

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

**FIRST APPEAL NO. 430 OF 2017
WITH
INTERIM APPLICATION NO.10316 OF 2022**

The New India Assurance Co. Ltd. ..Appellant.

v/s.

Mrs. Eshwari Vellapandi Devar & Anr. ..Respondents

AND

**FIRST APPEAL NO.1056 OF 2022
WITH
INTERIM APPLICATION NO.10315 OF 2022**

Dyaneshwar Madhukar Jare ..Appellant.

v/s.

Mrs. Eshwari Vellapandi Devar & Anr. ..Respondents

Mr. S.M.Dange for the Appellant-Insurance Company ion FA/430/2022.

Ms. Reena Kundu for the Respondent No.1.

Mr. P.M.Mokashi for the Appellant in FA/1056/2022.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 11th NOVEMBER, 2022.**

JUDGMENT.

1. These appeals under Section 30 of the Workmen's Compensation Act, 1923, are filed by the Appellant Insurance Company, as well as by the Insured/owner of the vehicle, challenging the judgment and order dated 29.5.2013, passed by the learned Commissioner of Workmen Compensation & Judge, 2nd Labour Court, Thane in Application (WCA)

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No. 105-B-22/ 2012. By the impugned judgment, learned Commissioner has allowed the claim application filed under the Workmen's Compensation Act and awarded compensation of Rs.4,45,420/- with interest at the rate of 12% per anum from the date of the incident till final realization.

2. Respondent Nos.1(a) and 1(b) are the legal representatives of the original claimant who died during the pendency of the appeal. The Original Claimant Eshwari Velapandi Devar, preferred an application for compensation under the Workmens Compensation Act with an assertion that on 11.02.2006 her son Selveakumar @ Kumar Vellapandi Devar who was employed as a cleaner on towing Vehicle No. MH04 –B-9534 expired in an accident arising out of and in the course of his employment.

3. The Owner/Insured did not contest the proceeding. The Appellant Insurance Company filed the written statement and denied that the deceased was in employment of the Respondent No.2. The Appellant Insurance Company also denied that the accident was caused in the course of his employment and hence denied its liability to pay compensation.

4. Learned Commissioner framed the issues and upon considering the evidence, recorded a finding that the deceased had expired due to the

injuries sustained in an accident arising out of and in the course of his employment. Learned Commissioner held that the deceased was employed as a cleaner and was earning salary of Rs.4000/- per month. Considering the age and the income of the deceased, and applying the relevant factor as per Schedule 4 of the Workmen Compensation Act, learned Commissioner quantified the compensation at Rs.4,45,420/- and directed the employer and the Insurance Company to pay the compensation with interest @ 12% from the date of accident till final payment. The said judgment, is assailed by the Appellant Insurance Company as well as the owner of the Vehicle.

5. Mr.Dange, learned Counsel for the Appellant Insurance Company, and Mr. Mokashi for the Owner of the Vehicle, have assailed the judgment mainly on the ground that the Claimant has failed to prove employer-employee relationship. Referring to the police papers, particularly, the statement of Esakki Muthu Paramshivam Devar, the brother of the deceased, learned Counsel for the Appellants submit that the accident was caused while the deceased and his two brothers were proceeding to Swami Nityanand Baba temple at Ganesh Puri to attend a religious festival. They submit that the death of the deceased was not caused in an accident arising out of and in the course of employment. They further submit that the identity of the deceased is also in dispute. In such circumstances, the findings recorded by the Tribunal are not

based on evidence and are perverse and illegal.

6. Per contra, Ms. Kundu, learned Counsel for the Respondent-Claimants submits that the findings are based on evidence on record. The case does not involve question of law and the finding of fact recorded by the learned Commissioner cannot be re-agitated in an appeal under Section 30 of the Employees Compensation Act.

7. The question for consideration is whether the findings recorded by the learned Commissioner that the death of Selveakumar @ Kumar Paramshivam Devar was caused in an accident arising out of and in the course of his employment are based on material placed on record.

8. Section 3 of the Workmen's Compensation Act imposes a liability on the employer to pay compensation to the employee in case of personal injury caused by an accident arising out of and in the course of the employment. In this regard, it would be advantageous to refer to the decision of the Hon'ble Supreme Court in ***Daya Kishan Joshi vs. Dynemech Systems Pvt. Ltd. (2018) 11 SCC 642***, wherein it is observed thus:-

“6. Undisputedly the employer's liability for compensation to the employee arises only if the employee has suffered in the accident which arose out of and in the course of employment.

Section 3(1) of the Act deals with the employer's liability for compensation to the employee in case of accident arising out of and in the course of employment. Section 3(1) reads thus:

"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:" The amount of compensation where the death resulted from the injury shall be quantified in accordance with Section 4 of the the Act. Section 4(1) (a) reads thus:

"Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

*(a) where death results from the injury : An amount equal to fifty per cent. of the monthly wages of the deceased *[employee] multiplied by the relevant factor;*

*or an amount of *[one lakh and twenty thousand rupees], whichever is more;"*

6. The words 'arising out of' and 'in the course of employment' are in fact two different phrases and have been understood as such. If the accident had occurred on account of a risk which is an incident of employment, the claim shall succeed unless, of course, the workman had exposed himself to an added peril by his own imprudent act. The phrase 'in the course of employment' suggests that the injury must be caused during the currency of employment, whereas the expression 'out of employment' conveys the idea that there must be a causal connection between the employment and the injury caused to the workman as a result of the accident.

Prima facie, while deciding the issue on hand, there is no material on record to show that the deceased workman had exposed himself to added peril by his own imprudent act.

