

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/FIRST APPEAL NO. 1142 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE A.G.URAIZEE**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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SHANTISWARUP AGRAWAL

Versus

BABYBEN MANGABHAI

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Appearance:

MR.VARUN K.PATEL for the PETITIONER(s) No. 1,2,3

MR YN RAVANI(718) for the RESPONDENT(s) No. 1,2,3,4

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CORAM: HONOURABLE MR.JUSTICE A.G.URAIZEE**Date : 04/04/2017****ORAL JUDGMENT**

1. The appellant has challenged the judgment and order dated 19.02.2013 passed by the Workmen Compensation Commissioner, Labour Court, Bhavnagar in Workman

Compensation (Fatal) Case No.4 of 2003 wherein the appellants are directed to pay a sum of Rs.4,26,940/- with 9% interest as compensation and 25% thereon i.e. Rs.1,06,735/- with 9% interest as penalty to the respondents who are the legal heirs and representatives of deceased Rameshbhai Mangabhai.

2. Thereon matrix of the case are that the deceased Rameshbhai Mangabhai was working as Sweeper (Safai Kamdar) on daily wages of Rs.88/- and he was also earning Rs.120/- daily by doing odd work. Thus, he used to earn Rs.6000/- per month. On 25.01.2003, the appellants summoned the deceased through one Bharatbhai Hirabhai Vegad for cleaning and repairing the Bungalow drainage for which Rs.100/- settled as wages. The appellant used to summoned the deceased for such work frequently and therefore, there was relationship of employer and employee between the appellant and deceased. While cleaning the drainage pipe line, the deceased fall-down from the height of 60 to 70 ft and died. The respondents who are legal heirs and representatives claimed compensation of Rs.3,52,000/- with penalty and interest at the rate of 18% from the appellants by filing Workman Compensation (Fatal) Case No.4 of 2003 in the Court of Commissioner for Workman's Compensation

Bhavanagar, the claim application is partly allowed by the Commissioner and the appellant being unhappy and therefore, preferred an appeal.

3. I have heard Mr. Varun K. Patel, learned advocate for the appellants and Mr. Yogesh Rawani, learned advocate for the respondents.

4. Mr. Varun Patel, learned advocate for the appellants vehemently submitted that the appellant had engaged the deceased for specific isolated work. Therefore, the engagement was the contract, for service and not contract of service. It is his submissions that the Commissioner has not properly appreciated this subtle difference and has erred in holding that there was employer and employee relationship between the appellants and deceased. In support of this contention he has relied upon the decision of the Supreme Court in the case of **LAXMINARAYAN REDDY VERSUS SANTHA AND ANOTHER, 2003 (9) SCC 190**. He also submitted that the person whose employment is a casual in nature and who is employed otherwise than for the purpose of employers trade or business has been excluded from the purview of the definition of employee. He therefore urged that the appeal may be allowed and the impugned judgment and

order may be set aside.

5. Mr. Yogesh Rawani has supported the impugned judgment and order. He vehemently submitted that the words “Other than the person who is employee is a casual in nature and who is employed then the otherwise than for the purpose of the employers, trade or business” as contained in Section 2(n) of the old Act are done away with in the new definition of “Employee” as contended in Section 2(dd) of the new Act and sub Section(iii) thereon makes it clear that the provision of the new Act retrospective in nature. He therefore, submits that the intention of the legislature is to include the domestic servant as well. He also submitted that the burden of proof that the work was of casual nature is on the employer and when the respondent have very clearly stated in the claim application as well as oral evidence that the appellants used to call the deceased for similar work frequently which is not rebutted and therefore, the Commissioner has not committed any error in holding that there was employer and employee relationship between the appellants and deceased. He further submitted that the employment of the deceased by the appellants falls within the list of presences specified in Schedule 2(9)(X). In support of his contentions, he has heavily relied upon the following decisions :

(1) Zila Sahakari Kendrya Bank Maryadit Versus Shahjadi Begum And Others, (2006) 11 SCC 692;

(2) Unreported decisions of this Court dated 02.08.2002 rendered in First Appeal No.743 of 2002 between the Sulekhram Stainless Steel Rolling Mill Versus Babubhai Chanaji Since Decd. Thro' Heirs and Legal Representatives.

6. He therefore urged that the impugned order of the Commissioner does not warrant interference and the appeal may be dismissed.

7. The neat question of law which is involved in the present appeal is whether the engagement of the deceased by the appellant for the purpose of cleaning of drainage pipe line of their private bungalow would come within the dragnet of recourse of the Workman Compensation Act or not.

8. First undisputed facts. The deceased Rameshbhai Mangabhai was summoned on 25.01.2003 by the appellants for cleaning of drainage pipe line of their private bungalow while doing his work, he fell down from the height of 60 to 70 feet and died. The respondents who are the legal heirs and representatives of the deceased filed an application before the

Commissioner of Workman Compensations Bhavnagar to recover compensation of Rs.3,52,000/- on 23.04.2003. At that time Workman Compensations Act, 1923 was holding field. The claim petition came to be finally disposed of by the impugned judgment and order on 19.02.2013, the Workman Compensations Act, 1923 came to be amended and came to be recrystallized Employees Compensation Act, 1923 by virtue of the Workman Compensation (Amendment) Act, 2009, which came into force on 18.01.2010.

