
(1983) 10 BOM CK 0022
In the Bombay High Court
Case No : First Appeal No. 240 of 1977

Smt. Sayamma

APPELLANT

Vs

Shabbir Ahmed A. Rehman and another

RESPONDENT

Date of Decision : 13-10-1983

Acts Referred:

Workmens Compensation Act, 1923 — Section 5

Citation : (1984) ACJ 203 : (1984) 1 LLJ 273

Hon'ble Judges : P.B. Sawant, J

Bench : Single Bench

Judgement

1. This is an appeal by the original Applicant who is the widow of the deceased workman. The Applicant had filed claim for compensation under the Workmen's Compensation Act, 1923 on the ground that her deceased husband Poshanna was employed along with other workmen by Opposite Parties Nos. 1 and 2 for doing the work of clearing and painting of chimneys of Opposite Party No. 2. Opposite Party No. 1 had taken the contract of the said work from Opposite Party No. 2. On the 3rd November, 1975, the deceased who had gone up the chimney on a scaffolding fell from a height of about 80 feet and sustained fatal injuries. He died on the same evening. On being served with the notices as required by the Act, the Opposite Parties deposited Rs. 13,500/- as compensation to be paid to the dependents of the deceased. The Applicant however claimed that the deceased was earning Rs. 15/- per day, and therefore, he fell within the wage group of Rs. 400-500, and hence he was entitled to a compensation of Rs. 21,000/- as provided in Schedule IV of the said Act. The Opposite Parties resisted the claim and their main defence was that the deceased was not a regular worker but a casual labourer employed on a daily wages of Rs. 6/- per day. It was also their contention that the deceased was employed only on the day on which he met with the fatal accident. On this basis the parties went to trial. The Applicant examined, one Asanna, a co-worker of the deceased and on behalf of the Opposite Parties, Opposite Party No. 1 Shabir Ahmed examined himself and Opposite Party No. 2 examined one Shabir Hussain who was

supposed to be the Supervisor on the said work of cleaning and painting the chimney. The learned Commissioner came to the conclusion that the deceased was a casual labourer and that his daily wage was only Rs. 6/- per day. He further held that the work of cleaning and painting of chimneys could bit be carried on normally except on the days the establishment was closed. According to him, therefore, the type of work could not be done for more than 20 days in a month. He therefore fixed the wage at Rs. 120/- multiplying the daily wage of Rs. 6/- by 20 days and awarded the compensation of Rs. 13,500/- on the basis that the workman fell within the wage group of Rs. 120-150. Since Opposite Parties had already deposited Rs. 13,500/- the application which was filed for the additional sum of Rs. 7,500/- was dismissed. However, the learned Commissioner granted Rs. 500/- as costs to the Applicant, on the ground that she was a widow with four children with the liability to maintain her old mother-in-law. It also further appears that theses costs were awarded as a concession from Opposite Party No. 1 Aggrieved by the dismissal of her application that the Applicant has preferred the present first appeal.

2. Shri Ghate, the learned counsel appearing for the Appellant-Applicant, contended that the learned Commissioner had committed two substantial errors of law. The first error, according to him, is that the Commissioner had recorded the finding that the workmen was earning only Rs. 6/- per day which was prima facie contrary to the evidence on record. His second submission was that even on the footing that the deceased was earning only Rs. 6/- per day, his monthly wage should have been calculated by multiplying the daily wage by 30 and not by 20 as has been done. In that case the deceased workman would fall within the wage group of Rs. 150-200 and the Applicant would be entitled to a compensation at least of Rs. 16,800/-.

3. I find much substance in the first contention, and hence, it is not necessary to decide the second contention at all. Asanna who was the co-workman of the deceased has stated in his deposition that Opposite Party No. 2's employee i.e., Witness No. 2 Shabir Hussain had taken the deceased Poshanna for work on the day of the accident and that the deceased's wages were Rs. 10/- per day. He also stated that his (i.e. witness's) wages were also Rs. 10/- per day. According to him, the deceased himself and one additional worker were working on that day under Opposite Party No. 1 Shabir Ahmed. According to him even the third worker was Paid Rs. 10/- per day. They had no weekly off and they get wages for the days they actually worked. He also stated that he knew the deceased Poshanna for about 10/5 years and they had worked under the said employer at many places. In his cross-examination on behalf of Opposite Party No. 1 he denied the suggestion that he had worked under Opposite Party No. 1 for the first time on the date of the incident or that Opposite Party No. 1 had employed the deceased for the first time on that day. He also refuted the suggestions that the deceased was employed on Rs. 6/- per day only. There was no cross-examination of this witness on behalf of Opposite Party No. 2 Nothing has therefore come out in the evidence of this witness examined on behalf of the

