* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO 99/2022**

Reserved on : 25.11.2022
Pronounced on : 06.01.2023

IN THE MATTER OF:

SEEMA & ORS. ..... Appellants

Through: Mr. Anshuman Bal, Advocate

versus

HDFC ERGO GEN INS CO LTD & ORS. ..... Respondents

Through: Mr. A K Soni, Advocate for respondent No.1/Insurance Company.
Mr. Akashdeep and Mr. Aman Preet Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

CM APPL. 19849/2022 (Delay)

1. By way of the present application filed under Section 5 of the Limitation Act, read with Section 151 Code of Civil Procedure, the appellants/claimants seek condonation of delay of 120 days in filing the present appeal.

2. Mr. Anshuman Bal, learned counsel for the appellants submits that appellant No. 1 is the wife of the deceased (*Sh. Dalip Kumar*), who unfortunately passed away in an accident on 07.11.2012. It is stated that though the impugned order was passed on 08.10.2021, however the present appeal

could not be filed timely as the Registry was closed for physical filing at the relevant time.

3. This Court takes note of the fact that, vide order dated 23.09.2021 passed in **Suo Motu Writ Petition (Civil) No. 3 of 2020** titled as In Re: Cognizance for Extension of Limitation, the Supreme Court has directed that for computing the period of limitation in suit, appeal, application or proceedings, the period from 15.03.2020 till 02.10.2021 shall stand excluded. The impugned order was passed on 08.10.2021. Considering the facts and circumstances of the case, the application is allowed and the delay of 120 days in filing the accompanying appeal is condoned.

FAO 99/2022

1. The present appeal has been filed under Section 30 of the Employees' Compensation Act, 1923 (hereinafter, referred to as *'the Act'*) on behalf of the appellants impugning order dated 08.10.2021 passed by the learned Commissioner, Employees' Compensation in Case No. CWC/D/ED/03/2013/7044, whereby their claim petition seeking compensation on account of death of claimant No. 1's husband was dismissed.

2. Facts of the case, as emanate from the records are that appellant No. 1 i.e., wife of deceased *Sh. Dalip Kumar*, alongwith other legal heirs had preferred a petition claiming therein that the deceased was employed as a driver with respondent No. 2/*Narinder Singh* and during the course of his employment, while driving a vehicle bearing TSR No. DL-1RL-4343, he met with an accident on 07.11.2012 near *Mayur Vihar Metro Station* within the jurisdiction of Police Station Pandav Nagar, New Delhi. An FIR No. 491/2012 was registered at Police Station Pandav Nagar, whereafter post-mortem of the deceased was conducted at the *GTB Hospital*. It was further claimed that at the time of death,

the deceased was about 34 years old and drawing a salary of Rs.10,000/- per month.

3. Learned counsel for respondent No. 1 contended that the claimant failed to establish employee-employer relationship between the deceased and respondent No. 2 and thus the fatal injury cannot be held to occur during the course of employment. It also denied any liability to pay compensation on the ground that the deceased did not have a valid and effective license to drive a vehicle and that MLC conducted at the *Lal Bahadur Shastri Hospital* indicated consumption of alcohol by the deceased at the time of driving the aforesaid TSR.

4. Initially, while referring to Section 3(1) of the Act, the claim petition was dismissed by the learned Commissioner vide order dated 30.11.2015 by observing that the deceased having been under influence of liquor at the time of occurrence, no claim for compensation could be entertained.

However, in appeal being FAO 413/2016, this Court vide judgment dated 18.12.2017 while observing that Section 3(1)(b) of the Act is not applicable to the accident in question as the case related to death and not injury, set aside the order dated 30.11.2015 and remanded back the matter to the learned Commissioner.

5. The parties appeared before the learned Commissioner and led their respective evidence. The following issues came to be framed:-

> *"(i) Whether the deceased was employed with the respondent or not?*
> *(ii) Whether the deceased died during the course of employment?*
> *(iii) Whether the claimant is entitled to get compensation on behalf of deceased?"*

6. The claim petition came to be dismissed. In the impugned judgment, the learned Commissioner concluded that the claimants failed to establish the employee-employer relationship between the deceased and respondent No. 2 inasmuch as it was not proved that any salary was paid to the deceased by respondent No. 2. Eventually, on above basis, all the issues were decided against the claimants.

