

Uday S. Jagtap

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

**FIRST APPEAL NO. 334 OF 2019
A/W
CIVIL APPLICATION NO. 2570 OF 2019
A/W
CIVIL APPLICATION NO. 1204 OF 2019
IN
FIRST APPEAL NO. 334 OF 2019**

M/s. New India Assurance Co. Ltd.

MRO-1, New India Bhawan,

34/38, Bank Street,

Mumbai – 400 013

At present : Mumbai Claim Hub,

41B, 4th floor, maker Tower E,

Opp. World Trade Centre,

Cuffe Parade, Mumbai – 400 005

.. Appellant

Vs.

1. Vijay Bapu Kamble

Father, Age 55 years

2. Smt. Suvarta Vijay Kamble

Mother, Age 55 years,

Both R/at ESIC Hospital

Quarters Type,

Room No. 01, Akurli Road,

Near Kandivali Station,

Kandivali East, Mumbai – 400 101

3. Abhishek S. Mayekar

Room No. 03, Haji Noorani Compound,

Ground Floor, Elephinstone Road,

Mumbai – 400 013

.. Respondents

.....

Ms. Jyoti Bajpayee for the appellant

Mr. T.J. Mendon for the respondents

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CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 12th FEBRUARY, 2021

PRONOUNCED ON : 23rd FEBRUARY, 2021

JUDGMENT : -

1. Feeling aggrieved by the impugned judgment and order dated 7th August, 2018 granting compensation to the respondents to the tune of Rs.8,15,400/- along with interest at the rate of 12% p.a. by the Additional Commissioner for Employees Compensation & Judge, 7th Labour Court, Mumbai, the insurer had preferred this appeal amongst following facts and grounds.

2. Deceased Harshad @ Sachin Vijay Kamble, was the son of respondent nos. 1 and 2 and an employee of respondent no.3. While discharging his duties an employee of the respondent no.3 deceased Harshad @ Sachin Vijay Kamble met with an accident as he was dashed by an unknown vehicle at Vine Gaon, Mumbai-Pune Highway No.4, Near Khalapur, Dist. Raigad. The respondent nos. 1 and 2, who are parents of the deceased have moved an application under Section 4 of the Employees' Compensation Act, 1923.

3. On 3rd September, 2015 deceased Harshad, as a driver of respondent no.3, had taken some students and teachers of Saboo Siddiki Technical College to Monteria Resort at Khalapur, Dist. Raigad for a picnic. After parking the motor vehicle at the said Resort, he went for shaving and met with a vehicular accident, resulting into his death due to the fatal injuries.

4. An offence came to be registered with Khalapur Police Station, Dist. Raigad.

5. It is the contention of respondent nos. 1 and 2 that at the relevant time, the deceased was employed with respondent no.3 and was drawing a monthly salary of Rs.8,000/-. He was aged about 32 years. After his death in an accident, the respondent nos. 1 and 2 have raised a claim before respondent no.3 and the insurer but the same was neither responded nor complied with.

6. Pursuant to filing an application under Section 4 of the Employees' Compensation Act, notices were duly served upon the appellant and respondent no.3. Despite sufficient opportunity, respondent no.3 did not appear before the Court and, therefore, the matter proceeded against him in his absence.

7. The appellant in its written statement denied all the averments made in the application. The specific stand of the appellant was that there was no casual connection between the incident and the work of the deceased, for which he was engaged. The appellant, therefore, disowned the liability in respect of the insured vehicle by contending that it was not involved in the accident / incident. The appellant, therefore, prayed for rejection of the claim of respondent nos. 1 and 2.

8. The learned Commissioner framed necessary issues after hearing the learned Counsel for the respondents and by the

impugned judgment and order, awarded compensation as above. The learned Commissioner *inter alia* directed the respondent no.3 to make payment of penalty amount to the extent of 50% of the claim amount.