Applicant to suggest that the deceased was getting less than Rs. 10/- per day, for that he was not getting the same wage as witness Asanna, there is no challenge to Asanna's deposition that he himself was getting Rs. 10/- per day. There is also further no challenge to Asanna's deposition that he and the deceased workman had worked under the said employer namely Opposite Party No. 1 at many places and that he knew the deceased workman for about 10/15 years. On the basis of this deposition it can safely be assumed that the deceased workman was a co-worker with Asanna. Although in terms it has not come in the deposition of this witness that both he and the deceased workman were doing the work of the same nature probably because no question was asked to him and a clarification got from him even in the examination-in-chief it can legitimately be inferred that since according to this witness the deceased was also paid the same wage per day, they were doing the same type of work. What is however relevant for our purpose is the amount of wage which was being received by the deceased workman and as pointed out earlier the deposition of this witness read as a whole goes to suggest that the deceased workman was getting the same amount of wage per day namely Rs. 10/-.

Then we have the deposition of Opposite Party No. 1 himself i.e. Shabbir Ahmed. He states that he is petty contractor of painting, cleaning of chimneys, etc., and that it was his supervisor viz., Shabir Hussein witness No. 2 for the Opposite Parties who has employed the deceased Poshanna. However, according to this witness he was employed as a helper and his wages were Rs. 6/- per day. He denies having seen the deceased before the day of the fatal accident and claims that the deceased worked only on that day with him. In his cross-examination, however, he has made certain admissions. He has stated that on the day in question they required two skilled workers and one helper and he asked his supervisor namely Shabir Hussein to get them. Accordingly, Shabir Hussein had arranged three workers and the man who was employed as a helper died in the accident. He therefore wanted to suggest at this stage that the deceased was employed only as a helper. He was however asked to make a distinction between a skilled worker and a helper and this is what he has to say in that behalf. "A worker who does work as cleaner of the chimney and as painter is termed by me as a skilled worker and the worker who helps him by giving bamboo and giving such other things is termed by me as a helper. Helper works by remaining on the ground. Skilled worker goes up on the chimney for doing the work. It is true that the deceased had gone up on the chimney. It is true that the deceased fell down and met with the fatal accident". Thereafter it appears that he volunteered and stated as follows : "Even helpers who want to learn work go up on the chimney for doing the work." This deposition of the witness clearly establishes two facts namely that it is only the skilled workers who go up the chimney for doing the necessary work of cleaning and painting it and the helper has not to go up unless he volunteers for the same. According to him, secondly, the deceased workman had in fact gone up the chimney and had fallen from it. When he added that even helpers who want to learn work go up the chimney for doing the work, the

addition was obviously to get out of the admissions which he had made namely that only the skilled workmen go up on the chimney and not the helpers and to disprove that the deceased was a skilled workman. For admittedly even according to him the skilled workman gets a different wage than the helper and as stated by the Applicant's witness Asanna, he was obviously not a helper but one of the two skilled workman. The daily wages of the skilled workman was Rs. 10/- per day. This witness has then stated that he was working for Opposite Party No. 2 for the last 2/3 years and that his father also used to take contracts from the very company i.e. Opposite Party No. 2. It was positively put to him that the deceased was a skilled worker. However, he denied the suggestion. There was no cross-examination of the witness of behalf of Opposite Party No. 2. The things which emerge from his deposition therefore are as follows : Firstly, according to him the workmen employed were two skilled workmen and one helper. They were engaged not by himself but by Shabir Hussein who is the supervisor and also the employee of Opposite Party No. 2; secondly, even according to him, a helper remains on the ground and does not go up the chimney; thirdly in fact, the deceased had gone up on the chimney and met with the fatal accident because he had fallen to the ground from above; and fourthly although he has denied knowing the deceased workman, he has admitted that he was doing the same work for Opposite Party No. 2 for the last 2/3 years prior to the date of his deposition, and before that, his father was taking the contracts. It is therefore difficult to believe his story that he came to know the deceased Poshanna only on the day of the accident. It is his version that he came to know the deceased Poshanna only on the day of the accident, then it is difficult to believe his implied suggestion that the deceased had gone up the chimney only to learn the work. A worker who is employed only for a day as a helper is not expected to volunteer to learn the work of a painter or a cleaner by climbing up the chimney. Of course, the witness has not stated under what circumstances and for what purpose the deceased had gone up the chimney if he was employed only as a helper, and further if he had gone up the chimney to learn the work, who was doing the work of helper at the time. There is not a word about it in his entire deposition. Then we have the deposition of Shabir Hussein who was the supervisor on the said work. He has stated that he works under Opposite Party No. 1 as a painter According to him, he also does the work of cleaning and putting of the scaffolding. He collects workers for Opposite Party No. 1 and fixes the wages of the workers. He had taken the deceased for work on that day along with two other workers. Two of them were skilled workers and one was a helper and it is his case that the deceased was a helper. He had agreed to pay Rs. 6/- to the helper and Rs. 10/- to the skilled workers. The work had been started on the very day and had lasted for three days. In his cross-examination he stated that he worked temporarily under Opposite party No. 1 whenever he used to call him and that he was getting Rs. 12/- per day. According to him also the helper works by remaining on the ground and the skilled worker climbs up on the chimney, cleanses and paints it. He also admitted that the deceased fell down from the chimney. He also stated that he was the supervisor and the workers did work