7. When a workman is on the public road or public place or on public transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. In other words, there must be a causal relationship between the accident and the employment. The expression 'out of employment' is 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. The words “arising out of employment” are understood to mean that during the course of employment, the injury has resulted from some risk incidental to the duties. Unless engaged in the duty owed to the employer, it is reasonable to believe that the workman would not otherwise have suffered.

There cannot be any dispute that the question as to when an employment begins and when it ceases, depends upon the facts of each case. There is a notional extension at both entry and exit by time and space. There may be some reasonable extension in both time and space and a workman may be regarded as in the course of his employment even though he has not reached or has left employer’s premises. In India, the courts have recognized the principle of notional extension of time and space for over 60-70 years while determining whether the injury has been caused out of or in the course of the employment of the workman. The Courts have held consistently that the employment does not necessarily end, when the tool down signal is given and when the workman actually leaves his place of work.

9. Reverting to the facts of the case, the original claimant had stated in her affidavit in evidence that her son-deceased Selveakumar @ Kumar Vellapandi was working as cleaner on Towing Van No. MH-04-B-9534. The said vehicle met with an accident on 11.02.2006, while Selveakumar was on duty as a cleaner and he expired as a result of the injuries sustained in the accident.

10. The claimant had admittedly not witnessed the accident. She had no personal knowledge about the accident. She was not aware whether the accident was caused in the course of employment, whether it arose out of an employment or whether there was nexus between the accident and the employment. The Claimant did not specify the name of the driver of the towing van. She also did not disclose that the said vehicle

was driven by her son Esakki Muthu Paramshivam Devar, who was allegedly employed as a driver on the said vehicle. Nevertheless, she placed on record statement of Esakki Devar recorded by the police in the said accident case. In the said statement, which was recorded immediately after the accident, Esakki Muthu Paramshivam Devar had stated that on the relevant date he and his two brothers- Kumar Paramshivam Devar and Selveakumar Paramshivam Devar were proceeding to Swami Nityanand Baba Temple at Ganeshpuri to attend a religious festival. He was driving the van whereas his brothers were seated on the rear portion of the vehicle. He has stated that his brothers Kumar Paramshivam Devar and Selveakumar Paramshivam Devar fell off the vehicle while he was negotiating a sharp turn. He had stated that Kumar Paramshivam Devar expired due to the injuries sustained in the said accident.

11. It is true that the statement under Section 161 of Cr.P.C. is not substantive evidence. Despite which the claimant has chosen to rely upon 161 statement of her son Esakki Muttu Paramshivam Devar instead of examining him. This witness who was the driver of the vehicle involved in the accident was a material witness to decide whether the deceased was employed on the said vehicle as a cleaner and whether there was nexus between his death and the employment. The claimant has not examined this witness and has not adduced any other evidence to

prove that the accident was caused in the course of the employment, which is a pre-requisite for compensation under Section 3 of the Workmen's Compensation Act. In the absence of such evidence, the petition for compensation under the Workmen's Compensation Act is not maintainable.

12. It is also pertinent to note that the claimant had claimed compensation on account of death of her son Selveakumar @ Kumar Vellapandi Devar, who was allegedly employed as a cleaner on a towing vehicle No. MH-04-B- 9534 which was owned by Dnyaneshwar Madhukar Jare, the Appellant in First Appeal No. 1056 of 2022. She had also produced the School Leaving Certificate of V. Selveakumar to prove the age of the deceased. It may be noted that the inquest panchanama as well as the post mortem report gives the name of the deceased as Kumar Paramshivam Devar. The claimant has relied upon the certificate from the police record to contend that Kumar Paramshivam Devar and Selveakumar is one and the same person. The statement of Essaki Devar negates this explanation. He has stated that on the relevant date he was traveling with both his brothers - Kumar Paramshivam Devar and Selveakumar Paramshivam Devar . He had stated that his both brothers had sustained injuries and that Kumar Paramshivam Devar had succumbed to the injuries. In such circumstances, it is indeed strange that the original claimant- the mother of the deceased should state the

name of the deceased as Selveakumar and later contend that Kumar Paramshivam Devar and Selveakumar is one and the same person. This discrepancy also raises a doubt about the employer-employee relationship as well as genuineness of the claim.

13. To sum up, the vehicle had met with an accident at Ganeshpuri between 3.00 to 4.00 a.m. There is absolutely no evidence to show that the deceased had to go to Ganeshpuri by reason of his employment or in the course of his employment. The claimant having failed to establish proximate nexus between the accident and the employment, the learned Commissioner was not justified in recording a finding that the death of Kumar Paramshivam Devar was caused in an accident arising out of and in the course of his employment. Hence the findings are not based on evidence on record, and are therefore perverse. Suffice it to say that a finding of fact arrived at without there being any evidence would also give rise to a substantial question of law. Reliance is placed on the decisions of the Apex Court in *Shakuntala Chandrakant Shreshti vs. Prabhakar Maruti Garvali (2007) 11 SCC 668* and *C. Manjamma & Another vs. Divisional Manager, New India Assurance Company Ltd., (2022) 6 SCC 206*.

14. Under the circumstances, and in view of the discussion supra, the impugned order cannot be sustained. Hence the appeals are allowed.

Impugned judgment is quashed and set aside. Consequently Claim Application (WCA) No. 105-B-22/2012 is dismissed.

. Compensation deposited by the Appellant Insurance Company, as well as by the Employer, be refunded to the Appellant Insurance Company and the Employer along with interest accrued thereon.

. Interim Applications stand disposed of in view of disposal of the appeals.

(ANUJA PRABHUDESSAI, J.)