



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

WRIT PETITION NO. 5390 OF 2024

Mahadev s/o Tanhu Borkar,
Aged about 59 years, Occu: Agriculturist,
R/o Padmapur, Tq. Bramhapuri,
District Chandrapur.

....**PETITIONER**

....**VERSUS**....

1. Waman s/o Damodhar Therkar,
Aged about 61 years, Occu: Cultivation &
Labour,
2. Vanita w/o Waman Therkar,
Aged about 56 years, Occu: Labour,

Both R/o Padmapur, Tq. Bramhapuri,
District Chandrapur.

....**RESPONDENTS**

Shri P.R. Agrawal, Advocate for petitioner
Shri A.M. Chandekar, Advocate for respondent No.1

CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 28/02/2025
DATE OF PRONOUNCING THE JUDGMENT: 25/03/2025

1. Rule. Rule made returnable forthwith. Heard learned
Counsel for the parties.

2. Being aggrieved by the order dated 29.06.2024 passed by learned Commissioner, under: Employees Compensation Act, & Judge, Labour Court, Chandrapur (In short learned Commissioner) below Exh. No. C-12, in WCA No. 8/2018 by which the learned Commissioner was pleased to reject an application filed by the petitioner for grant of permission for reexamination and alternatively declaring him hostile u/s 154 of Evidence Act and for cross examination of witness no. 2 examined by petitioner.

3. The petitioner is the original non-applicant whereas respondents are original applicants in WCA No. 8/2018 filed by respondents for grant of compensation under the provisions of Employees Compensation Act, 1923. The case of the respondents is that, the son of respondents namely Sandip Therkar met with a motor accident on 19.06.2018 at about 8.30 to 8.45 a.m. while performing his duty as a driver under the employment of the petitioner and he had received grievous injuries and died on the spot. The respondents made prayer for grant of compensation to the tune of Rs. 8,92,640/-.

4. On being notice, the petitioner appeared and filed his written statement/reply at Exh. C-5, thereby contending that, deceased Sandip Therkar was never in the employment with the petitioner. The learned Commissioner was pleased to frame issues vide Exh. 0-2. The respondent no. 1 namely Waman Damodhar Therkar entered into the witness box and deposed at Exh. U-10. The respondents had also examined one witness namely Diwakar Maroti Meshram vide Exh. U-33. On the other hand petitioner examined himself at Exh. C-14. In his evidence the petitioner has categorically stated that, at the relevant time of accident one Khojraj Vanaskar was the driver on the tractor in question and not the deceased.

5. The petitioner had examined the driver of his tractor namely Khojraj Vanaskar as his witness and on the same day his affidavit in lieu of examination in chief was filed vide Exh. C-19. Further chief examination of the said witness was undertaken in which he has categorically stated before the court that the contents of his affidavit were read over to him and after having gone through the same, he has signed the same as true and correct.

6. After lapse of period of three months, the witness namely Khojraj Vanaskar was subjected to cross-examination by the respondents in which he has surprisingly turned hostile and stated new facts which are contrary to the facts stated in his examination in chief. Therefore, the petitioner has filed an application seeking permission of reexamination of the said witness immediately after his cross examination was over. The same was opposed by the respondents by filing their say. The learned Commissioner was pleased to reject the said application on the ground that, there is no question of granting permission to re-examine the witness of petitioner. The aforesaid order is the subject matter of challenge in the present writ petition.

7. Learned Counsel for the petitioner contended that the learned Commissioner committed error in observing that, the permission to re-examination cannot be granted on the ground that, Witness No. 2 examined by the petitioner cannot be said to be turned hostile. While recording the said observation, the learned Commissioner has failed to consider the provision of Section 137 and 138 of the Indian Evidence Act, 1872, Admittedly witness no. 2 examined by the petitioner deposed contrary facts in his cross-

examination and turned hostile which were new for the petitioner and therefore the learned Commissioner ought to have granted permission to re-examine the said witness as the said powers are very much available to the learned Commissioner in view of Section 138 of the Indian Evidence act. Nowhere said aspect is considered by the learned Commissioner which renders the impugned order unsustainable in law. Therefore require interference by this Court and also needs to be set aside.

