

NAFR

HIGH COURT of CHHATTISGARH, BILASPUR**MAC No. 746 of 2012****Judgment reserved on 15.07.2020****Judgment delivered on 07.10.2020**

1. Smt. Kusum Devi, wife of Late Shri Ramkripal Singh, aged about 37 years
2. Kumari Khushboo, daughter of Late Shri Ramkripal Singh @ Kripal Singh, aged about 11 years
3. Vikram son of Late Shri Ramkripal Singh @ Kripal Singh, aged about 9 years

Appellants No. 2 and 3 being minors are represented through their mother Smt. Kusum Devi, wife of Late Shri Ramkripal Singh

All are residents of Khursipar, Bhilai, Tahsil and District Durg, Chhattisgarh

-----Appellants**VERSUS**

1. Rajendra Singh, son of Shri Ramadhar Singh, aged about 42 years, resident of Road SPA Block 6/D, Zone-2 Sector 11, Bhilai, District Durg, Chhattisgarh.
2. Branch Manager, National Insurance Company Limited, Branch No. 1 Bhutani Complex, GE Road, Power House, Bhilai, District Durg, Chhattisgarh

Through the Regional Manager, Office, National Insurance Company Ltd., Akashganga Parisar, Supela, Bhilai, District Durg, Chhattisgarh

-----Respondents

For Appellants	:	Mr. Manish Upadhyay, Advocate.
For Respondent No. 2	:	Mr. R.N. Pusty, Advocate.

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****CAV Order****Per Parth Prateem Sahu, J.**

1. This appeal under Section 30 of the Workmen's Compensation Act, 1923 (for short "Act of 1923") has been filed by the appellants-claimants against the order/ award dated 21-09-2011 passed by Commissioner, Workmen's Compensation Act, Durg, Chhattisgarh (Labour Court) in case no. 33/W.C. Act/2006 (Fatal) [for short "the Commissioner"] whereby the Commissioner has dismissed the claim application.
2. This appeal, therefore, was admitted for hearing on 26-07-2012 but the

substantial question of law could not be framed.

3. Upon hearing learned counsel for the respective parties on admission, following substantial question of law arises for consideration before this Court.

“Whether the finding recorded by the Commissioner with regard to the employer-employee relationship between deceased and Respondent 1/ Non-applicant 1 is perverse?”

4. With the consent of the parties, the appeal is being heard finally.
5. Facts giving rise to this appeal are that the Respondent 1 was registered owner of the truck bearing registration no. CG 07ZC 1222 (referred to as “offending truck”) which was insured with Respondent 2/ Non-applicant 2 for a period from 13-04-2005 to 12-04-2006. Ramkripal Singh (since deceased) met with an accident while driving the offending truck as it turned turtle and deceased Ramkripal Singh @ Kripal Singh who was driving the offending truck on the date of accident died. At the time of accident, the offending truck was travelling to Bhilai from Raigarh. The accident was reported to concerned police station based upon which crime bearing no. 131/2005 was registered. Appellants-claimants filed an application under Section 22 of the Act of 1923, pleading therein that on the date of accident, deceased was working as driver of the offending truck, engaged by Respondent 1/ Non-applicant 1, he was earning Rs. 5,000/- per month as salary including the daily allowances. Claimants were dependent upon the deceased and claimed Rs. 4,73,900/- as compensation.
6. Respondent 1/ Non-applicant 1 submitted preliminary objection to the application filed under Section 22 of the Act of 1923, pleading therein that he sold the truck in the name of appellant 1/ claimant 1 prior to the date of accident i.e. on 01-08-2004 whereas the accident took place on 31-05-2005. It was further pleaded that the deceased himself purchased the truck in the name of his wife for the total value of Rs. 2,33,000/- and as per the agreement, Rs. 83,000/- was paid and the balance amount was required to

be deposited with J.K. Finance, Durg. It is further pleaded that as the entire amount was not deposited with the J.K. Finance, name of appellant 1 could not be mutated or recorded in the records of RTO office. The possession of vehicle on the date of accident was with appellant 1 /applicant 1, deceased was not employed by Respondent 1/ Non-applicant 1, but after purchasing the truck in the name of his wife, deceased himself was driving the vehicle and met with accident. It is further pleaded that the application under Section 22 of the Act of 1923 is not maintainable because there is no employer-employee relationship between Respondent 1 and deceased.

