

**(1996) 03 J&K CK 0004**  
**In the Jammu And Kashmir High Court**  
**Case No : C.I.M.A. No. 23 of 1994**

New India Assurance Company

APPELLANT

Vs

Santosh Kumari and Others

RESPONDENT

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**Date of Decision :** 15-03-1996

**Acts Referred:**

**Citation :** (1997) 3 LLJ 1114

**Hon'ble Judges :** Bilal Nazki, J

**Bench :** Single Bench

**Advocate :** V.K. Chopra, for the Appellant; S.C. Gupta and Jagmohan Gupta, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Bilal Nazki, J.—Respondent No. 1's husband died in an accident of fire of vehicle No. JK 02-4123 which occurred during the intervening

night of May 18/19, 1991. She moved an application before the Assistant Commissioner, Rajouri (Commissioner under the Workmen's

Compensation Act) on August 27, 1992. The appellant herein and Respondent No. 2 were the respondents therein. According to the Respondent

No. 1 claimant, her husband was in the employment of Respondent No. 2 and the vehicle stood insured with the appellant. The facts as revealed

by the award state that the husband of Respondent No. 1 was the driver of the above mentioned vehicle who had gone with the owner of the

vehicle to Shahdra Sharief. He was asked to sleep in the vehicle which caught fire during the night and the husband of the Respondent No. 1

claimant was charred to death.

2. The Commissioner invited objections from the respondents and both the

respondents filed their objections. The owner of the vehicle admitted that the deceased husband of the Respondent No. 1 -- claimant was in his employment and he was being paid Rs. 50/- per day. The Insurance Company-appellants herein in their objections admitted that the vehicle in question stood insured with them. However, they took a plea that the deceased had not a valid driving licence on the relevant date. They also took the plea that the driver had been engaged only for a period of three days and was not being paid a regular monthly salary of Rs. 1500/-. They also submitted that the deceased driver was not a workman as defined in the Workmen's Compensation Act. The appellant did not lead any evidence before the Commissioner. The Commissioner passed an award in favour of the claimant, which has been challenged by way of this appeal. The only ground taken in the appeal is that on the date the accident took place, the deceased driver was already a Government employee, and as such, even if he was driving the vehicle which caught fire, he could not be deemed to be a workman within the meaning of the Act. The appellants have taken a plea that this fact was not known to them previously and therefore, was being agitated for the first time in the appeal. From a reading of the memo of appeal it becomes clear that this fact had been disclosed by Respondent No. 1 when she was examined by the Commissioner on April 19, 1993. In her statement in cross-examination, she had stated that her husband was working in the Public Works Department, and he had gone to Rajouri after taking leave. She has further stated that he was a daily wager. Although this fact was known to the appellant herein admittedly from April 19, 1993 that the deceased was working with Public Works Department, yet they did not produce any evidence to show as to what was the nature of employment of the deceased with the Public Works Department. The wife of the deceased driver had categorically stated that he was working on daily wage basis. It is common knowledge that a daily wager is being paid only for those days on which he works. In the absence of any evidence having been produced by the appellant, this Court has to believe the wife of the deceased driver that her husband was working only as a daily wager with the Public Works Department. A daily wager as such is not a Government employee.

3. My attention has been drawn by learned counsel for the appellant to the

provisions of Jammu and Kashmir Government Employees Conduct

Rules, 1971. Rule 10 thereof creates a bar for a Government employee to engage himself in trade or employment other than the Government

employment. But I do not think that a Daily Wager is a Government employee within the meaning of Rule 2(b) of the said Rules, where the

Government employee is defined to mean any person appointed to any civil service or post in connection with the affair of the State. A daily wager

is engaged for performing a specific job and is being paid for the day he is engaged. Therefore, even if it is held that the deceased driver was in the

employment of Public Works Department as a daily wager, even then that will not deprive him of the benefits under Workmen's Compensation

Act, provided it is shown that he was a workman within the meaning of the Act. Workman has been defined u/s 2(s) of the Act, as under:

'Workman' means any person employed (including an apprentice) in any industry to any skilled or unskilled manual or clerical work for hire or

reward and includes, for the purpose of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that

dispute, but does not include any person employed in the naval, military or air service of the (Government)"".

4. The counsel for the appellant submits that even if it is conceded that he was in the employment of the owner of the vehicle, even then the

deceased driver was a casual worker and not a Workman within the meaning of the Act. The counsel for Respondent No. 1 has submitted that it is

not for the appellant to dispute the nature of the relationship between the deceased driver and his employer. It is the employer who can challenge

the nature of employment of his employee, and the owner of the vehicle has in unequivocal terms admitted that the deceased driver was in his

employment. Moreover, the appellant had been given a chance by the Commissioner to produce the evidence. Since, they have failed to produce any

evidence, therefore, they cannot be heard to say that the nature of employment was of a casual nature. He has drawn my attention to a judgment of

the Supreme Court titled Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, . The interpretation of the definition of 'Workman' in the

Act came directly before the Court in the said case. The Court found that the essential conditions of a person being a Workman within the terms of

this definition is that he should be employed to do the work. In other words, there should be an employment of his by the employer and there should be the relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman within the definition of the terms as contained in the Act. After laying down the principle as enunciated above, the test laid down by the Supreme Court to determine as to whether a person is workman or not, is to see whether the employer has a right of control in respect of the work and the manner in which the work is being done?

5. While relying on the position of law as existed in England, the Supreme Court quoted with approval from Halsbury's "Law of England",

Hailsham Edition, Vol. 22, page 112, para 191, as under:

Whether or not, in any given case, the relation of master and servant, exists is a question of fact; but in all cases the relation imports the existence

of power in the employer not only to direct what work the servant is to do. but also the manner in which the work is to be done.

6. After analysing the whole law, the Supreme Court held that the principle which emerges from the authorities considered, the prima facie test for

determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by

the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work.

7. After laying down the said principle, the Supreme Court again quoted with approval the following words of Lord Uthwatt at page 23 in case

titled; Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd. 1947 1 AC 1 (E) :

The proper test is whether or not the hirer had authority to control the manner of execution of the act in question".

8. Now coming to the facts of the present case, it is very much clear that the owner of the vehicle had employed the deceased driver. The owner

had asked the deceased to drive the vehicle to Shahdra Sharief and during a half at Rajouri, the owner had asked the driver to sleep in the vehicle,

so that the vehicle was protected. Therefore, it is evident that the owner of the vehicle was having complete control over the deceased driver

(deceased). In the absence of any evidence adduced by the appellants to the contrary, this Court, has no doubt that a master and servant relationship existed between the owner and driver of the vehicle. It is not the length of service which makes a workman casual, but the nature of relationship which exists between the employer and the employee, since this was the only point agitated before this Court in which the appellant has not succeeded. Therefore, I do not find any merit in this appeal, which is accordingly dismissed.