7. In the present case, it is not disputed that the deceased died while driving the TSR in question. The only issue is whether the death had occurred during the course of his employment with respondent No. 2. In this regard it is sufficient to note that the claimant/*Smt. Seema Devi* has asserted in the claim petition as well her evidence that the deceased was employed with respondent No. 2 as a driver and was drawing a salary of Rs.10,000/- per month. The photocopy of FIR, Driving License, Badge, Post-Mortem Report, Election ID Card and Ration Card were exhibited as *Ex.PW1/1* to *Ex.PW1/2*. In cross-examination, she denied the suggestion that the deceased was driving a vehicle only on daily rental basis from respondent No. 2.

8. Respondent No. 2 examined himself. He stated that the deceased used to drive his TSR on daily rent basis but occasionally. He further stated that the deceased had driven his TSR for 16-17 days prior to the accident.

9. On this issue, it is deemed profitable to advert to the decisions of a Co-ordinate Bench of this Court in National Insurance Co. Ltd. *v.* Smt. Badami Devi and Ors. reported as **2014 SCC OnLine Del 1268**, wherein under similar facts, it was held that in a case of employment as a TSR driver it cannot be expected that there would be properly drafted employment contract. It was further held that once the Insurance Company has issued a policy containing a clause for payment under the Act for which premium is paid, and policy is issued to cover loss on account of the injuries to an employee arising out of and

in the course of employment, there is no reason to hold that the deceased should not be considered as an 'employee' of the owner of the vehicle. Relevant excerpt from the captioned decision is extracted below:

> *"7. So far as the first argument is concerned, in my opinion, no substantial question of law arises under Section 30 for this appeal to be entertained because in cases of employing of a driver for driving of a TSR I do not think that there would be properly drafted and typed out contracts which are required to be filed for showing the relationship of employer and employee. It is settled law that provisions of Code of Civil Procedure, 1908 (CPC) and Evidence Act, 1872 do not apply to the proceedings before the Commissioner. However, the fact that the vehicle which was driven by deceased Sh. Umesh Kumar met with an accident was in the name of the employer/respondent no.2, is sufficient to hold that the deceased Sh. Umesh Kumar was the employee of the respondent no.2 more so because there was no reason why the appellant/insurance company would have taken additional premium under the policy with respect to the Employee's Compensation Act if there was no employee i.e., the deceased employee Sh. Umesh Kumar. The first argument therefore urged on behalf of the appellant is rejected."*

The aforesaid view was reiterated in Suraj Munni & Anr. *v.* Sachin Bhatia & Anr. reported as **2017 SCC OnLine Del 11193**.

10. In view of the above, this Court is of the opinion that the learned Commissioner erred in concluding that merely because no formal proof of *Dalip Kumar's* employment with respondent No. 2 was brought on record, the employee-employer relationship was not proved.

11. Insofar as entitlement to receive compensation is concerned, the claimants are stated to be the widow, daughters, and mother of deceased/*Sh. Dalip Kumar*. They have established their status by placing on record respective copies of Voter ID Cards and Birth Certificates. They were dependants of the deceased and are entitled to death compensation.

12. Although a contention was raised that the deceased did not have a valid and effective driving license however, a perusal of record reveals that no such contention was raised in the written statement/written arguments filed before the Commissioner. Another contention raised that as per MLC of deceased, the smell of alcohol was noted and as such the respondent is not liable to pay compensation in view of Section 3(1)(b)(i) of the Act is also meritless as this Court while remanding back the matter had already opined otherwise, which was not challenged. In this regard, it is sufficient to take note of the similar view taken by the High Court of Himachal Pradesh and Rajasthan in National Insurance Company Limited, Through its Administrative Officer (Legal), Shri Vivek Suman *v.* Halya Devi and Others reported as **2022 SCC OnLine HP 1876** and National Insurance Company Ltd. *v.* Badam Devi and Ors. reported as **MANU/RH/1587/2014** respectively.