8. Learned Counsel for the petitioner relied on following citations:

1. *Rajiv Vijayasathya Rathnam Vs. Sudha Seetharam, 2020(205) AIC 763*

2. *Mattam Ravi S/o Raja Yellaiah and another Vs. Mattam Raja Yellaiah, s/o late Ramaiah and another, 2017(4) ALT 547*

9. Learned Counsel for the respondent/applicant supported the order passed by the learned Lower authority and contended that the lower authority has rightly held that the witness No.2 of the non-applicant cannot be said to be turned hostile and therefore cannot be declared as hostile accordingly

rejected the said application of the petitioner which needs to be confirmed.

10. Learned Counsel for respondent relied on *Shobhana Sahadev Shah and ors. Vs. Sangeeta Porbanderwala and ors., 2013(5) Bom.C.R.92.*

11. I have heard both the parties at length, perused impugned order and documents on record, considered the citations relied on by both the parties. I have perused the evidence of witness No.2 examined by the non-applicant in chief. He is supporting to the case of non-applicant Mahadev. The chief was recorded on 23.03.2023, even the evidence was verified on the same date. However, it appears that cross was recorded on 26.06.2023. In cross, the said witness deposed that he is not driving the vehicle on the day of incident and, therefore, he is not aware anything about the incident. He further deposed that he has filed affidavit. As per say of Mahadev Borkar (non-applicant), he also deposed that it is true that he has filed false affidavit and deposing falsely. Considering this cross-examination, the non-applicant filed an application for re-examination of witness No.2 and sought

permission for re-examination. In the alternative, he also prayed that witness be declared as hostile and to grant permission to cross-examine. After obtaining say on the said application, the learned Commissioner passed impugned order below Exhibit C-12.

12. The learned Commissioner observed that non-applicant failed to point out any such question of which witness has not given proper answer. The non-applicant has failed to point out any such question. It is also further observed that he has also failed to point out ambiguity with regard to the answer given by the said witness. He has not pointed out any answer given by the said witness which needs any clarification. If during the cross-examination, the said witness has given some admission can't be termed as hostile. On this ground, the application of the non-applicant came to be rejected.

13. The learned Counsel for petitioner relied on *Rajiv Vijayasathya Rathnam (supra)* in paragraph No.5 of the said judgment, after considering the provisions under Section 154 of the Indian Evidence Act, 1872, the Karnataka High Court held that

this provision allows a party to the proceedings, civil or criminal, to put questions to his own witness in the same way as the adverse party would do in cross-examination, of course with the permission of the Court. Such a witness can be asked leading questions under Section 143. The Karnataka High Court in paragraph No.5 (iii) and (iv) held as under:

“5. (iii) The terms ‘hostile’, ‘adverse’, ‘unfavourable’ or ‘unwilling’ witnesses are not employed in the Indian Evidence Act, 1872 by the drafts-man in view of conflicting judicial opinions in England as to the true meaning of these words; it is a settled principle of law that ordinarily a party calling his witness is not allowed to cross-examine him as if. Such party is an adversary in the proceedings; however, Sections 154 and 155 are in the nature of an exception of this general rule; these sections are founded on the wisdom gained from long experience of the learned; these sections provide for relaxation of the general rule so that by the cross-examination of the hostile witness truth is extracted; it is now well established that the scope of section 154 is not limited to putting leading questions, but extends to the whole range of cross-examination.”

(iv) A party will not be normally allowed to put leading questions (to cross-examine) his own witness save by the permission granted by the Court in its discretion; it is true that the discretion means according to rules of reason and justice; the exercise of discretion depends upon the facts and circumstances of each case; before a Court declares a witness hostile and grants permission to the party to cross-examine his own witness, there must be

some material to show that the witness has gone back from his earlier statement unjustifiably, or is not speaking the truth deliberately, or has exhibited an element of hostility, or has changed sides prima facie-, the demean or of the witness in the box may also be one of the relevant factors; the Court recording the evidence has to employ sound common sense and prudence while exercising the discretion; it is needless to mention that permission to treat the witness as hostile witness cannot be granted for mere askance."

14. The learned Counsel for petitioner also relied on *Mattam Ravi s/o Raja Yellaiah (supra)*, wherein similar facts arises. Three questions were framed by the Telangana and Andhra Pradesh High Court which reads as under in paragraph No.7:

"7. The issues for consideration in this revision are:

1) Whether section 154 of the Indian Evidence Act is applicable only to criminal proceedings and has no application to the civil cases as held by the trial Court?;

(2) In what circumstances the trial Court can grant such permission? And

(3) to what relief?"