9. I heard Ms. Bajpayee, learned Counsel for the appellant and Mr. Mendon, learned Counsel for respondent nos. 1 and 2.

10. Ms. Bajpayee, took me through the impugned Judgment and award by contending that the learned Judge has not considered the evidence on record in its correct perspective, in the sense, there is no evidence tendered to show that the deceased was in fact, working with respondent no.3 and that the incident took place during the course of his employment. It is contended that the accident did not arise out of the employment as the deceased died while going for shaving and, therefore, it cannot be termed to be 'a death during and in the course of employment'. It is further contended that the learned Judge ought to have considered the fact that the deceased had parked the vehicle and went for shaving and while crossing the road, was knocked down by another vehicle. Hence, there is no casual connection with the job on employment and that of the accident. It is contended that the observations of the learned Judge that the opponents are under legal obligation to cover the risk of such drivers in entire span of time and not only for the period of driving, is grossly erroneous. It is further contended that the learned Judge has failed to consider the fact that the deceased did not die due to the use of the insured vehicle. Lastly, the learned Counsel vehemently urged

to quash and set aside the impugned judgment and award by allowing the appeal.

11. Per contra, Mr. Mendon, learned Counsel for respondent nos. 1 and 2 has strongly supported the impugned judgment and award. Mr. Mendon, in support of his contention pressed into service four decisions, which shall be referred to at the appropriate stage.

12. Respondent no.1 had filed his affidavit in lieu of evidence before the Court. In order to substantiate the fact as to the employee – employer relationship between the deceased Harshad and respondent no.3, affidavit of respondent no.1 substantiate the said fact, which went uncontroverted by respondent no.3 owing to his absence despite due service. In the absence of any rebuttal to that effect, the learned Commissioner has rightly held that there was a employee – employer relationship between the deceased Harashad and respondent no.3.

13. There is no dispute that the deceased died in an accident which took place on 3rd September, 2015 when he had been to Monteria Resort for a picnic along with students and teachers of Saboo Siddiki Technical College and while going for shaving, was dashed by an unknown motor vehicle. Death of the deceased involving an unknown motor vehicle has been corroborated from the documents namely; certified copies of F.I.R., statements, panchanama, inquest panchanama and death certificate etc.

14. The police recorded statement of one Sandip Ashok Shingare, who is the co-employee of the deceased. Statement of Sandip A. Shingare reveals that on the day of incident, he along with the deceased and other co-employees, proceeded for their regular duties. They picked up teachers and students of Saboo Siddiki Technical College and proceeded to Monteria Resort, Khalapur, Dist. Raigad for a picnic. After reaching the destination, the deceased went for shaving. The accident occurred at that time as the deceased was dashed by another vehicle. Due to the fatal accident, the deceased succumbed to the injuries.

15. Crux of the appeal is that the appellant is not liable to pay compensation as the accident did not arise out of and in the course of employment of the deceased with respondent no.3. Undisputedly, the vehicle bearing No. MH-04-G-7400 belongs to respondent no.3, which was insured with the appellant. The learned Commissioner has, therefore, rightly observed that since the respondent no.3 did not turn up despite service, adverse inference is required to be drawn against him. The appellant was not prevented from summoning respondent no.3 to substantiate its contention that the deceased was not employed with him and the accident did not occur out of and in the course of his employment with respondent no.3.

16. From the cross-examining of the respondent no.1, nothing could be elicited from his mouth by the appellant, which would render his evidence as unworthy of credit. From the material on record, it can be safely said that it was a planned picnic by the

students and teachers of Saboo Siddiki Technical College to Monteria Resort, Khalapur. After reaching the destination, the deceased went for shaving. Obviously, after the picnic, it was incumbent upon the deceased, as a driver of the said vehicle, to bring back the students and teachers to Mumbai. Till his return to Mumbai, the deceased was in the course of employment of respondent no.3.

17. At this stage, the learned Counsel for the appellant has placed reliance on a decision of the Hon'ble Supreme Court in the case of ***Mallikarjuna G. Hiremath V. Branch Manager, The Oriental Insurance Co. Ltd. & Anr. (2009) LawSuit (SC) 211.*** It was a case under Workmen Compensation Act. The ratio laid down by the Hon'ble Supreme Court is that an accident may lead to death but that an accident had taken place must be proved. Only because a death has taken place in course of employment will not amount to accident. Death must arise out of accident and, therefore, there is no presumption that an accident had occurred. The facts in the said case are that the deceased who was driving the vehicle on the directions of insured had gone to Gurugunta from Siraguppa. There he had gone to a temple and was sitting on the steps of the pond in the temple and he slipped and fell into the water and died due to drowning. The High Court held that the owner of the vehicle is liable to pay the compensation. However, the Hon'ble Supreme Court allowed the appeal by observing that the High Court was not justified in holding that owner of the vehicle was liable to pay compensation.

