

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1613 OF 2004

1. Kavita Suresh @ Chabu Sase
Age : 28 years, occ : household

2. Sonali Suresh @ Chabu Sase
Age : 8 years, occ : education
(Through her real mother i.e.
appellant No.1.)

3. Namdeo s/o Kondiram Sase
Age : 62 years, occ : nil

4. Indubai Namdeo Sase
Age : 57 years, occ : household

All r/o Khandgaon, Tal. Pathardi,
District Ahmednagar.

Appellants
(original claimants)

Versus

1. Ramdas Haribhau Vishwasrao
Age : 49 years, occ : transport
R/o Savedi, Ahmednagar.

2. United India Insurance Co. Ltd.,
Market Yard, Station Road,
Ahmednagar

Respondents
(original opponents)

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Mr. N.C. Garud, Advocate for the appellants.

Mr. Umakant U. Wagh, Advocate for respondent No.1.

Mr. A.B. Gatne, Advocate for respondent No.2.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 25.01.2023.

Judgment pronounced on : 16.03.2023.

Judgment :

1. The appellants i.e. the original claimants have challenged the judgment and award passed by the learned 2nd Labour Judge, Ahmednagar (hereinafter referred to as “the trial Court”) on 11.10.2004 in Application (W.C.) No. 72/1997, whereby the claim for getting compensation under Workmen’s Compensation Act by the appellants – claimants in respect of accidental death of one Suresh @ Chabu Sase, has been rejected.

2. The background facts can be summarised as under :

Appellant No.1 is the widow of deceased Suresh whereas appellant No.2 Sonali is his daughter and appellant Nos.3 and 4 are his parents. The appellants – claimants before the learned trial Court contended that the deceased Suresh was under employment of present respondent No.1 as a driver on truck bearing registration No. MH-14-6429, which was insured with respondent No.2 – Insurance Company. The deceased was getting salary of Rs. 2,000/- per month. It is the case of the appellants that on 25.05.1997 the deceased, under the direction of respondent No.1, had gone to Pathardi to bring some goods at Ahmednagar. However, at about 1.30 a.m. the said truck overturned near the house of one

Mehboob Dadabhai Shaikh in the vicinity of Mali Babhulgaon village. In the said accident the deceased sustained fracture of ribs and died on the spot. Thus, the appellants claimed that as the deceased was under the employment of respondent No.1, they were entitled to get compensation under Workmen's Compensation Act, 1923. Accordingly, they claimed total compensation of Rs. 3,20,355/- alongwith interest at the rate of 18% per annum inclusive of the amount of penalty to the tune of Rs. 1,06,785/- from the respondents under joint and several liability.

3. Respondent No.1 i.e. owner, despite service, failed to file written statement, whereas respondent No.2 – Insurance Company vide it's written statement opposed the claim by contending that the deceased was not having valid driving licence. The Insurance Company also claimed that at the relevant time the said truck was carrying marriage party of 20 to 22 persons in breach of the terms and conditions of insurance policy. The learned trial Court, after conducting the trial and considering the entire material on record, dismissed the claim of the appellants. Hence, this appeal.

4. Learned Counsel for the appellants – claimants submits that respondent No.1 – owner did not file written

statement and respondent No.2 – Insurance Company, despite filing written statement, did not examine any witness in support of its contention. He pointed out that the driving licence of the deceased on record clearly indicates that it was valid for driving heavy goods vehicle since there was an endorsement on the same to that effect. He pointed out that the Insurance Company did not examine any witness to support its contention that at the relevant time the truck was carrying the marriage party. He further pointed out that the insurance policy had already covered the risk of 2 plus 4 persons including the driver, and therefore, the rejection of claim at the hands of learned trial Court on that ground is totally erroneous. According to him, the evidence of appellants – claimants remained unchallenged, and therefore, the learned trial Court should have granted compensation to the appellants. He relied on the following judgments.

