

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No. 897 of 2014**

1. Smt. Salendri Bai W/o Late Firturam Aged About 23 Years.
2. Kumari Purnima D/o Late Firturam Aged About 9 Years.
3. Devendra S/o Late Firturam Aged About 8 Years.

Appellant Nos.2 & 3 are Minor, Thru- Mother Smt. Salendri Bai.

All are R/o Sharda Para Camp-2, Bhilai, Distt. Durg, Presently R/o village -Iraguda, P. O. Sikosa, Tah. Gunderdehi, Distt. Durg Civil & Revenue District- Durg, C.G.

---Appellants/claimants**Versus**

1. Suresh Kumar Gupta S/o R/o Transport Nagar, Bhilai, Distt. Durg C.G.
2. Nand Kumar Sahu S/o Rajaram Sahu Aged About 43 Years R/o Kailash Nagar, Housing Board, Bhilai, Distt. Durg C.G.
3. Branch Manager Reliance General Insu. Co. Ltd., Plot No. 29, Nehru Nagar East, Commercial Complex, Bhilai, Distt Durg C.G.

--- Respondents

For Appellants	:	Mr. Gautam Khetrapal, Advocate.
For Respondent No.1	:	None.
For Respondent No.2.	:	Mr. Shikhar Bhaktiyar, Advocate.
For Respondent No.3	:	Mr. Nilesh Kumar Thakur, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, CJ**Hon'ble Shri Parth Prateem Sahu, J****Order on Board****Per Parth Prateem Sahu, J****31/08/2020**

1. Appellants/claimants have filed this appeal under Section 30 of the Employee's Compensation Act, 1923 (earlier Workmen's Compensation Act, 1906) (for short 'the Act of 1923') challenging the impugned judgment/ award dated 11.12.2013 passed by the learned Commissioner for Employees Compensation - cum - Labour Court, Durg, (CG) in Claim Case No.10/W.C.ACT/2011/Fatal dismissing application filed by the applicants/claimants for grant of compensation.

2. Facts relevant for disposal of this appeal are that Firturam was working as Driver of truck bearing registration number CG04-JA-4154 (for short 'the offending vehicle') under the employment of non-applicant No.2, owner of offending vehicle. On 17.9.2009 the offending vehicle loaded with cement of Century Cement left for Gunderdehi from Baikunth. On the way near Village Funda turn, the offending vehicle overturned as a result of which Firturam suffered grievous injuries on his head, hand & leg. He was admitted in District Hospital, Durg where he succumbed to the injuries on 18.9.2009.
3. Appellants/claimants have filed an application under Section 10 (a) of the Act of 1923 before the Commissioner seeking compensation of Rs.4,27,140/- pleading therein that on the date of accident, deceased was working as 'Driver' under the employment of non-applicant Nos.1 & 2 and getting Rs.3,325/- per month as salary.
4. Non-applicants No.1 & 2 submitted their reply to application admitting that non-applicant No.1 is registered owner of offending truck and deceased was their employee, who used to drive offending vehicle 10-15 days in a month. They have pleaded that deceased was habitual drunkard and on the date of accident, under the direction/instruction of non-applicant No.2 he took the truck of non-applicant No.1 as driver but instead of driving on main road, he drove the truck in rural roads under the influence of liquor, therefore, he himself was responsible for the accident, hence, claimants are not entitled for any amount of compensation. They have also pleaded that on the date of accident, truck was insured with non-applicant No.3/insurance Company, hence

liability, if any, to pay the amount of compensation would be of Insurance Company.

5. Non-applicant No.3-Insurance Company filed its reply to application denying the pleadings made in application including the income and employment of deceased with Non-applicant No.1 & 2, however, admitted the fact that on the date of accident, offending vehicle was insured with it. It was also pleaded that since death of deceased was not the outcome of accident arising out of and during the course of employment, no liability to pay the amount of compensation can be fastened upon Insurance Company.
6. On appreciation of pleadings and evidence placed on record by the respective parties, the learned Commissioner has framed as many as six issues for consideration and after conclusion of proceedings of the case held that death of deceased was on account of accident arising out of and during the course of employment; claimants were dependent upon the deceased; on the date of accident, the deceased was about 27 years old and earning Rs.3,325/- per month as salary. Issue with regard to entitlement of compensation as pleaded and claimed in application has been decided in negative and issue with regard to dismissal of application has been decided in affirmative in favour of applicants/claimants.
7. Mr. Gautam Khetrapal, learned counsel for appellants/claimants submits that the Commissioner has rightly decided the income of deceased and the issue that deceased died on account of injuries suffered by him in an accident arising out of during the course of employment, but erroneously arrived at a conclusion that on the date of accident, the deceased had