15. The Telangana and Andhra Pradesh High Court held that in view of Section 154 "The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might

be put in cross-examination by the adverse party."

16. The Court held that such a request can be made in civil as well as in criminal cases. The High Court of Telangana and Andhra Pradesh in paragraph No.10 laid down principles deducible from the precedent decisions, which reads as under:

"10. Principles deducible from the precedent decisions, noted above are as under:

a) Permission under Section 154 can be sought before evidence of witness is concluded;

b) Section 154 vests vide discretion in the Court to grant or refuse permission and it is an unqualified discretion.

c) Such discretion should be liberally exercised whenever the Court, from the witnesses demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice.

d) In Indian law, there is no scope to use words 'hostile' and 'adverse', therefore, grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared 'adverse' or 'hostile'.

e) While granting permission under Section 154, Court should avoid use of expression as 'declared hostile' and 'declared unfavorable'. Section 154 authorizes the Court,

in its discretion, to permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party.

g) The Courts are under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Such permission should not be granted at the mere asking of the party calling the witness.

h) Contingency as provided by Section 154 is extraordinary phenomenon and permission should be given only in special cases. There must be some material to show that the witness has gone back on his/her earlier statement or is not speaking the truth or has exhibited an element of hostility or has changed sides and transferred his loyalty to the adversary. The Court must ignore small or insignificant omission. Court must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner.

i) Under Section 154, it is not necessary to file a formal application and oral request can be made during the cross examination or re-examination or immediately after the conclusion of the examination of witness.”

17. As against this, learned Counsel for respondent relied on *Shobhana Sahadev Shah (supra)*, wherein he relied in paragraphs No.14 of the said judgment.

“14. The witness is an officer of the Court. The Court must protect the witness who makes a deposition. It is for

the Court to see whether the deposition is truthful or not at a later stage. A witness cannot be pressurized to make any statement. Similarly upon a consistent statement made by a witness, he cannot be declared hostile even if the statement made is against the case of the party."

18. In my considered opinion, while rejecting application, the Commissioner has not considered the fact that in cross-examination, the witness has admitted that he has filed false affidavit and he is deposing false on the day of cross-examination. He also turned back from the statement made in examination-in-chief. The judgment relied on by the respondent is not of any help to the respondent as in paragraph No.14, this Court observed that *"Similarly upon a consistent statement made by a witness, he cannot be declared hostile even if the statement made is against the case of the party."*

19. Here admittedly there is material to show that the witness has gone back on his earlier statement or is not speaking the truth and has changed sides and transferred his loyalty to the adversary. In such circumstances, considering the judgment referred by the petitioner also, the learned Commissioner ought to

have allowed the petitioner's alternative prayer. The finding in paragraph No.4 by the Commissioner "the non-applicant himself has filed affidavit in view of examination in chief of said witness and if during cross-examination, the said witness has given certain admissions to the applicant then it cannot be said that the said witness has turned hostile. The learned Commissioner recorded perverse finding that witness No.2 of the non-applicant cannot be said to be turned hostile and therefore there is no question of declaration that the witness turned hostile and no question of granting permission to re-examination or cross-examination of the said witness No.2. While passing this order, the learned Commissioner failed to appreciate this fact that in cross-examination which was conducted after a period of three months of examination in chief, the witness turned back to his original statement and in cross-examination it is admitted by the witness that he has filed false affidavit and deposed false. In view thereof, the learned Commissioner ought to have granted permission to cross-examine the witness No.2. The order passed is not sustainable in the eyes of law and liable to be set aside. Accordingly I proceed to pass the following order:

ORDER

- i) The Writ Petition is allowed.
- ii) The order dated 29.06.2024 passed by the Commissioner under Employees Compensation Act, and Judge, Labour Court Chandrapur below Exhibit C-12, in WCA No.8/2018 is hereby quashed and set aside.
- iii) The Commissioner, under Employees Compensation Act, and Judge, Labour Court Chandrapur, is hereby directed to allow the non-applicant to cross-examine witness No.2.
- iv) Parties to appear before the Commissioner, under Employees Compensation Act, and Judge, Labour Court Chandrapur, on 01.04.2025.

The Writ Petition is disposed of accordingly. No order as to the costs.

(SMT. M.S. JAWALKAR, J.)

R.S. Sahare