



Presented on	08	05	2018
Admitted on	08	05	2018
Disposed on	17	02	2023
Duration	Days	Month	Year
	09	09	04

**Before the Hon'ble Ex-Officio Employees Compensation Commissioner
and Presiding Officer of Labour Court at Junagadh**

Workman Case(FATAL) No.4/2018

Exh.71

Dependents & Heirs of deceased Atulbhai Pababhai Garchar:

- (1) Kadviben Atulbhai Garchar
Age : 29, Occupation : House work
- (2) Minor Motiben Atulbhai Garchar
Age : 16, Occupation : Study,
- (3) Minor Bharat Atulbhai Garchar
Age : 14, Occupation : Study,
- (4) Minor Jituben Atulbhai Garchar
Age : 13, Occupation : Study,
- (5) Minor Bhavnaben Atulbhai Garchar
Age : 12, Occupation : Study,
- (6) Minor Buddhiben Atulbhai Garchar
Age : 10, Occupation : Study,
- (7) Minor Kismat Atulbhai Garchar
Age : 2.5,
- (8) Jiviben Pababhai Garchar
(Deleted as per order U/Ex.44)

The applicant no.1 as natural guardian and
Mother of minor applicant no.2 to 7

R/o.Barvan Ness, Ta.Ranavav, Dist.Porbandar

Applicants ::

V/S

Truck No.GJ-10-X-8645 :

- (1) Owner : Devshibhai Ranabhai Keshwala,
R/o.Keshav, Ta.Dist.Porbandar
- (2) Insu.Co.: The New India Insurance Co.Ltd.,
at Gokul chambers, Kalva chowk,
Junagadh.

:: Opponents ::

For applicants : Ld.Advocate Mr.R.V.Parekh

For Opponent No.1 : Ld.Advocate Mr.P.K.Rathod

For Opponent No.2 : Ld.Advocate Mr.N.D.Kakkad

- : : Judgment : : -

- (1) The applicants have preferred present claim petition under the Employee's Compensation Act,1923.

The synopsis of the case of the applicants are as under:-

The Deceased Atulbhai was husband of Applicant No.1 and father of Applicant No.2 to 7. Applicants were depended on income of deceased Atulbhai and all family members stayed with decd.Atulbhai and he helped in home expenses. In this way, all the applicants are heirs and Dependents of Decd.Atulbhai. Date of birth of Decd.Atulbhai is 21-7-1979 so age of Decd.Atulbhai was 39 years at the time of accident. Decd.Atulbhai was young, healthy. deceased Atulbhai was working as a driver with the opponent no.1 in truck bearing registration No.GJ-10-X-8645, said truck was of the ownership of the opponent no.1. The opponent no.1 was paying the deceased, Rs.8000/- and other allowance as monthly salary. Deceased Atulbhai was working under Opponent No.1 as a driver. Opponent

No.1 was his employer. In this way there was a relationship of an employee and employer between the deceased and the opponent No.1. Deceased atulbhai was employed as a driver at the instruction of Opponent No.1. when Deceased Atulbhai was carrying out the pada pidhiya on truck from Jetalsar to village Chalamani, Ta.Bodeli, dist.Chhota Udepur, On date 19-3-2018 at 02-00 noon, Deceased Atulbhai was untying the rope on the truck, by accidentally Deceased Atulbhai was fall down from the truck and received serious injuries on the head and body. Then after, Decd. Atulbhai was immediately admitted in the Sangam Multi speciality Hospital Bodeli where got primary treatment, then after he was admitted in Civil Hospital, Ahmedabad and took treatment for two days as indoor patient. Then after he was admitted as indoor patient in H.J.Doshi Hospital, Rajkot on dtd.22-3-2018 where Atulbhai was died during treatment. Thus, the decd. Atulbhai was died during duty of Opponent No.1. So both the opponents jointly and severally are responsible to pay compensation. Due to the untimely death of the deceased, the Applicants have suffered loss of lifetime income of the Deceased. Therefore the applicants are entitled for getting Rs.7,67,600/- as amount of compensation and medical expenses from both the opponents jointly and severally, along with interest @12% from the date of accident and Rs.10,000/- as cost of this proceedings.