been under the influence of liquor while driving the truck, which is in contravention of Section 3 of the Act of 1923. He further submits that there is no evidence available on record except MLC report (Ex.D-7) in which there is mention about presence of smell of alcohol. He also submits that mere presence of smell of Alcohol or liquor would not itself be sufficient to hold that deceased was under influence of liquor at the time of accident. In support of his submissions, learned counsel places his reliance on the judgment passed by a Division Bench of Kerala High Court in case of **Jose P. V. vs Caestina & Ors**¹ and the judgment passed by the Hon'ble Supreme Court in case of **Bachubhai Hassanalli Karyani v. State of Maharashtra**².

8. Mr. Nilesh Kumar Thakur, learned counsel for respondent No.3/Insurance Company submits that the Commissioner based on the pleadings and evidence available on record has rightly dismissed the application. He submits that there is specific fact mentioned in MLC report (Ex.D-7) showing that deceased was driving the truck after consuming liquor which is not permissible in law in view of the specific provisions of Section 3 of the Act of 1923 restricting the employees to work under the influence of liquor.
9. Mr. Shikhar Bhaktiyar, learned counsel for respondent No.2/employer submits that deceased met with an accident on account of his own negligence as he was driving truck after consumption of liquor and under proviso to Section 3 of the Act of 1923, it is envisaged that employer shall not be liable to pay amount of compensation, if the employee has been found to be under the influence of drink or drugs. He further submits that

¹ 2015 SCC Online Kerala 27434.

² 1971 3 SCC 930.

MLC report clearly shows that deceased had consumed liquor and even the doctor, who conducted MLC, has arrived at a finding that there is smell of Alcohol.

10. We have heard learned counsel for the parties and perused the record.
11. On 23.10.2019, appeal was admitted for consideration on following substantial question of law :-

“Whether the finding of the Commissioner for Employee's Compensation, even in absence of the examination of doctor/ author of the MLC report forming part of Ex.D-7, dismissing the Claim Petition preferred under Section 10 of the Employee's Compensation Act, 1923 holding that the deceased -Fituram was driving the vehicle in question in a drunken condition, is perverse ?”

12. Employment of deceased and accident arising out of during the course of employment is not in dispute. Application filed by the appellants/claimants was dismissed only on the ground that smell of alcohol was found by the doctor as mentioned in MLC. The Commissioner has dismissed the application taking into consideration the proviso to Section 3 of the Act of 1923.
13. To appreciate the submissions made by the learned counsel for the respective parties and also whether the finding of Commissioner is contrary to the materials available on record, we find it appropriate to extract relevant provision i.e. Section 3 of the Act of 1923, which reads as under :-

“3. Employer's liability for compensation.”-(1) If personal injury is caused to an employee by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter :

Provided that the employer shall not be so liable-

- (a) in respect of any injury which does not result in the total or partial disablement of the employee for a period exceeding three days;

(b) in respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to

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(i) the employee having been at the time thereof under the influence of drink or drugs, or

(ii) the willful disobedience of the employee to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employees, or

(iii) the willful removal or disregard by the [employee] of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of employee." [***]. [***]"

14. A bare reading of above provision makes its clear that it dis-entitles an employee to claim compensation from the employer under different circumstances and one of which is mentioned under proviso (b) (i) of Section 3 (i). A glance of aforesaid provision would reveal that the word used under it is "under the influence of drink or drugs", it does not mention about consumption of drink or drugs. When the Legislature has consciously used the word 'influence' than it has to be read as it is and cannot be interpreted to be 'consumed'. There is vast difference between 'consumption of drink or drugs' or 'under the 'influence of drink or drugs'. The word 'under the influence' as defined in the Black's Law dictionary, which read as under :-

"Under the influence. (1879) (Of a driver, pilot, etc) deprived of clearness of mind and self-control because of drugs or alcohol. See DRIVING UNDER THE INFLUENCE [Cases : Automobiles – 332]"

15. The Act of 1923 does not say that employee will be dis-entitled if he is found to have been consumed drink or drugs, therefore, the burden is upon the employer of deceased/injured to prove that employee was under the influence of drink or drugs. Mere presence of smell of alcohol

or alcohol in the body will not itself be sufficient to dis-entitle the employee or legal heirs of deceased-employee from getting compensation under the Act.

