

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

FIRST APPEAL NO.662 OF 2019

Ravi s/o Bansilal Jaiswal,
Aged about 35 years,
Occupation – Business,
R/o. Kachisawanga, Tah. Katol,
District Nagpur

...APPELLANT

VERSUS

1. Shamrao s/o Dasruji Marbate,
Aged about 68 years,
Occupation – Labour,
2. Kamala w/o Shamrao Marbate,
Aged about 55 years,
Occupation - Labour

Both the respondents R/o.
Kacharisawanga, Tah. Katol,
District Nagpur

...RESPONDENTS

Shri Rahul Bhangde, Advocate for the appellant.
Shri K.K. Gour, Advocate h/f Shri Y.B. Mandpe, Advocate for
respondent No.2

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : APRIL 12, 2023.
PRONOUNCED ON : JUNE 06, 2023

JUDGMENT :

Heard learned Counsel for the parties.

2. The appellant has preferred the present appeal against the judgment and order passed by the Commissioner under the Employees Compensation Act (1st Labour Court) Nagpur in ECA No.B-22/2015 dated 06/08/2018 by which the appellant was directed to pay compensation of Rs.7,56,225/- to the applicants/respondents along with interest @ 12% per annum from the date of accident till the realisation of the amount. The appellant further directed to pay the penalty @ 10% of the amount of compensation to the applicants within one month.

3. Brief facts in nutshell are as follows :

(The parties hereinafter referred as per their original nomenclature.).

A] The respondents are the parents of the deceased Jeewan Marbate. They have filed an application for compensation on the ground that the appellant has employed the deceased Jeewan Marbate on daily wages of Rs.250/- per day. On 14/05/2013, the non-applicant had taken the deceased at about 11.30 a.m. on his motorcycle for cleaning his Well and assured that he will pay Rs.250/- per day. On this assurance, the deceased agreed to work with the non-applicant. The non-applicant had given understanding that there are five persons entered inside the Well and asked the deceased to help these five persons. The deceased called these five persons to ascertain the facts

and they did not respond, therefore, deceased was forced to enter inside the Well. All the five persons who entered in the Well became unconscious as poisonous gas was created in the Well as the Well was not cleaned so many years in the past. The deceased who was entered in the Well also affected by the said gas and died after entering in the said Well. The other five persons also found to be dead. As the death of the deceased was caused during the course of and in the course of employment, the respondents have claimed the compensation. Regarding the said incident, on the basis of report lodged by Mirabai Vijay Marbate Crime No.100/2013 was registered under Section 304 read with Section 34 of the Indian Penal Code against the appellant and one Bandu Maher.

4. It is further the contention of the respondents that at the time of death, deceased was 30 years old and was getting Rs.7500/- per month. Due to the death of the deceased they have lost the love and affection of their son, therefore, they are claiming compensation under the various heads along with the penalty.

5. The appellant has filed his reply and contested the application by denying the facts. As per the defence of the appellant, deceased was never employed by him as his employee and there was no master and servant relationship between them. The deceased and other five persons

entered into the Well at their own to clean the Well. Therefore, the appellant is not liable to pay compensation.

6. To substantiate the contention on behalf of the applicant, applicant No.2 - Kamala Shamrao Marbate stepped into the witness box and adduced her evidence. She also examined witness namely Vilas Mankar vide Exhibit 33. Besides oral evidence, respondents placed reliance on copy of crime details at Exhibit 18, copy of statement of Mirabai Vijay Marbate Exhibit 19, copy of FIR Exhibit 20, copy of Tahrir Exhibit 21, copy of Report Exhibit 22, copy of letter to Science Laboratory Exhibit 23, copy of letter to police authority Exhibit 24, copy of postmortem report Exhibit 25, copy of letter to Chemical Analyzer Exhibit 26, Chemical analyzer report Exhibit 27, copy of Histo pathology report Exhibit 28, etc. The appellant has examined himself vide Exhibit 38. Learned Commissioner appreciated the evidence on record and allowed the application by granting compensation of Rs.7,56,225/- along with @12% per annum from the date of accident till realisation of the amount. The Commissioner further directed to pay penalty @10% of the compensation amount.