- (2) The opponent no.1 has submitted his written statement

at Ex.30, wherein he has admitted that the deceased Atulbhai was working as a driver on his truck and he was paid to Decd.Atulbhai Rs.8,000/- as salary but he did not paid any other allowances to Decd.Atulbhai. He has also admitted that Decd.Atulbhai was carrying out the pada pidhiya on his truck No.GJ.10.X.8645 from Jetalsar to village Chalamani, Ta.Bodeli, dist. Chhota Udepur On dtd.19-3-2018, Decd.Atulbhai was climbing on the truck and untying the rope, by accidentally Decd.Atulbhai was fall down from the truck and was died in hospital during treatment on dtd.26-3-2018. He has also admitted the fact of para-5 of the application. He submitted that the fact of para-1,2,6,7,10,11 should proved by the applicants and the fact of para-9 is partly right. The opponent no.1 have taken out the insurance of the truck from opponent No.2 insurance company so that the responsibility to pay the compensation is belongs to the insurance company. He is not liable for paying any amount of penalty. He has stated that the applicants are not entitled for getting any relief from him so has prayed to reject their claim petition.

- (3) The opponent no.2 has filed written statement at Ex.12, where he stated that the claim of the applicants are not legal, proper and bonafide and hence, the same deserves to be dismissed and the statements and allegations, which are not specifically admitted/replied in this written statement are denied hereby. He has submitted that

the applicants have not disclosed the policy particulars in the petition and therefore, in absence of policy particulars opponent does not admit that the vehicle Truck No.GJ 10 X-8645 owned by Opponent No.1 was insured with this opponent under the provisions of W. C. Act at the time of alleged accident. He has denied that Shri Atulbhai Pababhai Garchar was tying the rope and fell down and faced the injuries hence, he died. He has submitted that no notice for the alleged death or accident is given by the opponent No.1 to this opponent, therefore, opponent no.2 does not admit that any death or accident is occurred to the deceased on 26-03-2018. He has submitted that that the provision of Section 64 VB of the Insurance Act, 1938 is not complied with in this matter, therefore, opponent no.2 is not liable to indemnify the opponent No.1. He has submitted that the owner of the vehicle colluded with the claimants and, therefore, the insurer is entitled to the benefit of Section 170 of the M.V.Act and to contest the claim on all or any of the grounds that are available to the persons against whom claim has been made. He has submitted that the deceased was not holding driving license at the time of accident, therefore, due to breach of policy terms, this opponent is not liable to indemnify the insured. He has submitted that to work out the compensation under the provision of W. C. Act, the Insurance Company requires the particulars Birth certificate of age proof, wage vouchers, M.L.C. P.M. Report, F.I.R.

Panchnama, and police papers, driving license, RC. Book etc. but in this case, no such documents have been provided by the applicants or insured and, therefore, this opponent is unable to process the claim under the provisions of W. C. Act. Moreover, it is admitted legal position that the Insurance company is not liable to pay the penalty, interest or cost. He has submitted that with reference to Paras 1 to 7 of the petition, the relationship of the applicants and deceased is not admitted, it is to be proved. It is not true that, the applicants are the only legal heirs and Dependents of deceased Atulbhai Pababhai Garchar. It is also not true that the age of deceased was 39 years at the time of alleged accident. The applicants are called upon, to put the strict proof of it. It is submitted that, the facts stated therein by the applicant is not within the knowledge of this opponent and therefore, the applicant is required to put the strict proof of the same. It is not true that, the deceased was employed to driver the Truck No. GJ 10 X-8645 at the time of alleged accident. He has submitted that with reference to Para 3 to 7 of the petition, it is not true that the deceased was serving as driver on vehicle owned by the opponent No.1. It is also not true that, the salary of the deceased was Rs.8,000/- per month. It is also not true that, the relation between the deceased and the Opponent No.1 were of employee and employer. It is not true that, the deceased has faced accident due to his work. It seems that the deceased himself is the

