

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

FIRST APPEAL NO. 1634 OF 2008

APPELLANT: Western Coalfields Limited, Umrer
Original Sub-Area, P.O. Umrer,
Respondent No.2. DISTT- NAGPUR.
Through it's Sub-Area Manager.

..V E R S U S..

RESPONDENTS 1. Smt. Vanmala w/o Late Shree Laxman
Wankhede, Aged Major, R/o Plot No. 31,
Ward No. 35, Kawarapeth, Tahsil Umrer,
Distt. Nagpur.

2. Western Coalfields Limited,
Jairpatka, Nagpur (M.S.), through it's
General Manager (N)

Mr Pushkar Ghare, counsel for the appellant.

CORAM : **URMILA JOSHI-PHALKE, J.**
DATE OF RESERVE : **24/03/2023**
DATE OF DECISION : **05/06/2023**

ORAL JUDGMENT :

1. By this appeal, the appellant has challenged the judgment and award passed by the Commissioner under Workmen's Compensation Act, 1923 in WCA Case No. 140/1995 dated 28/01/2005.

2. The deceased Laxman Fago Wankhede was in the employment of non-applicant/WCL working as a Grade-I –

Dumper Operator since 1964. Since 1964, the deceased was in a continuous employment of non-applicant. As per the contention of the applicant, on 07/09/1994, the deceased was proceeding to his duty in the night shift, however, he met with an accident at about 8.45 p.m. on bridge of Aam River, Umrer Coal Mines Road and fell in the river. The dead body of her husband was found at the bank of the river on the next day. At the time of alleged incident, the deceased was getting Rs. 75/-per day and his age was 49 years. As per the contention of the applicant, she being the legally wedded wife and depending upon the deceased Laxman. As the said accident took place during the course of and in the course of employment. She is entitled to receive the compensation from the non-applicants. She had also issued the notice to the non-applicant's demanding the compensation. However, the non-applicants have not paid any heed towards it. Therefore, she constrained to file an application for grant of compensation.

3. In response to the notice, the respondents appeared but failed to file written statement. Hence, application proceeded without the written statement.

4. The applicant adduced her evidence vide Exhibit No.15 and reiterated the contentions raised in the application. The sum and substance of her evidence is, since 1964, her husband was Grade-I Dumper Operator working in the WCL. On 07/09/1994, while proceeding to attend his duties in the night shift, her husband was met with an accident and succumbed to the death. The death of the deceased in the course of and during the course of employment

and therefore, she claimed the compensation. The non-applicant /respondents failed to cross-examine the witness and also, failed to adduce any evidence. After considering the evidence of the applicant, the Commissioner under the Employees Compensation Act awarded the compensation to the applicant of Rs.52,588/- along with interest at the rate of Rs. 12% per annum from 07/09/1994 till its realization.

5. Being aggrieved and dissatisfied with the judgment and award, present appeal is preferred by the appellant/WCL on the ground that the learned Commissioner had not considered the principals of law, and awarded the compensation. In fact, the burden to prove that such accident occurred during the course or arising out of the employment was on the applicant which was not discharged. Merely because, the evidence of the applicant remained unchallenged, the Commissioner cannot grant compensation. The applicant failed to prove that deceased was having night duty on the alleged day of incident. There is absolutely no evidence on record to show that the alleged accident occurred during the course and in the course of employment. Therefore, the judgment and award passed by the Commissioner under Employees Compensation Act is erroneous and liable to be set aside. In support of his contention, he placed reliance in the case of ***Regional Director, E.S.I. Corporation and another V/s Francis De Costa and another reported in (1996) 6 SCC.***

6. Heard learned counsel Mr Pushkar Ghare for the appellant, he reiterated the contentions and submitted that the

burden on the applicant to prove that the alleged incident has occurred during the course of and in the course of employment itself is not proved, hence, the judgment and award passed by the Commissioner is liable to be quashed and set aside.

7. The following substantial questions of law arises in the present appeal. The substantial question of law was not framed, it was framed now, which is reproduced as follows:

a) Whether the applicant proves that the death of the deceased Laxman was caused during the course of and in the course of employment?

b) Whether the learned Commissioner justified in awarding the compensation under the provisions of Employees Compensation Act?