7. Being aggrieved and dissatisfied with the judgment and order, present appeal is preferred by the appellant on the ground that the deceased was never his employee and he has never called the

deceased for cleaning the Well. In fact, deceased at his own entered into the Well to clean the Well on the say of the villagers as villagers were in need of water. It is further contention of the appellant that the alleged incident has taken place on 14/05/2013 whereas the application was filed on 29/05/2015 which is not within the limitation. The respondents have not filed the application along with the delay condonation application which is not considered by the learned Commissioner while allowing the application.

8. Heard Shri Bhangade, learned Counsel for the appellant. He submitted that the police papers that is the crime details form, FIR and the statements of the witnesses are contradictory to the story narrated by the respondents. The recitals of the FIR Exhibit 20 nowhere shows that the deceased was employee of the present appellant and the present appellant has called him to clean the Well. The recitals of the FIR shows that the deceased was called by one Bandu Maher and took the deceased along with him to save three persons who were drowning in the Well. The recitals of the FIR nowhere shows that the deceased was employee of the present appellant. Regarding the said incident, crime was registered against the present appellant and present appellant faced the prosecution under Section 304 read with Section 34 of the IPC. The Additional Sessions Judge, Nagpur after appreciation of the evidence

held that though the informant has lodged report that her brother-in-law (deceased) was forced by the present accused to enter in the Well and they were asked him to jump in the Well and due to which death is caused however, the evidence adduced by her is not corroborated by any other evidence. It is further observed by the Sessions Court that in all 10 witnesses were examined but none of the witnesses stated that who asked the complainant's brother-in-law to come and save the life of other persons. The wife of the deceased deposed that there is a political rivalry between Mirabai Marbate and present appellant's family, and therefore, the prosecution was lodged against the appellant and the appellant was acquitted from the charges. He further submitted that there should be casual connection between the employment and the cause of death. There is no evidence that the accident of the deceased was caused during the course of and in the course of employment. Hence, present appellant is not liable to pay any compensation.

9. *Per contra*, Shri Y.B. Mandpe, learned Counsel submitted that the respondents have claimed compensation under the provisions of beneficial legislation. There is no dispute that the deceased died due to suffocation in the Well which was owned by present appellant. He submitted that the deceased was working with the present appellant and on the day of incident also the deceased was in the employment of the

appellant and was called for cleaning the Well and during that process his death was caused. The respondents have proved that the death of the deceased is caused during the course of and in the course of employment, therefore, learned Commissioner has granted the compensation to the respondents. Therefore, no interference is called for.

10. After hearing both the sides and on perusal of the record the substantial questions of law which arises for determination are :

- (i) Whether the application filed by the claimants was within limitation?
- (ii) Whether the deceased was employee within the meaning of Section 2(1)(dd) of Employee's Compensation Act, 1923?
- (iii) Whether the death of the deceased was caused in an accident which took place during the and in the course of employment?

11. There is not dispute that the death of the deceased is caused on 14/05/2013 when he entered into the Well owned by the appellant. The respondents have come with a case that the deceased was in the employment of the appellant and on 14/05/2013, the appellant and one Bandu Maher called the deceased to clean the Well on payment of

Rs.250/- per day. The deceased agreed for the same and went along with the appellant and Bandu Maher and death of the deceased is caused when he entered into the Well.

12. Shri Bhangde, learned Counsel vehemently submitted that in view of Section 10 of the Employee's Compensation Act, 1923 (hereinafter referred to as 'the Act' for short) no claim for compensation shall be entertained unless the claim is preferred within two years from the death of the deceased. He further submitted that if the claim is not preferred within two years, on satisfaction of reasonable cause the delay can be condoned and application can be entertained. He submitted that proviso of Section 10(1)(b) says that on satisfactory reason the Commissioner can condone the delay and application can be entertained. But here in the present case, the death of the deceased was caused on 14/05/2013, the application was filed for compensation on 29/05/2015 i.e. beyond the limitation period. The learned Commissioner had not considered the said aspect. Admittedly, the application was not filed along with the delay condonation application. He submitted that though issue of the limitation is not raised by either parties concerned but it is the duty of the trial Court to consider. If trial Court fails to consider the issue, the appellant has right to raise such issue in the appeal. In support of his contention he placed reliance on