under his supervision. There was no cross-examination of this witness also, by Opposite Party No. 2. Even the deposition of this witness shows that he had engaged two skilled workers and one helper on the day in question and that it was not the job of the helper to go up the chimney to do any work and that the worker had in fact fallen down from the chimney and met with the fatal accident. He has also admitted that he was doing the work of supervision over the said work. However, he has not stated as to in what circumstances and for what purpose the deceased, if he was engaged as a helper, had gone up the chimney for doing the work of a skilled worker. This is the only evidence on record. Unfortunately the learned Commissioner has completely ignored these important facts which emerge out of the deposition of these three witnesses and which conclusively establish that the deceased workman was doing the work of a skilled worker at the relevant time and that he had fallen from above the chimney and met with the fatal accident. The skilled workman was getting Rs. 10/- per day even according to Opposite Party No. 1. There was no cross-examination of any of the witnesses on behalf of Opposite Party No. 2. In spite of this the learned Commissioner came to the conclusion that the deceased was only a helper. In Paragraph 3 of his judgment, he has stated that merely because a helper's job is only to remain on the ground and do such work under the direction of the skilled workmen, he cannot be treated as a skilled worker "merely because he happens to go up the chimney". He has however failed to notice that neither Opposite Party No. 1 nor his supervisor has stated the circumstances under which Poshanna had gone up the chimney at the relevant time. It is not their case that Poshanna at the relevant time wanted to learn the work of a skilled workman, and therefore, he had gone up the chimney. In fact, the addition of the statement in the deposition by Opposite Party No. 1 that even a helper goes up if he wants to learn the work of a skilled workman has come as an after-thought. However instead of relying on this deposition in favour of the workmen, the learned Commissioner has for no reason tried to slur over it. He has also further reasoned that even if the deceased workman was employed as a skilled workman, since Opposite Party No. 1 required only three workmen on that day, it should be presumed that the deceased workman was a helper. This is indeed a queer inference. The mere fact that Opposite Party No. 1 required only three workmen, two of whom were skilled, does not lead to the conclusion that it was the deceased worker who was the helper. The learned Commissioner has also indulged in some speculation and has reasoned that all the three workmen being friends might have accepted the offer in general by agreeing to work jointly on Rs. 26/- thus "agreeing inter se to equally share the day's earnings even though all of them were skilled workers." He then proceeds further and says "such is not the case of the Applicant. The Applicant's witness says that each of the three were engaged on the daily wage of Rs. 10/- while it has been alleged in the application that the deceased was employed on a daily wage of Rs. 15/-. Under the circumstances, I am inclined to believe the evidence of Opposite Party No. 1." It is unnecessary to comment upon this finding which discloses a strange method of reasoning, if at all.

4. I have therefore, no doubt in my mind that the Applicant has established that the deceased was a skilled workman and that the skilled workman was getting Rs. 10/- per day as his wages. In view of the provisions of S. 5(a) and (c) of the Act, it will have to be held that the workman's monthly wage was Rs. 300/- since the daily wage of Rs. 10/- will have to be multiplied by 30. There is no justification for multiplying the daily wage by 20 as the Commissioner has done. For such a calculation is against the said provisions of S. 5 Hence, the workman will fall within the monthly wage group of Rs. 200-300 and the total compensation payable to the Applicant will be Rs. 18,000/- as per Schedule IV of the Act. The Opposite Parties have admittedly deposited Rs. 13,500/-, and hence, the Applicant would be entitled to the additional amount of Rs. 4,500/-. The Opposite Parties therefore, are liable to pay an additional amount of Rs. 4,500/- to the Applicant.

5. In the result, the appeal is allowed. The Opposite Parties are directed to deposit an additional amount of Rs. 4,500/- being the compensation payable to the Appellant-Applicant. The opposite parties will also pay costs of this appeal which are fixed at Rs. 1,000/-. If the Opposite Parties fail to deposit Rs. 6,000/- being made up of the compensation of Rs. 4,500/- and the costs of Rs. 1,500/- inclusive of Rs. 500/- granted by the Commissioner within one month from the date of this order, the Applicant will be entitled to recover the amount of Rs. 6,000/- with interest at 6% per annum from the date the amount becomes payable till realization.

6. The Commissioner will expedite the distribution of the amount to the Applicant.