

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

941 FIRST APPEAL NO. 1700 OF 2016

Vyankat s/o Mukundrao Garge
Age: Major, Occu.: Contractor,
As M/s.Garje Steel, Old M.I.D.C.,
Board No.3, Barshi Road, Latur,
Tq. & Dist.Latur.

..Appellant
(Orig.Respondent)

Versus

1. Salimabee w/o Majeed Khan Pathan
Age: 63 years, Occu.: Household,
2. Yasmeen Begum w/o Ateeque Khan Pathan
Ae: 24 years, Occu.: Household,
3. Altaf s/o Ateeque Khan Pathan
Age: 4 years, Occu.: Nil,
Minor U/g. of his real mother i.e.
Respondent No.2,
Yasmeen Begum Ateeque Khan Pathan,
All above R/o.Sakhla Plot, Parbhani ..Respondents

...
Advocate for Appellant : Shri Sharad V. Natu
Advocate for Respondents : Shri Manoj M.Kadtu

...
CORAM : P.R.BORA, J.

DATE: 28th August, 2018

ORAL JUDGMENT :-

1. The appellant has preferred the present appeal against the Judgment and award dated 20.08.2015, passed by the Commissioner for Employees' Compensation and Civil Judge, Senior Division, Parbhani, in Workmen Compensation Case No.28 of 2012.

2. The present respondents had filed the aforesaid workmen compensation case claiming compensation on account of the death of one Ateeque Khan Majeed Khan Pathan. Respondent No.1 is the mother, respondent No.2 is the widow and respondent No.3 is a minor son of deceased Ateeque Khan. It was the case of the claimants before the Trial Court that deceased Ateeque Khan was employed by the present appellant on the work of *Muli Bandhara* for the purposes of painting work and on the date of incident i.e. 04.09.2011, when deceased Ateeque Khan was carrying out the work assigned to him, during the course of his employment, fell down in river Godawari and suffered death by drowning. As contended in the application, the age of deceased Ateeque Khan was 25 years and he was drawing the wages to the tune of Rs.6,000/- per month.

3. The application so filed by the respondents was opposed by the appellant. Appellant had taken a plea that deceased Ateeque Khan was not his employee but a sub-contract was allotted to him for carrying out painting work. The learned Commissioner, after having assessed the evidence on record, held the appellant liable for the payment of compensation to the tune of Rs.6,50,730/- to the claimants. Aggrieved thereby, the appellant has preferred the present appeal.

4. Shri S.V.Natu, learned Counsel appearing for the appellant criticized the Judgment passed by the Trial Court on various grounds. Learned Counsel submitted that the Trial Court has failed in appreciating that the claimants did not bring on record any evidence to show that deceased Ateeque Khan was in the employment of the appellant. The learned Counsel submitted that primary burden was on the claimants to sufficiently prove the employer-employee relationship between the appellant and the deceased. Learned Counsel further submitted that despite there being any convincing evidence, the learned Commissioner has held deceased Ateeque Khan to be the employee of the appellant. The learned Counsel further submitted that in order to substantiate the plea raised by the appellant in its written statement, the Manager of the appellant has deposed before the Commissioner.

5. The learned Counsel inviting my attention to the evidence of DW-1 submitted that it was specifically deposed by DW-1 that deceased Ateeque Khan was a sub-contractor and not an employee of the appellant. The learned Counsel further pointed out that in the cross-examination of the DW-1, nothing has been elicited so as to disbelieve his testimony. The learned Counsel

submitted that one more witness was examined by the appellant, who has fully corroborated the evidence of DW-1.

6. The learned Counsel further submitted that even the witness examined on behalf of the claimants has admitted that he was employed by deceased Ateeque Khan. Learned Counsel submitted that admission given by the said witness is sufficient to draw an inference that the person who can take in the employment some other person, cannot be held to be a workman or an employee. The learned Counsel submitted that the admission so given by the said witness leads to an inference that deceased Ateeque Khan was independently working as sub-contractor and not working as an employee of the appellant. The learned Counsel, inviting my attention to the affidavit at Exh.21 submitted that the averments in the said affidavit clearly reveal that deceased Ateeque Khan was working as sub-contractor of the appellant. The learned Counsel submitted that the learned Commissioner, Employees' Compensation, ignoring the evidence on record, has erroneously held the present respondents entitled for the payment of compensation. The learned Counsel, therefore, prayed for setting aside the impugned Judgment and award.

7. Shri M.M.Kadtu, Learned Counsel appearing for the respondents i.e. original claimants supported the impugned Judgment and award. The learned Counsel submitted that the claimants have sufficiently proved their claim and burden was on the appellant to substantiate his plea, when it was his contention that deceased Ateeque Khan was his sub-contractor. The learned Counsel submitted that except statement of the Manager of the appellant, there is no evidence brought on record by the appellant to show that deceased Ateeque Khan was not an employee but was a sub-contractor. The learned Counsel submitted that the oral and documentary evidence, which has come on record, has been properly appreciated by the learned Commissioner. The learned Counsel therefore, prayed for dismissal of the appeal.

8. I have given due consideration to the submissions advanced by the learned Counsel appearing for the respective parties. I have perused the impugned Judgment as well as the evidence on record. It is true that in the Written Statement, the appellant had raised a specific plea that deceased Ateeque Khan was not in his employment but was assigned a sub-contract of painting the doors of *Muli Bandhara*. In this context, it was the contention of the learned Counsel appearing for the appellant

that the primary burden was on the claimants to prove that deceased Ateeque Khan was in the employment of the appellant and that he suffered the accidental death during the course of employment. The learned Counsel, however, could not explain as to what sort of evidence could have been produced by the claimants to prove that deceased Ateeque Khan was in the employment of the present appellant. One of the claimants, who deposed before the Commissioner, has testified that deceased Ateeque Khan was working with the appellant and suffered the death during the course of employment.