author of death or to this injuries, hence he cannot get fruits for his own wrong. It is denied to be true that, the deceased was 39 years when the said accident occurred. He has submitted that with reference to Para 6 of the petition, it is submitted that, the facts stated herein are not true and hence are denied hereby. It is not true that any death or accident is occurred on 19/03/2018 on the vehicle No.GJ 10 X 8645 of opponent No.1, which has resulted the death of Shri Atulbhai Pababhai Garchar. It is also not true that the deceased is entitled for the compensation of Rs.7,67,600/- or any amount from this opponent. It is not true that any notice is served on this opponent No.2 by the claimants. He has submitted that with reference to Paras 3 to 8 of the petition, it is submitted that, the facts stated therein are not true and hence are denied hereby. It is not true that the applicants is entitled to receive any compensation it is also not true that any notice of the alleged accident is given by the applicants to this opponent. It is not true that any cause of action for filing this petition is arisen to them. He has submitted that with reference to Para 7 to 10 of the petition, it is submitted that, the facts stated therein are not true and hence are denied hereby. It is also not true that any accident is occurred on 19/03/2018 and hence deceased died due to accidental injuries. It is also not true that, any cause of action has arisen to the applicants for filing this petition. It is also not true that, the

salary of the deceased was Rs.8,000/- per month. It is also not true that, the applicants are entitled to receive the compensation of Rs.7,67,600/- or cost or penalty or interest from this opponent. It is also not true that, the present petition is filed within the prescribed period of limitation. It is also not true that, this Hon'ble Commissioner has jurisdiction to hear and decide the petition. All such averments are false and baseless and hence are denied hereby. He has submitted that the applicant is called upon to produce the F.I.R., Panchnama, age proof, M.L.C. Postmortem report, wage vouchers, policy, driving licence, R.C.Book, etc. in this matter. He has submitted that without admitting any liability and without prejudice to the contentions raised hereinabove, it is alternatively submitted that, the deceased had not faced any accidental injuries to the extent of his death and also it is submitted that, the wages of the deceased was not Rs.8,000/- per month and therefore, the applicant is not entitled to receive any compensation. Also it is submitted without prejudice to any of our contentions that the claim of the applicant is too high and excessive. He has prayed that the claim of the applicant may please be dismissed with costs.

- (4) Applicants have filed an application to delete Applicant No.8 due to death vide Exh.44. This Court ordered to delete Applicant No.8 under Exh.44.
- (5) The following evidence is produced by Applicants.

:: Evidence from applicants side ::**: Oral Evidence :**

No.	Particular	Exh.
1	Affidavit of chief examination of Applicant No.1 Kadviben Atulbhai Garchar	25
2	Deposition of witness Dr.Vivekbhai Kamalkishor Mital	36

: Documentary Evidence :

No.	Particular	Exh.
1	Copy of insurance policy of the truck	5/1
2	OPD Case papers of Sangam Hospital Boledi	47
3	Case papers of Civil Hospital, Amedabad	24/2
4	Final summary of H.J.Doshi Hospital Rajkot	24/3
5	driving license of Decd.	24/4
6	Death Certificate of Applicant No.8	35/1
7	Statement of Medical bill of Rs.44114/- with original bill -23	38
8	OPD Case book of Civil Hospital, Amedabad	46
9	Final summary of H.J.Doshi Hospital	37
10	case of H.J.Doshi Hospital	39
11	case papers of H.J.Doshi Hospital	40

(6) The applicants have filed evidence closure pursis at Exh.50.

(7) The following documentary evidence is produced by Opponent No.1

:: Evidence from opponent no.1 ::**: Documentary Evidence :**

No.	Particular	Exh.
1	Copy of permit of truck	55

2	Copy of PUC of truck	56
3	Copy of fitness certificate of truck	57
4	Copy of R.C.Book of Truck	58
5	Copy of insurance policy of the truck	59
6	letter to Opponent no.2, dtd.30/3/18	60
7	letter to Opponent no.2, dtd.10/4/18	61
8	Copy of amended insurance policy of the truck in the name of Opponent no.1	62

(8) The Opponent No.1 has filed evidence closure pursis at Exh.63.

