

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

**FIRST APPEAL NO.1821 OF 2020 WITH
CIVIL APPLICATION NO.5782 OF 2020**

IFFCO TOKYO General Insurance
Company Limited, Branch office at :
Akola, for the service of summons,
Legal Manager, above the Bank of
Rajasthan, Oppo. Uday Cinema Hall,
Akola, Tq. & Dist. Akola, through its
Authorized Signatory/ Branch Manager,
Branch Office, Aurangabad, Taluka
and District Aurangabad

... APPELLANT
(Orig. Respondent No.2)

VERSUS

1. Shahrenaz Begum Imam Baig,
Age 54 years, Occu. Household &
Labour, R/o Kajipura Wadegaon,
Tq. Balapur, Dist. Akola
At present R/o Kumbhari,
Tq. Manwath, Dist. Parbhani

2. Shaikh Imam Baig s/o Shaikh
Sheru Baig, Age 55 years,
Occu. Business, R/o Kajipura
Wadegaon, Tq. Balapur,
District Akola

... RESPONDENTS
(No.1 Orig. Applicant
No.2 Orig. Respdt. No.1)

.....
Shri S.G. Chapalgaonkar, Advocate for appellant
Shri D.S. Pawar, Advocate for respondent No.1.
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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 3rd August, 2021

Date of pronouncing judgment : 16th September, 2021

J U D G M E N T :

This is an appeal filed by the Insurance Company under Section 30 of the Employees' Compensation Act, 1923 (for short EC Act), challenging the judgment and order dated 4/3/2020, passed by the Commissioner under the EC Act in W.C.F.A. No.26/2016, directing the appellant Insurance Company and the owner of the vehicle, to pay jointly and severally compensation amounting to Rs.8,85,480/- within two months, lest the amount shall carry interest @ 12% p.a.

2. The substantial questions of law involved in this appeal have been enumerated in the appeal memo. To be precise, one of them is :-

Whether employer-employee relationship between the respondent No.1 and the deceased could be said to have been established in absence of material on record ?

FACTS :-

3. The respondent No.1 owned a truck, bearing No.MH-19/4721. Deceased Azar was said to have been employed as a driver on the said truck. On 15/5/2016, the deceased drove the respondent No.1 and some of his labours to the bank of a river for loading sand therein. The deceased and the labours started loading the truck with sand. A cliff of

sand, all of a sudden, caved in. The deceased and one more labour got accidentally buried thereunder. The deceased died on the spot. The applicant, mother of the deceased, therefore, preferred the application against her husband, respondent No.1 and the insurer of the truck for compensation. On appreciation of the evidence in the case, the learned Commissioner allowed the application.

4. Heard learned counsel for the parties. Learned counsel for the appellant – Insurance Company would submit that, it is a collusive claim. The employer-employee relationship between respondent No.1 and the deceased is not proved. Although the deceased died in an unfortunate accident, his death could not be said to have occurred as a result of personal injury caused to him by accident arising out of and in the course of his employment. The learned counsel took me through relevant evidence on record to submit that the Commissioner erred in allowing the application. According to him, the truck did not have a valid permit. As such, its a breach of terms and conditions of the policy of insurance. The appellant – Insurance Company has, therefore, no liability to pay compensation. The learned counsel, therefore, urged for allowing the appeal.

5. Learned counsel for the respondent No.1 (original petitioner) would, on the other hand, submit that, it is not that no employer-employee relationship would exist between blood relations. He relied on the driving licence of the deceased. According to him, the witnesses examined on behalf of the petitioner did specifically state that the deceased had driven them to the river bed. The witness specifically stated that, the deceased was a driver on the truck. This piece of evidence has not been specifically traversed in the cross-examination. According to him, a sworn testimony would always prevail over unsigned statements recorded under Section 161 of the Code of Criminal Procedure. He would further submit that, by virtue of theory of notional extension of 'employment', the deceased could be said to have suffered injuries and died thereof in the course of and arising out of his employment. He relied on the following authorities :-

- (1) Mackinnon Machenzie and Co. (P) Ltd. Vs. Ibrahim Mammed Issak [1969(2) SCC 607]
- (2) Mst. Param Pal Singh through Father Vs. National Insurance Company & ors. [AIR 2013 SC 974]
- (3) United India Insurance Co. Ltd. Vs. Prakash Shankar Gaurav & ors. [(2007) ACC 680]
- (4) Sumit Tamrakar & ors. Vs. Nafis Hussain & ors. [2019 ACJ 744]

- (5) United India Insurance Co. Ltd. Vs. Baljeet Kaur & ors. [111(2010) acc 300 (Utt.)