8. As per the contention of the applicant, she is the legally wedded wife of the deceased Laxman, who was in the employment of the non-applicant No.1 in the capacity of Grade-I Dumper Operator since 1964. On 07/09/1994, the deceased was proceeding for attending his duty in the night shift, he met with an accident at about 8.45 p.m. on bridge of Aam River, Umrer Coal Mines, Road and fell in the river. The applicant has claimed the compensation under the provisions of the Workmen's Compensation Act, on the ground that the alleged accident occurred in the course of and during the course of employment and therefore, the claimant is entitled for compensation.

9. In support of contention, she adduced her evidence by filing affidavit of examination in chief. As per her evidence, she has produced on record panchanama, death certificate, and medical report. However, no documents are produced on record. Admittedly, her evidence remained unchallenged. In view of the definition of “employment injury” in Section 2(8) of the Employees’ State Insurance Act, 1948, in order to succeed in his claim for compensation, the employee must prove that the injury or the death had been caused out of and in the course of employment. Both the conditions will have to be fulfilled before he or she could claim any benefit under the Act. The words “arising out of and in the course of employment” shows that the injury must be of such an accident as can be attributed to an accident or an occupational disease arising out of his employment “out of ” must caused by employment. The meaning of the words in the course of his employment appearing in Section 3(1) of the Workman’s Compensation Act, 1923 was dealt by the Hon’ble Apex Court in the case of *Saurashtra Salt Manufacturing Company ... vs.. Bai Valu Raja And Ors reported in AIR 1958 (SC) 881*, wherein it is held that as a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. 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, 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 course 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. 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. [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 as, “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 Act. The Hon’ble Apex Court in *Daya Kishan Joshi vs Dynemech Systems Pvt Ltd reported in 2018 (1) All MR 434(S.C)*, held that accident arising out of and in the course of employment- meaning and concept, there must be causal connection between the employment and injury. As per the principal of notional extension of time and space applicable in India, the employment does not necessarily end when down tool signal is given and workman leaves his place of work. The workman maybe regarded as in the course of his employment even though he is not reached or left employers premises. It is further held by the

Hon'ble Apex court that, the phrase 'in the course of employment' suggests that the injury must be caused during the course 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.

10. In the light of above principals, in the present case admittedly, the appellant has not denied that the deceased was in their employment. However, there is absolutely no evidence on record that deceased was having night duty on the relevant date i.e. on 07/09/1994 and deceased met with an accident when he was proceeding to attend his duty. In fact, the death of the deceased is caused in an accident itself is not proved by the applicant. The fact that the alleged death of the deceased is caused, during the course of and in the course of employment, itself is not proved by the applicant. Though the evidence of the applicant remained unchallenged, thereafter also, the burden is on the applicant to prove that the alleged accident took place when the deceased was proceeding to attend his duty that is in the night duty. The casual connection between the employment and the accident itself is not proved by the applicant. In the case in hand, the applicant has not proved that deceased was having night duty on the alleged day of incident and he met with an accident while he was proceeding to attend the duty. In fact, the fact that the death of the deceased is caused in an accident itself is not proved by the applicant. In the case of ***Regional Director, ESIC and another V/s Francis De Costa***

and another referred (supra), the Hon'ble Apex Court laid down three principals for the claimants to prove before them can claimed compensation under Section 2(8) of the Employees' State Insurance Act, 1948 that there was an accident, the accident had causal connection with the employment and the accident must have been suffered in course of employment.

11. Here in the present case, the fact that there was an accident, the accident had casual connection with the employment and the death of the deceased was caused in the course of employment itself is not proved by the applicant. The learned Commissioner has awarded the compensation by observing that as there is no rebuttal evidence, he has no alternative to accept the evidence of the applicant is erroneous, and misconception of the legal provision. Though the evidence of the applicant remained unchallenged, then also burden on the applicant to prove that death of the deceased was caused in an accident which arose, 'during the course of and in the course of employment' has to be discharged which is not discharged in the present case.

12. Having regard to the fact and circumstances of the case, the judgment and award passed by the Commissioner deserves to be quashed and set aside. In view of the above discussion, the appeal deserves to be allowed. Hence, I proceed to pass the following order:

- a) First Appeal is **allowed**.
- b) The judgment and award passed by the Commissioner under Workman's Compensation Act,

in WCA Case No. 140/1995 dated 28/01/2005 is quashed and set aside.

- c) The appellant/WCL is entitled to receive the refund of amount if deposited in this Court.

The appeal is **disposed of** with no order as to costs.

JUDGE

RKN