13. The Bombay High Court in Amita wd/o Prakash Madavi and Others *v.* New India Assurance Co. Ltd., Nagpur and Another reported as **2016 SCC OnLine Bom 180** also held that Section 3(1)(b) of the Act excludes the contingency where death or permanent total disablement occurs as a result of an accident. Relevant excerpt from the said decision is reproduced hereunder:

> ***"5.*** *Heard the respective counsel and perused the documents filed on record. The learned Commissioner in paragraph 6 of the impugned judgment has recorded a finding that Prakash was at the time of the accident driving the car in the capacity of a driver. In paragraph 10 of the judgment a further finding has been recorded that while performing his duties he had consumed liquor after which the vehicle met with an accident. These findings recorded by the learned Commissioner are based on appreciation of evidence available on record. The same do not warrant any interference. In fact the appellants have proceeded on the basis that the accident took place when the driver of said vehicle was under influence of liquor. The question therefore is whether provisions of section 3(1)(b) of*

the said Act can be relied upon for defeating the claim for compensation.

Under provisions of section 3(1)(b) of the said Act, an employer is not liable to pay compensation in respect of an injury caused by an accident which is directly attributable to the employee having been at the time of the accident under influence of drink or drug. However, aforesaid provision excludes the contingency of either death or permanent total disablement being influenced as a result of such accident. The intention therefore appears to exclude the liability of an employer when an accident results in injury on account of the employee at the time of the accident being under influence of drink or drug. The exclusion of the consequence of death or permanent total disablement appears to have been made with a view to safeguard the interests of dependents in such contingencies.

6. *In United India Insurance Company Ltd. (supra), a learned Single Judge of the Himachal Pradesh High Court considered the aspect of a fake license with the driver and its effect on the claim for compensation under the said Act. In paragraph 21 of said judgment it has been observed thus:*

> *"21. However, the legislature in proviso to section 3(1) of W.C. Act has exempted the employer in certain cases. The most important factor to be noted is that this exemption is not applicable in the case of death or permanent total disablement, but only in cases of injury. In cases of injury, if the employer proves that workman was under the influence of drink or drugs or that he had wilfully disobeyed any express order or specific rule with regard to securing the safety of the workman or the workman has wilfully removed or disregarded any safety guard or other devices which he knew were provided for the purpose of securing the safety of a workman, then the employer can avoid his liability. However, even in such cases the employer is liable to pay compensation in case death or permanent disablement results from the injury. The intention of the legislature is thus very clear. In cases of death or*

> *permanent total disablement even if the employee has wilfully disregarded the safety aspects then also the employer would be liable."*
>
> *From the aforesaid it is therefore clear that in cases of injury, if the employer proves that the workman was under the influence of drink or drug then the employer can avoid his liability. However, even in such cases, the employer is liable to pay compensation where death or permanent disablement results from the injury. The intention behind aforesaid provision indicates that in case of injuries, the employee in question is made to suffer by denying the benefit of compensation while in the case of death or permanent disablement, care has been taken to see that the claim for compensation is not defeated on said count and the defendants do not suffer.*
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> *xxx*
>
> ***9.** In view of aforesaid discussion the substantial question of law is answered by holding that the learned Commissioner was not justified in ignoring the provisions of section 3(1)(b) of the said Act while rejecting the claim for compensation."*

14. In alike facts and circumstances, the Division Bench of High Court of Chhattisgarh in Salendri Bai and Others *v.* Suresh Kumar Gupta and Others reported as **2020 SCC OnLine Chh 1397** observed thus:

> ***"11.** On 23.10.2019, appeal was admitted for consideration on following substantial question of law:*
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> *"Whether the finding of the Commissioner for Employee's Compensation, even in absence of the examination of doctor/author of the MLC report forming part of Ex. D-7, dismissing the Claim Petition preferred under Section 10 of the Employee's Compensation Act, 1923 holding that the deceased-Fituram was driving the vehicle in question in a drunken condition, is perverse?"*
>
> ***12.** Employment of deceased and accident arising out of during the course of employment is not in dispute. Application*

filed by the appellants/claimants was dismissed only on the ground that smell of alcohol was found by the doctor as mentioned in MLC. The Commissioner has dismissed the application taking into consideration the proviso to Section 3 of the Act of 1923.