6. Section 3 of the Employees Compensation Act reads thus :

“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 -
 - (i) the employee having been at the time thereof under the influence of drink or drugs, or
 - (ii) the wilful disobedience of the employee to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employee, or
 - (iii) the wilful 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 employees.”

The applicant was, therefore, required to prove

that the deceased was in the employment as a driver on the truck owned by the respondent No.2. The deceased suffered injuries by accident arising out of and in the course of his employment, and as a result of the said injury, he died.

7. The appellant Insurance Company has a justification to contend that, it is a collusive claim. The petitioner – claimant is mother of the deceased. The truck belonged to her husband, respondent No.2. As such, the claim has been filed by a wife against her husband. True, the deceased held a valid and effective driving licence. Admittedly, the deceased, his father and a few labours had been to the river bed for loading of sand in the truck. It is also undisputed that, while the deceased was engaged in excavating the sand, so as to fill the truck therewith, a cliff of sand caved in. The deceased and one of the labours were buried thereunder. Both died on the spot.

8. The respondent No.2 (truck owner) lodged the report of the accident with the concerned Police Station (Exh.31). He reported therein that, he was driver on his own truck. He would ply the truck for transporting sand. His son-deceased Azar Baig and 4 others were employed by him as labours for loading the truck with sand and transporting the

same. On 15/5/2016, he took his son and other labours to the river bed, in his truck. While the deceased and others were engaged in excavating the sand, a cliff caved in. The deceased died accidentally.

9. The respondent No.2, owner of the truck appears to have consciously remained absent in the proceedings before the Commissioner.

10. The statement of Isamuddin reads that, on 15/5/2016, he along with labour Sameer, Shaikh Juned, Rahemankhan and Azar Baig (deceased) had accompanied the respondent No.1 (truck owner) in his truck to fetch sand.

11. The statement of Sameer reads that, on 15/5/2016, he along with Azar Baig (deceased), Shaikh Juned, Rahemankhan, Isamuddin had been to the river bed in a truck to fill the same with sand.

The statements of Shaikh Juned and Rahemankhan are on the lines of statement of Sameer.

12. Aforesaid are the statements recorded by the investigating officer soon after report regarding accidental death was registered. These police papers were produced before the Commissioner. The aforesaid police papers were

tendered in evidence and relied upon by the petitioner herself. She, therefore, cannot be allowed to turn around therefrom. It is to be stated that, these statements came into being when it was not in the mind of the petitioner or her husband to move the petition for compensation. As such, those statements could be said to have been made when the parties thereto were uninfluenced by any interest. In my view, therefore, these statements carry more probative value than the interested words deposed to before the Commissioner. All the aforesaid statements indicate it was the respondent No.2 (truck owner) who drove the deceased and other labours in the truck to the river bed for loading of sand.

13. The petitioner gave her evidence on affidavit, reiterating the averments in the petition. It is not the case of the petitioner in her application that the deceased was engaged as a labour on the truck. Whatever case, therefore, she has averred in her examination-in-chief, would be a clear departure from the pleadings. The same, therefore, needs to be ignored. Moreover, she has stated in her cross-examination that, she did not have any documentary evidence to show that the deceased was serving with her husband as a driver. She has been cohabiting with her husband (respondent No.2, truck owner) since the accident. She claimed ignorance as to

who were serving as driver and/or labours with the truck owned by her husband.

14. As such, it is a case of bare one line evidence of the petitioner that her deceased son was serving with her husband as a driver. The petitioner examined one Rahemankhan. It is in his evidence that, he was working as a labour on the truck owned by the husband of the petitioner. On the fateful day, he along with four others had been to the river bed in the truck to fetch sand. It is further in his evidence that, deceased Azar Baig would assist them in filling up the truck with sand. He would also drive the truck. In his cross-examination, he deposed that, the deceased would ply the truck. It was the deceased who looked after maintenance of the truck. His evidence is, however, silent to state that the deceased would ply the truck as a paid driver. The testimony of this witness would be of not much assistance to the petitioner, although the Commissioner has relied on his evidence on the ground that the same has not been specifically traversed in the cross-examination. The said witness was specifically suggested in the cross-examination that he was deposing false. A mere omission, if any, in non-traversing a particular piece of evidence would, in no way, be taken as fatal in particular facts and circumstances of the

case. The same has to be read in the totality of the evidence on record. Non-traverse, if any, can be relied on to breach a missing link or reinforce the evidence in the matter.

