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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

FIRST APPEAL NO.995 OF 2011

1. Ramesh s/o Totaram Raipure,
Aged about 61 years, occupation agriculturist.

2. Sau.Sushilabai w/o Ramesh Raipure,
Aged about 56 years, occupation housewife.

Both r/o Wadner Bholji, taluka Nandura,
District Buldana. **Appellants.**

:: VERSUS ::

Subhash s/o Gokuldas Mohta, (dead),
Aged about 48 years, occupation contractor,
Both r/o Wadner Bholji, taluka Nandura,
District Buldana.

Legal Heirs

1-A) Smt.Savita wd/o Subhash Mohta,
Aged adult, occupation -

1-B) Vinit s/o Subhash Mohta,
Aged adult, occupation -

1-C) Shryas s/o Subhash Mohta,
Aged adult, occupation -

R/o Wadner Bholji, taluka Nandura,
District Buldana. **Respondents.**

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Shri V.K.Paliwal, Counsel for Appellants.

Shri Rahul Tajne, Counsel for Respondent Nos.1-A to 1-C.

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CORAM : **URMILA JOSHI-PHALKE, J.**

DATE : **19/01/2023**

ORAL JUDGMENT

1. By this appeal, appellants (claimants), who are legal representatives of deceased Ashok, challenged judgment and award dated 28.6.2010 passed by learned Commissioner under Workmen's

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Compensation, Labour Court, Buldana in WCA (F) Case No.1/2006 whereby learned Commissioner rejected claim of claimants.

2. Brief facts are as follows:

As per contentions of claimants, deceased Ashok was their only son and they were dependents on him. Deceased Ashok died in an accident on 6.2.2003. It is alleged by claimants that respondent Subhash Mohta was contractor registered for Buldana district and his offices are situated at Khamgaon, Malkapur, Nandura, and Jalgaon-Jamod. He was running a construction business and was engaged in constructing roads and different types of construction works. On 6.2.2003, respondent Subhash Mohta called deceased Ashok to drop his friend Pramod Patil at Nandura Railway Station on a motorcycle owned by Subhash Patil. After dropping Pramod Patil at Nandura Railway Station, deceased Ashok was returning by the said motorcycle. However, deceased Ashok met with an accident near Wawge Typing Institute, Nandura and he sustained multiple injuries and ultimately succumbed to injuries. It has been further alleged that at the time of the occurrence, deceased Ashok was in the employment of respondent Subhash Mohta and the said accident took place while deceased Ashok was discharging his duties and, therefore, compensation is liable to be paid to claimants.

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3. It is further contention of claimants that deceased Ashok was 23 years of age at the time of the alleged incident and was drawing salary of Rs.5000/- per month. Respondent Subhash Mohta has not provided any compensation to claimants and, therefore, on 13.6.2003 and 5.7.2003 claimants issued Notices to respondent Subhash Mohta calling upon him to pay compensation. However, respondent Subhash Mohta neither replied the said Notice nor paid any compensation to claimants and, therefore, claimants constrained to file an application under the Workmen's Compensation Act for grant of compensation. They claimed compensation to the tune of Rs.5.00 lacs along with 18% interest thereon with other statutory benefits.

4. In response to the application by claimants filed under the Workmen's Compensation Act for grant of compensation, respondent Subhash Mohta appeared and filed his written statement at Exhibit-22 denying contentions of claimants. He denied that deceased Ashok was in his employment and the accident took place during the course of employment. It is his contention that deceased used to drive his motorcycle whenever required and being a good friend he used to cooperate him. On the day of the occurrence also, deceased Ashok obtained motorcycle, owned by respondent Subhash Mohta, for his personal work, but unfortunately he met

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with an accident and, therefore, he is not liable to pay any compensation.

5. Learned Commissioner under Workmen's Compensation framed necessary issues. Both parties adduced their evidence and after hearing both sides, learned Commissioner was pleased to reject the application by assigning reasons that claimants failed to prove relationship between deceased Ashok and respondent Subhash Mohta as employer and employee and the accident took place during the course of employment.

6. Being aggrieved and dissatisfied with the rejection of the claim application by claimants, the present appeal is preferred by claimants on the ground that learned Commissioner erred in holding that employer and employee relationship is not established by claimants. Further ground raised in the appeal is that learned Commissioner failed to consider Police Papers and statements recorded by Investigating Officer and illegally and erroneously rejected the application and, therefore, judgment and award passed by learned Commissioner deserves to be set aside.

7. On 29.2.2012, the appeal was admitted on substantial question of law that whether finding of learned Commissioner under the Workmen's Compensation Act that deceased Ashok was not in

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the employment of respondent Subhash Mohta is based upon misreading and mis-appreciation of evidence.