- (i) United India Insurance Co. Ltd vs Lehu and others 2003 (2) G.L.H. 256 S.C.*
- (ii) Narayan Shahadu Patil and others vs Kalashri Vijay Dhamke, 2008 (1) M.L.J. 88*
- (iii) Mangenese Ore (India) Ltd. vs Commissioner for Workmen Compensation and another 2008 (2) M.L.J. 693*
- (iv) Vivekanand Raghunath Naik Gaonkar vs Vinayak Nilba Naik Gaonkar, 2008 (4) M.L.J. 774*

- (v) *Sarla Verma and others vs Delhi Transport Corporation and another, 2009 (5) M.L.J. (SC) 775*
- (vi) *Oriental Insurance Co. Ltd. vs Mohammad Nasir & anr 2010 (1) M.L.J. 312*
- (vii) *Municipal Corporation Amravati vs Pratibha Kashinath Gajbhiye and another, 2012 (1) M.L.J. 230*
- (viii) *Lata Ramchandra Ubale vs Ramchandra Shankar Ubale and others, 2012 (4) M.L.J. 747*
- (ix) *Mukund Dewangan vs Oriental Insurance Co. Ltd. Civil Appeal No. 5820/2011 (S.C.)*

5. On the contrary, learned Counsel for respondent No.1 – owner vehemently argued that the appellants could not establish the fact that at the time of accident, the deceased was driving the truck during the course of his employment, and therefore, the learned trial Court rightly dismissed the claim petition. He also relied on certain judgments, as below.

- (i) *Rohini Shamrao Burud vs Hindustan Petroleum Corp. 2006 (1) All.M.R. 44*
- (ii) *Gaurang V. Merchant and others vs Madhliso and Co. Pvt. Ltd and others, 2004 (2) ALL.M.R. 737*

6. On the other hand, learned Counsel for respondent No.2 – Insurance Company also opposed the submissions made on behalf of the appellants and pointed out that the penalty claimed by the appellants is to be paid by the owner as per Section 4 of Workmen's Compensation Act. Further, he pointed out that under Section 3 of the said Act,

the appellants were under obligation to prove that the deceased was working under respondent No.1 and the accident took place during the course of his employment, especially when the widow of deceased was not an eye witness and there was no direct evidence of carrying goods at the time of accident. He pointed out that the F.I.R. lodged by brother-in-law of the deceased shows that the deceased was carrying marriage party at the time of accident and was not assigned any duty by his employer for bringing certain goods as alleged. He pointed out that even otherwise also, no passengers were allowed to be carried in goods vehicle and on that count also the Insurance Company cannot be saddled with the liability of paying compensation.

7. With the assistance of respective learned Counsel of the contesting parties, I have gone through the impugned judgment, citations relied upon and the record and proceeding of the original claim petition.

8. Though the Insurance Company has claimed that the deceased was not possessing valid driving licence for driving heavy goods vehicle, but the driving licence on record clearly indicates that there is endorsement of "HGV" means "Heavy Goods Vehicle" on the licence of deceased. As such,

the finding of learned trial Court to the effect that deceased was not having valid driving licence, prima facie appears erroneous. Further, though the learned Counsel for the appellants – claimants submitted that the evidence of widow of deceased remained unchallenged where she had stated her story that deceased had gone to Pathardi for bringing certain goods at Ahmednagar, but in the cross-examination itself she has admitted that she had not witnessed the accident. Therefore, prima facie there is burden on the appellants to establish their case. Even on preponderance of probabilities also they failed to establish the same. There are number of judgments cited by the learned Counsel for the appellants to show how the appellants are entitled for compensation since the policy had covered risk of 2 plus 4 persons including the driver. However, most of those judgments are under the Motor Vehicles Act, and therefore, not applicable. So far as the judgments under Workmen's Compensation Act are concerned, the appellants are entitled for compensation only if it is proved that the said accident took place during the course of employment of the deceased. In fact, the learned trial Court has rejected the claim only on that ground by considering the material on record. Therefore, this aspect has to be reconsidered in the light of material on record.