18. The learned Counsel for the appellant has relied upon one more judgment of the Hon'ble Supreme Court in case of *Mackinnon Mackenzie & Co. Pvt. Ltd. Vs. Ibrahim Mohommad Issak, (1969) Law Suit (SC) 275*. This is under Section 3 of the Workmen Compensation Act. The ratio laid down herein is that the injury must arise both "out of" and "in the course of employment". There must be a casual relationship between the accident and the employment. If the accident had occurred on account of a risk, which is an incident of the employment, the claim must succeed, unless, the workman has exposed himself to an added peril by his own imprudent act.

19. I am afraid, both case laws referred to hereinabove, would not be made applicable to the present situation in view of the simple reason that here it is not the case that the deceased had exposed himself to an added peril by his own imprudent act. What he did was he proceeded for shaving which can, by no stretch of imagination, said to be an imprudent act on his part. It was just an accident.

20. Secondly, in case of *Mallikarjun G. Hiremath* (supra), the deceased had gone to a temple and was sitting on the steps of the pond in the temple and he slipped and fell into the water and died due to drowning. The deceased had exposed himself to an added peril by his act of sitting on the steps of the pond. D

21. In that context, it can be apposite to refer to a decision of the Hon'ble Supreme Court relied upon by Mr. Mendon in the case of

Manju Sarkar & Ors. Vs. Mabish Miah and Ors. (2014) ACJ 1927.

The Hon'ble Supreme Court has lucidly enunciated and interpreted Section 3(1) of the Workmens' Compensationo Act as to what is "arising out of" and "in the course of employment" as well as "notional extension". It was a case wherein a driver took the truck to the destination and was to bring the vehicle back laden with rice bags. Since some delay had been occurred in loading the goods, driver left the truck in care of the helper by telling him that he would return in the night. However, during the night, he met with a road accident and succumbed to his injuries in the hospital. It is held by the Hon'ble Supreme Court that in the given set of facts and circumstances, "notional extension" is applicable since the deceased met with road accident in the course of his employment. The deceased had gone to that place only on account of employment of a driver of the truck. Paragraph 7, 8 and 10 of the judgment would reflect the ratio decidendi :-

"7. From the pleadings it is clear that Sajal Sarkar was employed by respondent Nos.1 and 2 to drive their truck at the relevant time. Though respondent Nos. 1 and 2 had stated in the counter that Sajal Sarkar was entrusted to drive the truck on 13.5.2005 and on the same day the said truck entered the godown complex of FCI at Churaibari, this statement about the date does not appear to be correct. It is categorically stated in the claim petition that Sajal Sarkar drove the truck vehicle on 14.5.2005 and the said fact is corroborated by the averments in the First Information Report as well as final report which specifically states that the truck reached the FCI godown at Churaibari on 14.5.2005.

8. Further case of respondent Nos.1 and 2 is that Sajal Sarkar was employed by them to drive the truck vehicle

from Agartala to Dharmanagar FCI godown at Churaibari and on the truck reaching the godown, Sajal Sarkar ceased to be in their employment. This also appears to be an after thought and factually incorrect. As per the averments in the First Information Report lodged by helper Bikram Deb the truck reached Churaibari FCI godown on 14.5.2005 and Sajal Sarkar was to return back to Agartala with the truck laden with rice bags. According to the complainant, on reaching FCI godown in the afternoon on 14.5.2005, considering the delay of loading goods, Sajal Sarkar left the place by leaving the truck in his care and told him that he would return in the night and since he did not return during the night, he searched him the next morning and after coming to know about the accident and death, he lodged the complaint. If Sajal Sarkar was actually employed only for the trip from Agartala to FCI godown Churaibari there was no need for him to inform the helper that he would come back in the night to the godown for the return trip and in the same way there was no obligation on the part of the helper Bikram Deb to search for Sajal Sarkar the next day morning leading to lodging of the complaint. These circumstances clinch the issue and prove that Sajal Sarkar was employed to drive the truck from Agartala to FCI godown Churaibari and return back to Agartala with the truck laden with the rice bags. It is also relevant to point out that respondent Nos.1 and 2 neither examined themselves in the trial nor examined helper Bikram Deb or permanent driver Gopal Sharma to substantiate their plea.