8. It is not in dispute that deceased Ashok met with an accident when he was proceeding on his motorcycle along with Vinod Gosavi. First Information Report was also lodged by said Vinod after the accident on 7.2.2003. Recital of the First Information Report shows that said Vinod is also resident of Wadner Bholji. On 6.2.2003, at about 11:30 pm, he was returning along with deceased Ashok. While they were returning, deceased Ashok was riding the motorcycle and informant Vinod was pillion rider on the said motorcycle. The First Information Report further states that deceased Ashok was driving the said motorcycle in excess speed. There was a stationary truck on the road and some stones were fixed around the said truck. The motorcycle of deceased Ashok hit the said stones and slipped and deceased Ashok and informant Vinod sustained injuries. Deceased Ashok succumbed to said injuries instantaneously. On the basis of the said First Information Report, the police registered the offence vide Crime No.6/2003 punishable under Sections 279, 337, and 308 of the Indian Penal Code. After registration of the crime, wheels of investigation started rotating.

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9. During investigation, Investigating Officer drawn spot panchanama, inquest panchanama, and dead body of deceased Ashok was referred for postmortem examination. The cause of death shown in the postmortem examination is "Hemorrhagic Shock" due to injuries and rupture of liver and spleen.

10. Recital of spot panchanama shows that the alleged incident occurred on East – West National Highway. Recital of the spot panchanama further shows that the alleged accident took place where stones were fixed around a stationary truck. It is not in dispute that the alleged accident occurred as deceased Ashok could not see stones fixed around a stationary truck and the motorcycle slipped and he sustained injuries as a result of which he succumbed to injuries.

11. Claimants, the parents of deceased Ashok, claimed that deceased Ashok was working with respondent Subhash Mohta as labour and drawing salary of Rs.5000/- per month. As claimants came with a case that deceased Ashok was working with respondent Subhash Mohta, a burden is on claimants to prove that there was employer and employee relationship between deceased Ashok and respondent Subhash Mohta.

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12. It is crystal clear from evidence on record that informant Vinod, who was eyewitness of the incident, is not examined by claimants.

13. Claimants have adduced their evidence. On behalf of claimants, claimant No.1 stepped into witness box and reiterated contentions that deceased Ashok was working with respondent Subhash Mohta. Claimant No.1 is cross-examined at length and during his cross-examination it came on record that he has no documentary evidence to show deceased Ashok was working to respondent Subhash Mohta.

14. Another witness Subhash Samadhan Bhakare is also examined vide Exhibit-26. His evidence is to the extent that he is a Dhaba Owner and labourers working with respondent Subhash Mohta used to come on his Dhaba to have their lunch. He further deposed that deceased Ashok was their sub-contractor. The said witness is also cross-examined at length. During cross-examination, he admitted that he has no document to show that he is running Dhaba as well as he has no document to show that deceased Ashok used to come on his Dhaba along with other labourers and deceased Ashok was working as labour contractor. Thus, evidence adduced by claimants shows that they have not examined any worker working along with deceased Ashok. No

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documentary evidence either salary slip or certificate is placed on record to show that deceased Ashok was working with respondent Subhash Mohta.

15. In rebuttal, respondent Subhash Mohta entered into witness box and deposed that there was a cordial relationship between him and deceased Ashok and he handed over his motorcycle to deceased Ashok for his (deceased) his personal work. During his cross-examination, he denied that deceased Ashok was working along with him. He admitted that initially Pramod Patil was working and now he is not working with him. The said admission shows that one Pramod Patil was working with him. Said Pramod Patil was not examined by claimants.

16. As per case of claimants, deceased Ashok had been to Nandura Railway Station to drop Pramod Patil, who was working with respondent Subhash Mohta. Neither Pramod Patil nor any co-employee is examined by claimants. Thus, cross-examination of respondent Subhash Mohta nowhere shows that deceased Ashok was working with him.

17. Besides the oral evidence of these witnesses, no other documentary evidence is produced to show that deceased Ashok

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was working with respondent Subhash Mohta and there was employer and employee relationship between them.

18. In order to appreciate rival submissions of parties, it is necessary to note the Section 2(n) of the Workmen's Compensation Act, 1923, as it stood at the relevant point of time. At that time, Section 2(1)(n) of the Act read as follows:

"Section 2(n) 'workman' means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is-

(i) a railway servant as defined in Section 3 of the Indian Railways Act, 1890 (9 of 1890), not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) employed on monthly wages not exceeding (one thousand rupees) in any such capacity as is specified in Schedule II.

Whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of (the Armed Forces of the Union) and any reference to a workman who has been injured shall, where the workman is dead includes a reference to his dependents or any of them."

