly dismissed. Interim orders, if any, are hereby vacated. The appellant shall pay cost of Rs.2,500/- to the respondent Nos.1 to 4.

(M. S. SONAK, J.)