9. The Workman Compensation Act denying the term Workman in Section 2(n) which reads as under :

Section 2(n) :

(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 or a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) employed [The words "either by way of manual labour or" omitted by Act 15 of 1933, Section 2] [The words "one monthly wages not exceeding on

thousand rupees” omitted by Act 22 of 1984, Section 2 (w.e.f. 1st July, 1984) 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] [The words “or of the Royal Indian Marine Service” omitted by the A.O. 1937 (w.e.f. 1st April, 1937), and reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.”

10. The definition of the workman “ As contained in the old Act came to be amended and titled as “Employee” in Section 2(dd) of the E.C. Act after amendment. It reads as infra :

Section 2(dd) :

(dd) “employee” means a person, who is -

(i) a railway servant as defined in clause (34) of Section 2 of the Railways Act, 1989 (24 of 1989), 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) (a) a master, seaman or other members of the crew of a ship,

(b) a captain or other member of the

crew of an aircraft,

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India; or

(iii) employed 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 any employee who has been injured shall, where the employee is dead, include a reference to his dependants or any of them."

11. The conjoint reading of the definition of the "Workman" and "Employee" in the under-amendment and amendment Act respectively would indicate that the words "other than person who is employee of a casual nature and who is employee otherwise than for the purpose of the employers trade or business" as appeared in the under-amendment definition "Workman" as contended in Section 2(n) of the W.C. Act are omitted in the definition of "Employee" as contend in Section

2(dd) of the E.C. Act.

12. Mr. Rawani, learned advocate for the respondent wants to convince this Court that in view of the words used in (iii) of Section 2(dd) of E.C. Act that “ Employed in any such capacity as is specified in Scheduled (ii), whether the contract of employers was made before or after passing of this Act” makes the E.C. Act retrospective nature and omitting words “ other than a person who is employees is of a casual nature and who is employee otherwise than for the purposes of the employers trade or business” would bring even domestic servant within the sweep of the W.C. Act. I am not inclined to accept the submission. Employment of words “Whether the contract of employment was made before or after all the passing of this Act, are not introduced in Section 2(dd)(iii) in the definition of Employee for the first time were also there in Section 2 and i.e. definition of workman in the W.C. Act. Moreover, in my opinion this words are incorporated to safeguard and protect the interest of the workman of employee as the case may be who were employed before the respective Act coming into force and whose employment continued even after coming into force of the new Act. I am therefore, of the view that by employing this amendment the provision of E.C Act would not become retrospective.

13. Heavily relying on Scheduled 2 item 10 by Mr. Rawani to emphasize his submission that their existed relationship of employer and employee as the deceased was engaged/employed in repairing work of drainage pipe line. Reliance on Schedule 2 is misplaced the definition of Employee as contained in Section 2(dd) of the E.C. Act for the purpose of Scheduled 2 would be a person recorded for a work abroad by company and who is employee out side India for the work specified in item (x) of this scheduled admittedly the deceased was not employed by any company to work out side India. Therefore, merely because he was engaged by the appellant for cleaning work of the drainage work would not bring the deceased within the mischief of item (x) of Schedule 2 of E.C. Act.

14. It is an undisputed fact as could be assumed from the averments made in the compensation application filed by the respondent with the Commissioner for Workman Compensations that deceased was working as Sweeper (Safai Kamdar) with Bhavnagar Municipal Corporation on daily wages and was doing odd jobs in extra time. It is thus vividly clear from these averments made in the application itself that the deceased was daily wager employee of the Bhavnagar

Municipal Corporation . It needs not clarification that the person cannot work for two masters at the same time. The documentary and ocular evidence makes it manifestly clear that the deceased was summoned by the appellants for a specific jobs of cleaning the drainage pipe line of the residential bungalow of the appellant for which Rs.100/- were settled as the wages. In the back drop of this undisputed admitted facts which cannot be said by any stretch of imagination that there was contract of employment between the deceased and the appellants and therefore, the deceased and the same was "Contract for Service" which would not bring the deceased withing the definition of Workman as contended in Section 2(n) of the Workman Compensation Act, 1923.

15. The decision relied upon by Mr. Rawani, learned advocate for the respondents are not at all applicable to the facts of the present case. The perusal of the decision would reveals that in each of the cases there was a contract for employment for doing specific job either directly by the employer or through a contractor. Therefore, in view of the factual scenario of the each of the cases it was held that there was a relationship of employer employee between the parties and the employer therefore was held liable to pay

compensation to the employees or his legal heirs.

16. The Commissioner is seems to have clearly fallen in error in recording the conclusion that there was a relationship of employer employee between the appellants and the deceased merely on the basis of averments made in the application and the oral evidence that the appellants used to call the deceased for odd work often and therefore, there was relationship of employer and employee shutting his eyes to the facts to the fact that the deceased was a daily wages employee of the Bhavnagar Municipal Corporation and that the requirement under Section 2(n) of the W.C. Act, 1928 was not fulfilled to bring the relationship of the appellant and the deceased within the purview of the employer and employee.

17. I am therefore of the view that the liability of payment of compensation for the death of the deceased Rameshbhai Mangabhai cannot be fasten on the appellant and view thereof the impugned judgment and order cannot be sustained.

18. As a result, the appeal succeeds and is hereby allowed. The judgment and order dated 19.02.2013 passed by the Commissioner for Workman Compensation Bhavnagar in W.C. (Fatal) case No.4 of 2008 is hereby quashed and set-aside in the facts of the present case.

Parties are left to bear their own costs.

R& P is ordered to be remitted to the lower authority forthwith.

(A.G.URAIZEE, J.)

PALLAVI