9. It appears to me that the greater burden was on the appellant to rebut the contention of the claimants that deceased Ateeque Khan was in his employment. It is not disputed by the appellant that he was a contractor for carrying out the work of *Muli Bandhara*. It is further not in dispute that deceased Ateeque Khan was carrying out the work of painting the doors of the said Muli bandhara. No doubt the appellant has disputed the contention of the claimants that deceased Ateeque Khan fell in river Godawari while carrying out the painting work of the doors of the *Muli Bandhara* and a further specific plea was raised by the appellant that deceased Ateeque Khan entered in the river for the purpose of swimming and drowned in the river, however,

the plea so raised by the appellant has not been substantiated by him. If the evidence of appellant's witness is perused, it clearly reveals that the fact so stated by him was his hearsay information and he was not having any personal knowledge of the said incident. Admittedly, the said incident was not eye-witnessed by him. In the circumstances, it is difficult to believe that deceased Ateeque Khan did not fall in the river while painting the doors of the *Muli Bandhara* and that he drowned after he had entered in the Godawari river for the purpose of swimming.

10. Further, it appears to me that if it is the case of the appellant that he had assigned a sub-contract of painting the doors of *Muli Bandhara* to deceased Ateeque Khan, there must have been something in writing in that regard i.e. to say a written agreement or contract for the said purpose between the appellant and deceased Ateeque Khan. Admittedly, no such written agreement or contract is produced on record by the appellant. As is revealing from the evidence of the appellant's witness, there was an oral agreement between the appellant and deceased Ateeque Khan regarding the work of painting to be carried out by deceased Ateeque Khan.

11. Reliance was also placed by the learned Counsel appearing for the appellant on the document at Exh.21. The document at Exh.21 is an affidavit sworn by the legal heirs of deceased Ateeque Khan; wherein it is contended that contract of colouring the doors of *Muli Bandhara* was given to deceased Ateeque Khan and that on 04.09.2011 after finishing the work at about 05:30 p.m. the deceased entered in the Godavari river for the purpose of swimming and was flown away. However, it is significant to note that nothing was asked to Yasmeen Begum the wife of deceased Ateeque Khan, who deposed before the Commissioner as about the contents of the affidavit at Exh.21. The said affidavit was shown to Yasmeen Begum during the course of her cross-examination and it appears that the only question, which was asked to her was, whether it bears her signature and she admitted that the document was bearing her signature. However, nothing has been asked to the said witness as about the contents of the said document. The document at Exh.21 is titled as affidavit and it is scribed on Stamp paper of Rs.100/-, however, it is quite evident that the contents of the said affidavit were not verified by the signatory to the application before any competent authority nor it is a notarised document. Since the contents of the said documents are not proved, merely because the said document has been marked as Exh.21, the said

document cannot be used as an evidence in the matter. There is reason to believe that purposefully nothing was asked to Yasmeen Begum as about the contents of the said application with an apprehension that she would never admit its contents.

12. The evidence of Shyam Kamble (PW-2) was also relied upon by the appellant to urge that deceased Ateeque Khan was not an employee but a sub-contractor. The learned Counsel for the appellant brought to my notice the contents of the cross-examination of Shyam Kamble (PW-2), wherein he has admitted that deceased Ateeque Khan had obtained the colouring contract of *Muli Bandhara* and that deceased Ateeque Khan had employed him on the said work. However, having read the entire evidence of Shyam Kamble (PW-2), it is quite difficult to agree with the contentions of the appellant that on the basis of the aforesaid admission given by Shyam Kamble (PW-2), the appellant has proved that deceased Ateeque Khan was a sub-contractor. Said Shyam Kamble (PW-2) has testified in his examination-in-chief that deceased Ateeque Khan fell down in the Godavari river when he was carrying out the work of colouring the doors of *Muli Bandhara* and flown away in the water of Godawari river. Nothing has been asked in his cross-examination to Shyam Kamble (PW-2) that the fact as aforesaid

stated by him is false and that deceased Ateeque Khan did not fall in Godavari river while carrying out colouring work, but fell down in Godavari river after he had entered in the water of Godawari river for the purpose of swimming.

13. It is significant to note that in his examination-in-chief, Shyam Kamble (PW-2) has specifically deposed that he was employed by contractor Vyankat Garje i.e. present appellant and his salary was fixed to the tune of Rs.6,000/- per month and that an amount of Rs.1,000/- was paid to him by way of advance. In his cross-examination, it is nowhere suggested to Shyam Kamble (PW-2) that the fact as aforesaid deposed by him is false and he was never employed by the appellant nor any amount was paid to him by way of advance. The evidence of Shyam Kamble (PW-2) has to be read as a whole. Merely because he admitted that he was taken on the said work by deceased Ateeque Khan, no such inference can be drawn that he was employed by deceased Ateeque Khan.

14. After having considered the entire evidence on record, it does not appear to me that the Trial Court has committed any error in recording the findings that deceased Ateeque Khan was in the employment of the present appellant and suffered an

accidental death during the course of his employment. The appellant has failed in bringing on record any cogent and sufficient evidence to substantiate his plea that deceased Ateeque Khan was not his employee but was a sub-contractor.

15. The Judgment relied upon by the learned Counsel for the appellant in the case of ***Om Prakash Batish Vs. Ranjit @ Ranbir Kaur and others [2008 (12) SCC, 212]*** does not support the case of the appellant. The appeal filed by the appellant being devoid of substance, deserves to be dismissed and is accordingly dismissed.

(P.R.BORA)
JUDGE

SPT