7. Respondent 1, except the preliminary objection, has not filed reply to the claim application and was proceeded ex parte. The Commissioner has formulated total six issues for consideration including issue no. 1 “whether Ramkripal Singh died in an accident arising out of and during the course of employment under non-applicant no. 1”
8. The Commissioner upon considering the material and evidence placed on record held that as the offending truck was sold in the name of Applicant 1, deceased was driving the offending truck in the capacity of husband of applicant 1 and further that there was no employer-employee relationship established between non-applicant 1 and the applicant and dismissed the claim application without deciding other issues framed by him.
9. Mr. Manish Upadhayay, learned counsel for the appellants submits that the finding recorded by the Commissioner with regard to the employer-employee relationship based on the pleadings of Respondent 1/ Non-applicant 1 in his preliminary objection and the photocopy of the document which is placed on record and marked as Ext. D-1 is erroneous. He submits that, Respondent 1/Non-applicant 1 after filing of the preliminary objection was proceeded ex parte, he has not filed reply to the claim application. The document Ext. D-1, photocopy of the alleged sale of the offending truck in the name of claimant/ applicant is not proved. The Commissioner in its impugned order/ award while deciding the objection raised by the applicant with regard to

admissibility of photocopy exhibited as D-1 was allowed in favour of applicant(s)/ appellant(s).

10. He submits that when the document itself has not been admitted as evidence then there cannot be any finding based on it that on the date of accident, offending truck was transferred/ sold to applicant 1. It is also pointed out that non-applicant 1/ Respondent 1 was proceeded ex parte but somehow he has been shown to be examined as witness no. 2 of the applicant, his evidence is to be decided in the light of the pleadings made by the claimants without considering any pleading of Respondent 1/non-applicant 1. The finding recorded by the Commissioner with regard to employee-employer relationship is not sustainable.
11. Per contra, Mr. Ratan Pusty, learned counsel for the Respondent-Insurance Company submits that the Commissioner has rightly dismissed the claim application recording that the applicants failed to prove employee-employer relationship. It is contended that for maintaining the application under Section 22 of the Act of 1923, employee-employer relationship is primary and essential ingredient to be established by injured or the legal representatives of the deceased employee, but in the case at hand, the applicant/ appellant failed to prove that the deceased was under employment of Respondent 1. He also submits that non-applicant/ defendant can be examined as applicant's witness with the permission of this Court and in the case at hand, non-applicant 1/ defendant has been examined as witness. There is no illegality in the proceedings drawn by the Commissioner.
12. We have heard learned counsel for the respective parties and also perused the record of the case.
13. In pleading, claimants have very specifically pleaded that the vehicle was owned by Non-applicant 1 in which deceased husband of applicant 1 was working as driver who met with an accident while driving the offending truck. Respondent 1/Non-applicant 1 who appeared in person in the proceeding

before the Commissioner and submitted preliminary objection with regard to maintainability of the application under the Act of 1923. This preliminary objection was replied by the appellants/ applicants and denied the fact mentioned therein, in fact, they have pleaded that the truck was seized by the investigating agency by the police in crime no. 131/2005 on 31-05-2005. It is the Respondent 1/non-applicant 1 who has filed an application before the competent court for taking custody of the vehicle mentioning therein that he is owner of the vehicle and it is the only source of earning.

14. Going by the proceedings/ order sheets recorded by the Commissioner, it would show that Respondent 1/non-applicant 1 was proceeded ex parte on 02-09-2006 as he has failed to submit reply to the application on 11-09-2006. Non-applicant 1/ Respondent 1 submitted preliminary objection and thereafter on 14-06-2007, application for notice to produce document was filed by non-applicant 1. On 07-03-2008, the Commissioner decided both the applications; application for notice to produce document was dismissed mentioning therein that the applicants were dependents upon the deceased workman and it is the employer who is responsible for payment of compensation and as the applicants are not having the document sought to be produced, copy of insurance policy, the applicants cannot be forced and dismissed it. For deciding the preliminary objection, it is recorded that the preliminary objection will be decided after framing issues in this regard.
15. Non-applicant 1/ Respondent 1 from the date of recording and drawing ex parte proceedings against him, he has not moved any application for permitting him to participate in the proceedings but after examination of applicant 1 as witness for the applicants after few days on 13-05-2009, non-applicant 1 has been examined as applicant's witness. This proceeding was recorded in the order sheet dated 13-05-2009. Records do not show that the name of this witness is mentioned in the list of witnesses nor any application has been filed by the applicants for recording the statement, evidence of non-applicant 1 as witness of the applicants.

