

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

FIRST APPEAL NO. 584 OF 2018

Mohd Ayub Hengai Khan and Ors.	Appellants
V/s.	
Mohd Anis Mohd Yunis and anr.	Respondents

Mr. T.J. Mendon for the appellants.
Mrs. Poonam Mital for respondent no.2.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 13th AUGUST, 2019**

ORAL JUDGMENT:-

. With consent of the learned counsel for the appellants and the respondent no.2, the appeal is heard finally at the stage of admission.

2. The appellants herein has challenged the judgment and order dated 21/02/2018 in Application (ECA) No.36/B-8 of 2014, whereby the learned Commissioner for Employees Compensation Act and Judge, 5th Labour Court, Mumbai has absolved the respondent no.2 of its liability of indemnifying the insured and allowed the application only against respondent no.1.

3. The brief facts necessary to decide this appeal are as under :-

4. The appellant nos.1 and 2 are the parents, the appellant nos.3 and 4 are the sisters and the appellant no.5 is the brother of the

deceased Mohd. Maroof s/o. Mohd. Ayub Khan who expired in an accident on 27/04/2009 on Ahmedabad – Mumbai Highway Road No.8. The deceased Mohd. Maroof was employed as a cleaner on a truck bearing No.MCU-3833 which was owned by the respondent no.1 and insured with the respondent no.2. It was the case of the appellants that on 27/04/2009, while the deceased Mohd. Maroof was filling diesel in the truck at the petrol pump at Navsari, another vehicle dashed against him and thereby caused his death. The appellants claimed that the deceased was 20 years of age and was earning salary of Rs.4,000/- per month. The appellants claimed that the deceased Mohd. Maroof had died in the course of his employment. The appellants therefore filed a claim under Workmen's Compensation Act claiming compensation of Rs.4,48,000/- with interest @ 12% p.a from the respondents being the employer and the insurer of the vehicle.

5. The respondent no.1 admitted that the deceased Mohd. Maroof was employed as a cleaner on his vehicle No.MCU-3833 and that he was paid salary of Rs.4,000/- per month. The respondent no.1 also admitted that the deceased was on duty as a cleaner and that his death was in the course of the employment. The respondent no.1 claimed that the vehicle was duly insured with the respondent no.2 and that the

respondent no.2 is liable to pay the compensation.

6. The respondent no.2 denied that the deceased was employed as a cleaner on the vehicle No.MCU-3833 owned by the respondent no.1. The respondent no.2 thus disputed the employer - employee relationship between the respondent no.1 and the deceased. The respondent no.2 claimed that the policy did not cover cleaners and further denied that the death of Mohd. Maroof was in the course of his employment. The respondent no.2 therefore denied its liability to indemnify the insured.

7. The learned Commissioner upon considering the evidence adduced by the appellants, recorded a finding that the deceased was employed as a cleaner on the truck bearing No.MCU-3833 which was owned by the respondent no.1 and insured by the respondent no.2. The learned Commissioner has also recorded a finding that the death of the deceased was in the course of the employment and that the appellants are entitled for compensation of Rs.4,42,740/-. The Commissioner has observed that the vehicle under which the deceased Mohd. Maroof was crushed, was not owned by the respondent no.1. The Commissioner therefore held that the insurance company is not

liable to indemnify the insured/respondent no.1. Accordingly, the learned Commissioner directed the respondent no.1 to pay the compensation and dismissed the claim against the respondent no.2. Aggrieved by the dismissal of the claim against the respondent no.2- insurance company, the appellants have preferred this appeal.

8. Mr. T.J. Mendon, learned counsel for the appellants contends that under Section 3 of Workmen's Compensation Act, it is obligatory on the part of the employer to pay compensation to his employee if personal injury is caused to the employee by accident arising out of and in the course of his employment. He contends that the deceased was employed as a cleaner on the truck owned by the respondent no.1 and insured by the respondent no.2. The deceased Mohd. Maroof had met with an accident resulting in his death during the course of his employment. He contends that though the principal liability is that of respondent no.1, in view of the contractual liability, the respondent no.2 is liable to indemnify the insured. He has relied upon the decision of the Apex Court in *Manju Sarkar and ors. V/s. Mabish Miah and ors. 2014 ACJ 1927*, and the decisions of this Court in *Abdul Hamid Mohd. Hussain Khan and anr. V/s. Laxman Nagu Dhaigude and anr. in First Appeal No.47/2011* and *Mahendra Singh Tulsi Singh*

and Anr. Vs. Gurpreet Singh Gurdev Singh and Anr. in First Appeal No.618 of 2016.