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14. *A bare reading of above provision makes its clear that it dis-entitles an employee to claim compensation from the employer under different circumstances and one of which is mentioned under proviso (b)(i) of Section 3 (i). A glance of aforesaid provision would reveal that the word used under it is "under the influence of drink or drugs", it does not mention about consumption of drink or drugs. When the Legislature has consciously used the word 'influence' than it has to be read as it is and cannot be interpreted to be 'consumed'. There is vast difference between 'consumption of drink or drugs' or 'under the 'influence of drink or drugs'. The word 'under the influence' as defined in the Black's Law dictionary, which read as under:*

> *"**Under the influence.** (1879) (Of a driver, pilot, etc) deprived of clearness of mind and self-control because of drugs or alcohol. See DRIVING UNDER THE INFLUENCE [Cases : Automobiles - 332]"*

15. *The Act of 1923 does not say that employee will be dis-entitled if he is found to have been consumed drink or drugs, therefore, the burden is upon the employer of deceased/injured to prove that employee was under the influence of drink or drugs. Mere presence of smell of alcohol or alcohol in the body will not itself be sufficient to dis-entitle the employee or legal heirs of deceased-employee from getting compensation under the Act.*

16. *Section 185 of the Act of 1988 reads as under:*

> *"**185. Driving by a drunken person or by a person under the influence of drugs,** - whoever, while driving, or attempting to drive, a motor vehicle,*
>
> *[(a). has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser, or].*

(b). is under this influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle, shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both"

17. *From perusal of above quoted Section 185 of the Act of 1988, it is apparent that whoever, driving a vehicle after consuming alcohol, has in his blood, alcohol exceeding 30 mg. per 100 ml of blood, detected in a test by a breath analyser, or is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle. There is nothing in the evidence brought on record by the employer suggesting that deceased was having in his blood alcohol exceeding 30 ml per 100 ml of blood making him incapable to exercise proper control over the vehicle.*

18. *In absence of aforementioned two specific evidence on record against the deceased, the employer cannot be exonerated from its liability to pay the amount of compensation, especially when the proviso under Section 3 of the Act of 1923 uses the word "under the influence of drink or drugs" and "not consumption of drink or drugs". of Jose P.V.'s case (supra).*

19. *Relevant paragraph of Bachubhai Hassanalli Karyani's case (supra) has held as under:*

"4. The doctor had also admitted that a person could smell of alcohol without being under the influence of drinking. No urine test of the appellant was carried out and although the blood of the appellant was sent for chemical analysis, no report of the analysis was produced by the prosecution.

5. It seems to us that on this evidence it cannot be definitely held that the appellant was drunk at the time the accident occurred.

6. In view of this conclusion we are of the opinion that it would meet the ends of justice if the sentence of rigorous imprisonment passed against the appellant is reduced to imprisonment already undergone, but the sentences of fine shall remain. It is directed that the appellant be released forthwith."

20. *Relevant paragraph of Jose P.V.'s case (supra) has held thus:—*

"6. *The entry made by the doctor in the wound certificate that smell of alcohol was present in the breath of the appellant cannot be a reason for finding that he was under the influence of alcohol rendering him unable to keep himself proper and stable and contributing to the cause of accident. Drinking of alcoholic beverages is not a prohibited thing in this democratic country. But the crucial question is as to whether after drinking alcohol, the appellant had actually contributed to the cause of accident……."*

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22. *If the facts of the case at hand are considered in the light of aforementioned law laid down by the Hon'ble Supreme Court & High Court, in this case except mention of smell of Alcohol in MLC report by the doctor who conducted MLC, there is no other evidence to show that on the date of accident, deceased was under the influence of liquor. Therefore, in the considered opinion of this Court, the finding recorded by the Commissioner that deceased was in a drunken condition and under the influence of liquor is without any admissible piece of evidence. The finding recorded by the Commissioner that the claimants are not entitled for any amount of compensation as there was breach of policy condition and act of deceased is contrary to the Act of 1923 is not sustainable and it is hereby set aside.*

23. *Accordingly, question of law framed is decided in favour of the appellants/claimants."*

15. Based on the foregoing discussion, the present appeal is allowed and the impugned order dated 08.10.2021 is set aside. Consequently, the matter is remanded back to the learned Commissioner, Employees' Compensation to award the compensation in terms of the Act. The matter shall be listed at the first instance before the concerned Commissioner on 20.01.2023. Let the compensation amount be paid to the appellants/claimants within four weeks thereafter.

16. The appeal is disposed of in the above terms. Miscellaneous application, if any, is disposed of as having become infructuous.

17. The Registry shall communicate a copy of this judgment forthwith to the concerned Commissioner, Employee's Compensation.

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 6, 2023/v