16. Be that as it may, the statement of non-applicant 1/ Respondent 1 was recorded by the Commissioner as witness of the applicants. Now the question arises for consideration is what will be the veracity of evidence of non-applicant 1 whose evidence is recorded as applicant's witness in absence of the reply filed by him to the claim application. The only pleading was the preliminary objection filed by him mentioning that the vehicle was sold/ transferred in the name of applicant 1 from non-applicant 1 and since then the vehicle was being driven by deceased and further the mode of payments and balance payment to be paid to J.K. Finance and further that there was no employer-employee relationship. The Commissioner in second paragraph of paragraph 6 has accepted the objection raised by the learned counsel for the applicants/ appellants therein with regard to admissibility of document i.e. sale letter but the Commissioner has recorded that even if **“the sale letter is not exhibited but evidence of witness no. 2 of the applicants' witness remained uncontroverted”** and held that the deceased was under employment of non-applicant 1 was not found to be proved. Further again taken a note that on the date of accident, the vehicle was sold in the name of applicant 1/ wife of deceased. The relevant portion of paragraph 6 of the impugned award is reproduced below for ready reference.

“06. उपरोक्त विवेचना से स्पष्ट है कि मृतक रामकृपाल उर्फ कृपाल सिंह की मृत्यु दिनांक 31.05.2005 को ट्रक क्रमांक सी जी 07 जेड सी 1222 के पलट जाने से हुई जो प्रकरण में संलग्न दुर्घटना से सम्बंधित दस्तावेज मर्ग क्रमांक 31/2005 के संलग्न प्रमाणित प्रतिलिपि से भी होता है। मृतक एवं अनावेदक क्रमांक के मध्य नियोजक एवं कर्मकार का सम्बन्ध होना चाहिए इस बाबत आवेदक द्वारा अनावेदक क्रमांक 01 का बयान अंकित कराया गया है। जिसमें अनावेदक क्रमांक 01 राजेंद्र सिंह ने स्पष्ट रूप से कथन किया है कि मृतक रामकृपाल कभी भी उसके उक्त ट्रक में वाहन चालन का कार्य नहीं किया है उन्होंने यह भी कहा है कि उक्त वाहन को दिनांक 01.08.2004 को मृतक की पत्नी श्रीमती कुसुमसैंगर को विक्रय कर दिया था विक्रय दिनांक से उक्त वाहन ट्रक क्रमांक सी जी 07 जेड सी 1222 का सञ्चालन कुसुम सैंगर द्वारा कराया जा रहा है। तथा मृतक कुसुम सैंगर का पति होकर वाहन का चालन कर रहा था।

प्रदर्श डी 1 जवाबदारी पत्र, विक्री पत्र डिलवरी पत्र की छायाप्रति अभिलेख में संलग्न है जिसे प्रदर्श अंकित कराने में आवेदक अधिवक्ता ने आपत्ति व्यक्त की थी क्योंकि उक्त दस्तावेज छायाप्रति है ऐसी स्थिति में मूल के आभाव में उसे प्रदर्शित कराना न्यायोचित प्रतीत नहीं होता है। आवेदक अधिवक्ता की आपत्ति स्वीकार की जाती है भले ही वाहन विक्रय पत्र अभिलेख में प्रदर्शित नहीं हुए है किन्तु आवेदक साक्षी क्रमांक 02 पूर्व वाहन स्वामी के कथनों का खंडन आवेदिका द्वारा नहीं कराया गया है जबकि अनावेदक क्रमांक 01 को आवेदकगण ने स्वयं की ओर से साक्ष्य देने लेकर आए है। इस तरह अभिलेख में यह प्रमाणित नहीं हुआ है कि मृतक रामकृपाल सिंह उर्फ कृपाल सिंह दुर्घटना दिनांक 31.05.2005 को अनावेदक क्रमांक 01 के नियोजन में था। बल्कि उक्त दिनांक को उक्त वाहन मृतक की पत्नी को विक्रय हो चुकी थी। इस आवेदिकागण यह प्रमाणित करने में पूर्णतः असमर्थ रहे है कि घटना दिनांक 31.05.2005 को मृतक एवं अनावेदक के मध्य कर्मकार एवं नियोजक का सम्बन्ध था। अतः वाद प्रश्न क्रमांक 01 आवेदकगण के विरुद्ध निर्णित किया जाता है।"