10. This Court has in the celebrated decision in General Manager B.E.S.T. Undertaking, Bombay vs. Mrs. Agnes (AIR 1964 SC 193] laid down as follows:-

“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.”

22. Similar is the view echoed in the judgment by the Hon’ble Supreme Court in ***Poonam Devi & Ors. Vs. Oriental Insurance Co.Ltd. 2020 (3), T.A.C. 73 (SC)***. In the said case, the deceased was aged about 21 years and was in employment of respondent no.2 as a driver. While on the way he went to canal to fetch water and also to have a bath. Unfortunately, he slipped into canal and died. The Commissioner awarded an amount of Rs.4,45,420/- along with interest @ 12% in addition to penalty imposed on employer. The High Court allowed the appeal filed by the respondent by holding that deceased may have died during course of employment but death in question did not arise out of employment, as bathing in the canal was not incidental to employment but was at peril of the workman. It is observed by the Hon’ble Supreme Court that indisputedly, deceased was in the course of his employment. A judicial note was taken of the fact that the possibility of the truck also requiring water to prevent overheating cannot be completely ruled out. The act of the deceased driver to ensure the safety of truck belonging to employer and to ensure safe journey for himself considered as incidental to employment by extension of notional employment theory. The Hon’ble Supreme Court by relying upon the case law

in case of *B.E.S.T. Undertaking Vs. Agnes*, AIR 1964 SC 193 and *Leela Bai and Anr. Vs. Seems Chouhan and Anr.* (2019) ACJ 637 (SC) set aside the order of the High Court. As can be seen that the ratio laid down in the case of *Poonam Devi* (supra) and *Manju Sarkara* (supra) would be squarely applicable to the present set of facts and can be distinguished from a judgment in the case of *Mallikarjun G. Hiremath* (supra) and *Mackinnon Mackenzie and Co. Pvt. Ltd.* (supra).

23. It would be apposite to refer the observations made by the Hon'ble Supreme Court in paragraph 8 in case of *Leela Bai* (supra), which reads thus :-

“8. The deceased did not remain at the bus stand living in the bus as a member of the public or by choice after arrival at Burhanpur till departure for Indore the next morning. It is not the case of the respondent that the deceased was at liberty to proceed home and return at leisure the next morning after parking the bus at the Burhanpur bus stand at night. The Act being a welfare legislation, will have to be interpreted in the facts of each case and the evidence available, to determine if the accident took place in the course of employment and arose out of the employment. In Agnes (supra) it was observed :-

“...The man's work does not consist solely in the task which he is employed to perform. It includes also matters incidental to that task. Times during which meals are taken, moments during which the man is proceeding towards his work from one portion of his employers' premises to another, and periods of rest may all be included.”

24. Turning back to the case in hand, admittedly, the deceased was duty bound to bring back the students and teachers of Saboo

Siddiki Technical College and, therefore, there is an extension of notional employment. The journey was incomplete. There is nothing wrong for the driver to go for shaving during the break. It was not the case of the respondent that the deceased was prevented by the employer to proceed anywhere during the halt at the picnic spot.

25. Thus, in view of the ratio laid down by the Hon'ble Supreme Court in case of Manju Sarkar (supra) and Poonam Devi (supra) *vis-a-vis* the facts and evidence in hand, I do not find any reason to interfere with the impugned judgment and award passed by the learned Commissioner, who has rightly considered the age and income of the deceased as well as the suitable factor of 203.25 applicable to the age of the deceased.

26. Upshot of the observations, would result in dismissal of the appeal with costs.

27. In view of the dismissal of the appeal, pending applications also stand disposed of.

(PRITHVIRAJ K. CHAVAN, J.)