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19. As already observed that there is no single document on record to show that deceased Ashok was working as workman with respondent Subhash Mohta, bare reading of the above mentioned provisions shows that workman means a person other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business including a railway servant as defined in Section 3 of the Indian Railways Act not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or employed on monthly wages not exceeding one thousand rupees in any such capacity as is specified in Schedule II.

20. Here, claimants have not proved that at any point of time deceased Ashok had worked for respondent Subhash Mohta as a casual worker or in a regular employment. In fact, relationship between deceased Ashok and respondent Subhash Mohta as employer and employee itself is not established by claimants to show at any point of time deceased Ashok had worked for respondent Subhash Mohta and hence he is workman within the definition Section 2(n) of the said Act. A bare statement of claimants that deceased Ashok was working with respondent

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Subhash Mohta is not sufficient to infer that deceased Ashok was working with respondent Subhash Mohta.

21. Learned counsel Shri V.K.Paliwal for claimants placed reliance on the decision of the Honourable Apex Court in the case of Vimala Devi and others vs. National Insurance Company Limited and another, reported at (2019)2 SCC 186 wherein the Honourable Apex Court has dealt with an issue of non-exhibition of documents i.e. a procedural lapse.

Here, in the present case, the issue is whether claimants have proved employer and employee relationship between deceased Ashok and respondent Subhash Mohta. Thus, the case cited *supra* and issue involved in the present case are not identical to each other.

Learned counsel Shri V.K.Paliwal for claimants also placed reliance on the decision of the Honourable Apex Court in the case of J.C.Shah vs. Ramaswami, reported at AIR 1968 SC 1418 wherein issue before the Honourable Apex Court was that a party in possession of best evidence which would throw light on the issue in controversy withholding it, Court ought to draw an adverse inference against him.

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Here, in the present case, issue involved is whether claimants have succeeded in proving that there was employer and employee relationship between deceased Ashok and respondent Subhash Mohta. Foundational facts are to be established by claimants who approached to this Court for compensation. Claimants have not established foundational facts as there is employer and employee relationship between deceased Ashok and respondent Subhash Mohta. Therefore, this case cited *supra* also is not helpful to claimants.

22. On the other hand, learned counsel Shri Rahul Tajne for respondents placed reliance on the decision of the Honourable Apex Court in the case of Central Mine Planning and Design Institute Ltd. vs. Ramu Pasi and anr, reported at 2006(1) ALL MR (SC) 150 wherein the Honourable Apex Court after considering rival submissions, dealt with definition of workman and held that a bare reading of the said Act shows that the expression 'workman' as defined in the Act does not cover a casual worker. There was also no definite material adduced to show that the claimant was employed for the purposes of the employer's trade or business.

The ratio laid down in the above case applies to the present case in hand since in the present as there is no definite material adduced to show that deceased Ashok was employed by

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respondent Subhash Mohta and as such there was no relationship between deceased Ashok and respondent Subhash Mohta as employer and employee. That being so, application filed before learned Commissioner under the Workmen's Compensation by claimants for compensation came to be rejected observing in the application that claimants have failed to prove relationship between deceased Ashok and respondent Subhash Mohta as employer and employee.

23. Considering the material on record, it is crystal clear that claimants have failed to prove that deceased Ashok was working with respondent Subhash Mohta and the accident took place during the course of employment and they are entitled for compensation.

24. The basic ingredient to claim compensation under the provisions of the said Act is that claimants have to prove relationship as employer and employee and another material ingredient to prove the occurrence of accident during and in the course of employment, which are absent in the present case.

25. The claimants filed an application for adducing additional evidence. In the application, claimants contended that statements of respondent Subhash Mohta and Pramod and Pramod

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Patil are recorded by Investigating Officer to the effect that deceased Ashok was working with respondent Subhash Mohta and, therefore, additional evidence is to be permitted to be led under Order XLI of Rule 27 of the Code of Civil Procedure. Before adducing additional evidence, parties have to establish that the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or party seeking to produce additional evidence establishes that notwithstanding exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment. Thus, under Order XLI Rule 27 of the Code the evidence may be admitted by the Appellate Authority or for any other substantial case. For that purpose, parties seeking additional evidence have to satisfy the Court that earlier Court refused to admit evidence which ought to have been admitted or after exercise of due diligence he could not produce the said evidence. The application filed by claimants nowhere shows that an attempt was made by them to lead evidence. Thus, per-condition before adducing additional evidence is not established by claimants.

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26. In view of the above said circumstances, as claimants failed to prove relationship as employer and employee between deceased Ashok and respondent Subhash Mohta as well as failed to prove that the alleged accident occurred during and in the course of employment, the appeal has no merits. Hence, the substantial question of law is answered accordingly.

27. In this view of the matter, as the appeal is devoid of merits, the appeal is dismissed. No costs.

(URMILA JOSHI-PHALKE, J.)

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