9. Ms. Poonam Mital, the learned counsel for the respondent no.2 contends that the vehicle which was insured by the respondent no.2 – insurance company was not involved in the accident. She submits that the vehicle which had dashed against the deceased Mohd. Maroof was neither owned by the respondent no.1 nor insured by the respondent no.2 – insurance company and as such the respondent no.2 – insurance company was not liable to pay any compensation.

10. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

11. At the outset, it may be mentioned that Section 3 of the Employees Compensation Act, imposes a liability on the employer to pay compensation to his employee in case of death or personal injury caused by accident arising out of and in the course of the employment. In *Manju Sarkar* (supra) the deceased driver had got down to make arrangements for repair of the truck. In the same night he met with an accident and sustained injuries which led to his death. While

considering the question whether the death of the deceased driver was arising out and in the course of employment, the Apex Court has reiterated the principles in ***General Manager, B.E.S.T. Undertaking, Bombay Vs. Agnes , 1958-65 ACJ 473(SC)*** wherein it has been held as under:

“(12) Under Section 3(1) of the Act the injury must be caused to the workman by an accident arising out of and in the course of his employment. The question, when does an employment begin and when does it cease, depends upon the facts of each case. But the courts have agreed that the employment does not necessarily end when the 'down tool' signal is given or when the workman leaves the actual workshop where he is working. There is a notional extension at both the entry and exit by time and space. The scope of such extension must necessarily depend on the circumstances of a given case. As employment may end or may begin not only when the employee begins to work or leaves his tools but also when he used the means of access and egress to and from the place of employment.”

12. In the instant case, the learned Commissioner has recorded a specific finding that the deceased Mohd. Maroof was employed as a

cleaner on the truck bearing no.MCU-3833 owned by the respondent no.1 and insured with the respondent no.2. The deceased was on duty as on the date of the accident. He was hit by another vehicle while the truck had stopped at a Petrol Pump at Navsari (Gujarat) to fill petrol/diesel. Said Mohd. Maroof died as a result of the injuries sustained in the said accident. The learned Commissioner has recorded a finding that the death of the deceased- Mohd. Maroof, an employee of the respondent no.1, was caused by accident arising out of and in the course of his employment.

13. Having recorded these findings, the learned Commissioner has absolved the respondent no.2 – insurance company from its liability to indemnify the insured only on the ground that the vehicle which had dashed against Mohd. Maroof was not owned by the respondent no.1 and / or insured by the respondent no.2 – insurance company.

14. A plain reading of the written statement reveals that the respondent no.2 had disputed its liability to indemnify the respondent no.1 - insurer only on the ground that the deceased was not a cleaner and further that the policy did not cover a cleaner. The respondent no.2 – insurance company had not raised a defence that it was not

liable to indemnify the respondent no.1/insured on the ground that the vehicle involved in the accident was not owned by it. Under the circumstances, the respondent no.2 – insurance company could not have been absolved of its liability on the ground which was neither pleaded nor proved.

15. Be that as it may, the death of the deceased-Mohd. Maroof was due to an accident arising from the use of the motor vehicle. The said vehicle was insured by the respondent no.2 and had insurance cover for the cleaner and covers the claim arising out of accident. Under the contractual liability, the respondent no.2 was liable to indemnify the respondent no.1/insured. Hence, the learned Labour Commissioner could not have exonerated the respondent no.2-insurance company of its liability in indemnifying the insured. As a consequence thereof the award in question should have been passed jointly and severally against the employer as well as against the respondent no.2-Insurance Company.

16. As a result, the Appeal is allowed. The order of the learned Commissioner for Employees Compensation Act and Judge, 5th Labour Court, Mumbai exonerating the respondent no.2 – insurance company

is set aside. Consequently, the claim of the appellants as against the respondent no.2 is allowed. The respondent nos.1 and 2 are jointly and severally directed to pay compensation of Rs.4,42,740/- to the appellants/applicants with interest @ 12% per annum from the date of the accident till its realization.

Preeti H.
Jayani

17. First Appeal stands disposed of.

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by Preeti H.
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Date: 2019.08.27
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(SMT. ANUJA PRABHUDESSAI, J.)