State of Gujarat Vs. Kothari and Associates (2016) 14 SCC 761 wherein it is held by the Hon'ble Apex Court that it is thus irrelevant that the appellant State has not raised the issue of limitation before the trial Court. A duty was cast on the court to consider this aspect of law, even on its own initiative, and since it failed to do so, the appellant State was competent to raise this legal question in appeal or indeed even in any successive appeal.

13. For filing the application for compensation, the limitation period is prescribed in Section 10 of the Act which says that no claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or, in case of death, within two years from the date of death. The proviso under Section 10(1)(b) of the Act says that the Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause. Admittedly, in the present case, the incident occurred on 14/05/2013 and on the same day, the

death of the deceased was caused. The application ought to have filed on or before 13/05/2015. In the present case, application is filed on 29/05/2015 which is beyond the limitation period and also not with the application showing the sufficient cause. The learned Counsel for the appellant rightly pointed out that though the issue regarding the limitation was not raised by the appellant before the trial Court but it was the duty of the trial Court to see whether the application is filed within the limitation. Admittedly, the learned Commissioner has not framed the issue regarding the limitation and not addressed the issue. The application apparently filed beyond the period of limitation so it is barred by the limitation.

14. As per the case of the respondents, deceased was in the employment of the appellant on a daily wages of Rs.250/- per day. On the day of incident also deceased was called by the appellant on daily wages, and therefore, he is an employee of the appellant. To claim the compensation, the claimants have to prove that the deceased was in the employment of the appellant and the accident arose during the course and in the course of employment. In fact, there should be a casual relationship between the accident and the employment. The definition of 'employee' is given under Section 2(1)(dd) the clause (iii) of the said definition shows that a person who employed in any such capacity as he

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 any employee who has been injured shall, where the employee is dead, include a reference to his dependents or any of them. Thus, casual worker is also covered under the definition of 'employee'.

15. In the light of above definition, the evidence of the respondents is to be looked into. The evidence of PW-1 - Kamala w/o Shamrao Marbate shows that the appellant had employed the deceased on daily wages of Rs.250/- per day. On 14/05/2013, also he has taken the deceased on his motorcycle to clean the Well and assured that the deceased will get Rs.250/- per day for the said work. During her cross-examination, she admitted that she has no documentary evidence to show that her son was in the employment of the appellant and was getting Rs.250/- per day. She even denied that she has lodged the FIR about the alleged incident. She admitted that the appellant was prosecuted in a Criminal Case No.474/2013 and acquitted from the charges. In support of her contention she further examined Vilas Dnyaneshwarrao Mankar who also testified that the deceased was

working with the present appellant and on the day of incident, he entered into Well to clean the Well. During his cross-examination he admitted that he is not aware whether the appellant had asked the deceased to enter into the Well. He further admitted that regarding the said incident, police have taken the action. He also admitted that he has no documentary evidence to show that the deceased was working with the appellant.

16. The appellant has adduced his evidence and deposed that the villagers have decided to clean the Well owned by him as the villagers were in need of water. He further stated that the Well water was not a usable water, and therefore, villagers requested him to clean the Well and the villagers called the persons to clean the Well. He admitted that regarding the said incident, crime was registered against him and he was acquitted from the charges. Thus, he denied the employment of the deceased with him. Admittedly, the claimant has to prove the incident and placed reliance on the police papers. One Mirabai Marbate lodged the report about the said incident. The recitals of the report shows that on 14/05/2013, one Bandu Maher approached to the deceased on 14/05/2013 and requested him to come along with him to save three persons who entered into the Well of the appellant and drowning, therefore, her brother-in-law initially denied for the same but said Maher