16. Section 185 of the Act of 1988 reads as under:-

“185. Driving by a drunken person or by a person under the influence of drugs, – whoever, while driving, or attempting to drive, a motor vehicle,-

[(a). has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser, or].

(b). is under this influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle,

shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both”

17. From perusal of above quoted Section 185 of the Act of 1988, it is apparent that whoever, driving a vehicle after consuming alcohol, has in his blood, alcohol exceeding 30 mg. per 100 ml of blood, detected in a test by a breath analyser, or is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle. There is nothing in the evidence brought on record by the employer suggesting that deceased was having in his blood alcohol exceeding 30 ml per 100 ml of blood making him incapable to exercise proper control over the vehicle.

18. In absence of aforementioned two specific evidence on record against the deceased, the employer cannot be exonerated from its liability to pay the amount of compensation, especially when the proviso under Section

3 of the Act of 1923 uses the word “under the influence of drink or drugs” and “not consumption of drink or drugs”. of **Jose P. V.'s** case (supra) h

19. Relevant paragraph of **Bachubhai Hassanalli Karyani's** case (supra) has held as under :-

“4. The doctor had also admitted that a person could smell of alcohol without being under the influence of drinking. No urine test of the appellant was carried out and although the blood of the appellant was sent for chemical analysis, no report of the analysis was produced by the prosecution.

5. It seems to us that on this evidence it cannot be definitely held that the appellant was drunk at the time the accident occurred.

6. In view of this conclusion we are of the opinion that it would meet the ends of justice if the sentence of rigorous imprisonment passed against the appellant is reduced to imprisonment already undergone, but the sentences of fine shall remain. It is directed that the appellant be released forthwith.”

20. Relevant paragraph of **Jose P. V.'s** case (supra) has held thus :-

“6. The entry made by the doctor in the wound certificate that smell of alcohol was present in the breath of the appellant cannot be a reason for finding that he was under the influence of alcohol rendering him unable to keep himself proper and stable and contributing to the cause of accident. Drinking of alcoholic beverages is not a prohibited thing in this democratic country. But the crucial question is as to whether after drinking alcohol, the appellant had actually contributed to the cause of accident.....”

21. Issue with regard to the presence of strong smell of spirit in the post mortem report of deceased has been considered by the Hon'ble Supreme Court in case of **Jiju Kuruvila and others v. Kunjuamma Mohan and others**³ held as under :-

“20.6. The post-mortem report, Ext.-A5 shows the condition of the deceased at the time of death. The said report reflects that the deceased had already taken meal as his stomach was half full and contained rice, vegetables

³ (2013) 9 SCC 166

and meat pieces in a fluid with strong smell of spirit. The aforesaid evidence, Ext.-A5 clearly suggests that the deceased had taken liquor but on the basis of the same, no definite finding can be given that the deceased was driving the car rashly and negligently at the time of accident.”

22. If the facts of the case at hand are considered in the light of aforementioned law laid down by the Hon'ble Supreme Court & High Court, in this case except mention of smell of Alcohol in MLC report by the doctor who conducted MLC, there is no other evidence to show that on the date of accident, deceased was under the influence of liquor. Therefore, in the considered opinion of this Court, the finding recorded by the Commissioner that deceased was in a drunken condition and under the influence of liquor is without any admissible piece of evidence. The finding recorded by the Commissioner that the claimants are not entitled for any amount of compensation as there was breach of policy condition and act of deceased is contrary to the Act of 1923 is not sustainable and it is hereby set aside.
23. Accordingly, question of law framed is decided in favour of the appellants/claimants.
24. As the Commissioner has not calculated the amount of compensation, interest and penalty, we are of the view that the matter requires to be remitted back to the learned Commissioner for Employees Compensation -cum- Labour Court, Durg (CG) for calculating amount of compensation to be awarded to the claimants, award of interest on the amount of compensation and penalty, in accordance with law.
25. Accordingly, the appeal is allowed, impugned award/judgment is hereby set aside and the matter is remitted back to the Commissioner with a

direction to decide quantum of compensation, interest and penalty awardable to the claimants in accordance with law as expeditiously as possible, preferably within a period of five months from the date of receipt of copy of the award.

26. Registry is directed to send back original record without any further delay.

Sd/-

(P. R. Ramamchandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge

Jamal/-