15. It is not that no master-servant or employer-employee relationship could exist between blood relations. There has to be cogent and reliable evidence in proof of such relationship. The evidence in the case undoubtedly indicates that, it was the respondent No.2 (truck owner) who would ply his own truck. Although the deceased held a valid and effective driving licence, he would assist his father as a labour. On the same lines are the statements recorded during investigation of the accidental death. The petitioner, mother of the deceased, did not have personal knowledge as to who were serving with her husband and in what capacity as well. There is no documentary evidence in proof of the employer-employee relationship. The respondent No.2 (truck owner) consciously remained absent in the proceedings before the Commissioner. Both the petitioner and he himself have been residing together. No other conclusion from the evidence on record could be drawn than that it is a case of collusion between the petitioner and respondent No.2, her husband. The learned Commissioner ought not to have relied on the evidence of witness Rahemankhan in view of there being

voluminous, cogent and reliable evidence to indicate that on the given day the respondent No.2 drove the truck to the river bed. The deceased and others had accompanied him in the truck as the labours to load the truck with sand. The unfortunate death of Azar, therefore, could not be said to have occurred as a result of personal injury caused to him by accident arising out of and in the course of his employment.

16. There can be no dispute over what has been observed and held in the authorities relied on by the learned counsel for the respondent No.1 (original petitioner). The gist thereof is given hereunder :-

17. In case of Mackinnon Machenzie & Company (supra), it has been observed :-

“5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words “in the course of the employment” mean “in the course of the work which the workman is employed to do and which is incidental to it.”. the words “arising out of employment” are understood to mean that “during the course of employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered.” In other words there must be a casual relationship between the accident and the employment. The

expression “arising out of employment” is again not confined to the mere nature of the employment. The expression applies to employment as such – to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises ‘out of employment’. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act. In **Lancashire and Yorkshire, Railway Co. v. Highley** (1917 AC 352), Lord Sumner laid down the following test for determining whether an accident “arose out of the employment” :-

“There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this : Was it part of the injured person’s employment to hazard, to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment. If nay, it did not, because, what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of the workman was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment, that the workman should have acted as he was acting, or

should have been in the position in which he was, whereby in the course of that employment he sustained injury.”

18. In case of Param Pal Singh (supra), it has been observed :-

“Workmen’s Compensation Act, 1923 – Section 3 – Compensation on death of workman – Deceased employed as driver – While driving truck, he felt uncomfortable – Parked truck near destination – And met with his unexpected death – Driving vehicle for long distance of about 1152 kms. - He would definitely have undergone strain and stress– Hence, there was casual connection to death of deceased with that of his employment as truck driver – Conclusion of W.C. Commissioner that death of deceased – Was in accident arising out of and in course of his employment – Perfectly justified – Contrary conclusion reached by High Court – Unsustainable and set aside.”

19. In the case of Prakash Gaurav (supra), it has been held that, *“It is to be noted that a father engaging his son as an employee in a vehicle owned by the father is not prohibited in law nor it can be said that such a situation is not normally possible.”*

20. In the case of Sumit Tamrakar (supra), it has been observed :-

“14. Now the only issue that remains to be adjudicated upon is as to whether the death of the

deceased Imtiyaz Hussain has arisen out of and in the course of employment. Undisputedly, the deceased at the relevant point of time was working as a driver of the offending bus. The injuries sustained by the deceased were a result of an assault made by a group of villagers when the deceased was in the course of driving the said bus belonging to the appellants. Whether the assault made by the villagers could be brought within the ambit of an accidental death or not is immaterial for the moment, for the reason that the claim raised by the claimants was under the provisions of the Act of 1923 where the requirement for payment of compensation is envisaged under sub-section (1) of Section 3 which says that if personal injury is caused to a workman by “accident arising out of and in the course of employment”, the employer shall be liable to pay compensation.”

21. In case of Baljeet Kaur (supra), it has been observed :-

“9. The Workmen’s Compensation Commissioner after having considered the entire evidence available on record and hearing learned Counsel for the parties came to the conclusion that deceased – Balvinder Singh was employed as driver over Vehicle No.D.I.G.-3587 owned by opposite party No.1- Sri Darshan Singh on salary basis at the time of accident and claimant could not be deprived of getting compensation on account of relationship of father and son between owner and driver of vehicle.”

22. It is to be reiterated that, each case has its own peculiar facts and circumstances. The evidence in the matter

does lead me to observe that the Commissioner erred in allowing the application for compensation. Interference is, therefore, called for with the impugned order.

23. In the result, the appeal succeeds. Hence the order :-

ORDER

- (i) The First Appeal is allowed.
- (ii) The order dated 4/3/2020, passed by the Commissioner under the EC Act in W.C.F.A. No.26/2016 is hereby set aside. The W.C.F.A. No.26/2016 stands dismissed.
- (iii) The amount of compensation deposited by the appellant Insurance Company be returned to it along with interest accrued thereon after a period of three months.
- (iv) In view of the above, Civil Application No.5782/2020 stands disposed of.

**(R. G. AVACHAT)
JUDGE**

fmp/-