took him forcefully. It is further the recitals of the FIR that the present appellant and said Bandu Maher insisted the deceased to enter into the Well. In the entire FIR there is no whisper that the deceased was the employee of the appellant and out of that relationship appellant has called him. Thus, the recitals of the FIR and the oral evidence of PW-1 is contradictory. The postmortem report is also on record which also shows the history that on 14/05/2013 the accidental death of the deceased was caused while cleaning the Well. Admittedly, regarding the said incident the appellant was prosecuted. Admittedly, the result of acquittal will not affect the claim of the claimants for compensation but considering the peculiar facts of the present case, if the judgment of the criminal Court is taken into consideration wherein it is specifically observed that out of 10 witnesses not a single witness has corroborated the story of the informant that it was the appellant who called the deceased and insisted the deceased to enter into the Well. Regarding the negligence of the appellant also the finding given by the Sessions Court is that no evidence is adduced to prove the negligence of the deceased.

17. The basic question which is required to be addressed in this appeal is whether there was any employer and employee relationship between the deceased and the appellant. The Division Bench of this Court in *Bhagubai Vs. General Manager, Central AIR 1955 Bom 105*

observed that there must be a casual connection between the accident and the employment in order that the Court can say that the accident arose out of the employment of the deceased. It is equally clear that the cause contemplated is the proximate cause and not any remote cause. The authorities have clearly laid down that if the employee in the course of his employment has to be in a particular place and by reason of his being in that particular place he has to face a peril and the accident is caused by reason of that peril which he has to face, then a casual connection is established between the accident and employment. It is now well settled that the fact that the employee shares that peril with other members of the public is an irrelevant consideration. It is true that the peril which he faces must not be something personal to him, the peril must be incidental to his employment. It is also clear that he must not by his own act add to the peril or extend the peril. But if the peril which he faces has nothing to do with his own action or his own conduct, but it is a peril which would have been faced by any other employee or any other member of the public, then if the accident arises out of such peril, a casual connection is established between the employment and the accident.

18. Thus, taking note of the above observation it is now require to be seen whether the deceased was in the employment of the

appellant. Admittedly, there is no documentary evidence to show that the deceased was in the employment of the appellant. Even the recitals of the FIR on which the respondents placed reliance on to prove that the accident arose during the course of employment has also not supported the fact that the deceased went at the spot of incident being he is in the employment of the appellant. In fact, there is no whisper that the deceased was taken by the appellant being his employee and alleged accident occurred. In fact, the recitals of the FIR shows that one Bandu Maher took the deceased along with him to save three persons who entered into the Well owned by the appellant and while saving three persons, death of the deceased is caused. Thus, there was no nexus between death of the deceased and the employment. To come within the act the injury by accident must arise both out of and in the course of employment. The words “in the course of employment” mean “in the course of the work which the workman is employed to do and which is incidental to it”. The words “arising out of employment” are understood to mean that “during the course of the employment”, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered. In other words, there must be casual relationship between the accident and the employment.

19. In the present case, the foundational fact that the deceased was in the employment of the appellant itself is not proved by the respondents. Secondly, the application filed by the respondent for grant of compensation is beyond the period of limitation. The learned Commissioner entertained the application which is filed beyond the period of limitation without any delay condonation application. Thus, on the ground of limitation also the application deserves to be dismissed.

20. In view of the above discussion, the observation of the learned Commissioner that the respondents are entitled to receive the compensation is erroneous as the employer-employee relationship itself is not established. The respondents further failed to establish that there was a casual relationship between the accident and the employment. Therefore, appeal deserves to be allowed by setting aside the judgment and order of compensation.

21. Therefore I proceed to pass following order L:

(i) The appeal is allowed

(ii) The judgment and order passed by the learned Commissioner under the Employees Compensation Act, 1st Labour Court, Nagpur in E.C.A. No.B-22/2015 granting compensation of Rs.7,56,225/- along with interest @ 12% per

annum and penalty of 10% is hereby quashed and set aside.

(iii) If the appellant has deposited any amount of compensation in this Court, he is entitled for the refund of the said amount.

(iv) If any amount is withdrawn, the appellant shall not recover the same from the respondents.

(v) The appeal is disposed of with no order as to costs.

(URMILA JOSHI-PHALKE, J.)

**Divya*