17. If the basis of transfer of ownership and sale of the vehicle itself i.e. Ext. D1 is not found to be admissible evidence by the Commissioner, whether in the facts of the case where the deceased while driving a truck, met with an accident, the name of non-applicant 1 is shown to be registered owner in registration certificate can be treated as an employee in absence of any other evidence or pleadings on the part of non-applicant 1. More so when, the non-applicant no. 1 is undisputedly a registered owner, sale/ transfer of the vehicle not proved by documentary evidence.
18. True it is that for maintaining the application under Section 22 of the Act of 1923, the burden is upon the claimants/ injured employee to prove that there was employee-employer relationship between the injured/ deceased with the non-applicant against whom the claim is filed. But at the same time, looking to the object of the Act, mode of proof of employee-employer relationship may vary from case to case, particularly, when it is the case of driver of the vehicle who undisputedly met with an accident while driving the vehicle of the registered owner, especially when the plea of sale/ transfer could not be

proved. The burden to prove the fact that deceased was not his employee shifts upon the non-applicant no. 1-owner of the offending truck. The Commissioner has not adverted to this fact while deciding the application filed by the appellants. But from perusal of entire order passed by the Commissioner, it appears that the basis of dismissal of the application of the appellants is the sale of the offending vehicle which was being driven by the deceased at the time of accident. The hon'ble Supreme Court has considered the issue on whom the onus to prove the employer-employee relationship would lay in the case of **Kanpur Electricity Supply Co. Ltd. v. Shamim Mirza** reported in (2009) 1 SCC 20 and held thus:

“20. It is trite that the burden to prove that a claimant was in the employment of a particular management, primarily lies on the person who claims to be so but the degree of proof, so required, varies from case to case. It is neither feasible nor advisable to lay down an abstract rule to determine the employer-employee relationship. It is essentially a question of fact to be determined by having regard to the cumulative effect of the entire material placed before the adjudicatory forum by the claimant and the management.”

The Hon'ble Supreme Court in another judgment in **Bharat Sanchar Nigam Limited v. Bhurumal** reported in (2014) 7 SCC 177, identical question was considered and held thus:

“24. Once we come to the conclusion that the respondent had been doing the work of the appellant, it was for the appellant to prove as to who was the contractor to whom the work was awarded and that the contractor had recruited the respondent. No such evidence is produced by the appellant. Moreover, the appellant has itself accepted the fact that the work of a lineman was not given on contract basis.”

19. In the case at hand, it is not in dispute that the offending vehicle driven by the deceased on the date of accident was recorded in the name of Respondent 1/ non-applicant 1 in the registration certificate. The document produced by Respondent 1/ non-applicant 1 Ext. D1 showing the sale/ transfer of the offending vehicle in the name of applicant 1 was not found to be admissible

by the Commissioner. When once the objections of the applicants/ appellants were sustained by the Commissioner with regard to admissibility of the documents in showing the sale of offending vehicle and not accepted as evidence then the case is to be considered on the basis that there was no sale/ transfer of the offending vehicle, more so, in absence of any admissible piece of evidence placed on record by the non-applicant 1/ Respondent 1.

20. For the foregoing reasons, the impugned award/ order passed by the Commissioner under Workmen's Compensation Act, Durg, is not sustainable and it is hereby set aside. The case is remitted back to the Court of Commissioner for deciding the case afresh taking into consideration the objection of the appellants already decided in favour of the appellants. Needless to mention that the Commissioner shall decide the case after affording opportunity of hearing to all the respective parties. Looking to the date of filing of the application of the year 2006, we direct the Commissioner to decide the claim/ application as earliest as possible preferably within a period of 5 months from the date of production of certified copy of the order passed by this Court.

21. Records of the case be sent back along with the copy of this order to the concerned Commissioner.

Sd/-
(P.R. Ramachandra Menon)
 Chief Justice

Sd/-
(Parth Prateem Sahu)
 Judge