9. It is the case of appellants that respondent No.1 had asked the deceased to bring certain goods at Ahmednagar from Pathardi and for that purpose the offending truck was plied on the road by deceased and during that journey, the accident took place. Though the widow of deceased i.e. appellant No.1 Kavita has deposed so, but in the cross-examination she has admitted that she had not seen the accident personally, and therefore, there is no direct evidence on record to show that the deceased had gone for carrying the goods at the time of accident. Learned Counsel for the Insurance Company pointed out that the document on record, such as F.I.R. at Exh.U-4/1 clearly indicates that the truck was not plied on the road at the relevant time for carrying such goods. Learned Counsel for respondent No.1 has also denied such contention of the appellants and submitted that there was no order to the deceased for carrying such goods from respondent No.1-owner. As against this, learned Counsel for the appellants pointed out that despite sending notice to respondent No.1 – owner for calling upon to pay the compensation, he did not reply the same, and therefore, he had accepted the contention of appellants as claimed in the petition that the deceased, under the instructions of respondent No.1, had gone to carry the goods.

10. It is significant to note that though the claimants have put-forth theory of carrying the goods by deceased during the course of employment, but they have also relied upon the documentary evidence in respect of the accident. On going through the complaint lodged by brother-in-law of the deceased, which is at Exh. U-4/1, it is clearly evident that on 24.05.1997 he married with sister of the deceased and on the day of the accident i.e. on 25.05.1997 he alongwith his wife and other relatives, aggregating 20 to 22 persons, proceeded towards Mohta Devi temple from Lohsar at about 12.30 in tempo bearing registration No. MH-14-6429 and at that time the deceased Suresh was driving the said tempo. He has specifically stated that the accident took place due to negligent conduct of the deceased himself. Not a single word is there in the said complaint that the deceased was assigned with duty of bringing certain goods from Pathardi. On the contrary, it seems that the deceased was taking marriage party to Mohta Devi temple for religious purpose.

11. In the case of *Oriental Insurance Co. Ltd. vs Premlata Shukla and others*, reported in *2007AIR SCW 3591*, the Hon'ble Apex Court in para-15 has made the following observation :

“15. A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon”.

12. Further, it is settled that a party cannot be allowed to bring on record oral evidence contrary to the documents on record. Moreover, this Court in the case of ***Rohini Shamrao Burud vs Hindustan Petroleum Corp.*** (supra) has observed that when the evidence on record does not show that the deceased was sent out for any official duty when he met with the accident, therefore cannot be said to have died in course of his employment. With this observation, this Court had upheld the judgment of the learned Commissioner under Workmen's Compensation Act whereby compensation was rejected. The important observation of this Court in the said judgment is as under :

“8. All this evidence on record suggests that the deceased met with an accident which occurred when he had left the official place of work. There is no evidence on record at all to indicate that he was sent out of the official duty when he met with the accident. Nor is there any evidence on record to establish the fact that there was a practice of sending the general workers out on official duty during their shift timings. The appellant has not examined Ghadamal who would have been the best possible witness in the circumstances. He was riding pillion with the deceased and would have been

able to disclose as to whether the deceased had indeed left on official duty. Therefore, the appellant has not been able to prove that the deceased met with an accident arising out of and in the course of employment.

9. In the case of Mackinnon Mackenzie & Co. Pvt. Ltd. (supra), the Supreme Court has held that in the case of death caused by accident, the burden of proof rests upon the workman to prove that the accident arose out of the Page 1076 employment as well as in the course of employment. Direct evidence is not necessary. However, the facts proved must justify the inference that the death occurred on account of an accident arising out of and in the course of employment. The Supreme Court has held that the Commissioner should not surmise or conjecture or A... but may draw legitimate inferences from the proved facts. In the present case, the evidence on record does not give any scope for drawing conjectures or surmises but a legitimate inference that the accident had not occurred during the course of employment. Merely because the accident occurred during the duty hours of the deceased, it could not be held that the accident arose out of and in the course of employment”.

13. In the instant case also, though it is contended by the appellants that the deceased was sent by respondent No.1 – owner for bringing the goods at the time of accident, but the documentary evidence in respect of the accident speaks different story, and therefore, in the light of the aforesaid observations, it cannot be held that the accident had taken place during the course of employment of the deceased. Merely because the owner did not reply the notice issued to him for payment of compensation alongwith the penalty, the appellants cannot be absolved from the burden of showing that the accident took place during the course of employment.

Therefore, it is transpired that the learned trial Court, by considering all these aspects, has rightly held that the accident did not take place during the course of employment, and therefore, the appellants – claimants are not entitled for compensation. In view of the same, the appeal being devoid of merit, stands dismissed.

(SANDIPKUMAR C. MORE, J.)