(9) The following documentary evidence is produced by Opponent No.2

:: Evidence from opponent no.2 ::

: Documentary Evidence :

No.	Particular	Exh.
1	True copy of Insurance Policy with terms and conditions	54

(10) The Opponent No.2 has filed evidence closure pursis at Exh.64.

(11) The Applicants have submitted written argument at Ex.69. The following Judgments are produced by the Applicants in support of his argument.

- (1) 1992 ACJ 321, Hon'ble Gujarat High Court
Shantaben Ambalal sutaria and others Vs.
Valijibhai Harjibhai patel and others
- (2) 2010 ACJ 1338, Hon'ble Calcutta Judicature
Chhalana Dam and others Vs. New India Insu.Co.
- (3) 2007 ACJ 1329, Hon'ble Rajasthan High Court
Habibnur Khan and others Vs. Govind Singh and
others

- (4) 2015 ACJ 2392, Hon'ble Madras Judicature
National Insu.Co.Ltd. Vs Anthony (since decd.)
and others
- (5) 2020 ACJ 1529, Hon'ble Jharkhand High Court
Oriental Insu.Co.Ltd., Vs Renu Mishra and others
- (12) The Opponent No.1 has submitted written argument at
Ex.70.
- (13) The Opponent No.2 has argued orally.
- (14) Following issues were framed at Ex.18 for judicial
decision of this case.
 - (1) Whether the applicants proves that they are
legal heirs / dependents of the decd.
Atulbhai Pababhai Garchar ?
 - (2) Whether the applicants proves that there was
relationship of an employer and employee
between the decd. Atulbhai Pababhai Garchar
and the opponent no.1 at the time of
accident?
 - (3) Whether the applicants proved that deceased
accident occurred during the course of his
employment?
 - (4) Whether the applicants proved that the age
of the deceased is 39 years and the monthly
income of Rs.8,000/- at the time of
accident?
 - (5) Whether the applicants proves that the
opponents are liable for paying compensation
jointly and severally under the Workmen
Compensation Act ? if yes, how many ?

(6) Whether the opponents are liable for paying interest and penalty? If yes than who and what amount?

(7) What order?

(15) The answers to the above issues are as below:

(1). Affirmative.

(2). Affirmative.

(3). Affirmative

(4). The age of the deceased at the relevant time of accident was 38 years.

The monthly wages of the deceased at the relevant time of accident was Rs.8000/-.

(5). Affirmative. The opponents are liable for paying, the applicants Rs.7,63240/- as an amount of compensation and Rs.44,114/- as actual medical expenditure

(6). Affirmative. The opponents are liable for paying simple interest @ 12 percent on the amount of compensation from dt.19-3-2018 till realization of it. The opponent No.1 is also liable for paying fifteen percent of the amount of compensation as an amount of penalty to the applicants.

(7). As per final order.

(16) **Reasons for issues** :

16.1)Issue no.1

Now looking to the issue no.1, it is to be decided that whether the applicants are the dependents of deceased Atulbhai Pababhai Garchar or not. The

applicant No.1 in the claim petition as well as in her affidavit of chief examination filed at Ex.25, has stated that deceased is her husband From this thing it can be said that all the persons along with the applicant who are mentioned in the application are the heirs and legal representative of deceased but whether the applicants are the dependent or not is to be decided.

16.2) For deciding this question, the definition of "**dependent**" as provided in **sec.2(1)(d)** of the Employee's Compensation Act is required to be referred at this juncture. The relevant portion of the said provision is quoted as below.

Section 2(1)(d) ::

"dependent" means any of the following relatives of deceased workman (employee), namely :-

*(i) a widow, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter or a **widowed mother**; and*

(ii) if wholly dependent on the earnings of the employee at the time of his death; a son or a daughter who has attained the age of 18 years and who is infirm:

(iii) if wholly or in part dependent on the earnings of the employee at the time of his death,--

(a)

*(b) **a parent** other than a widowed mother,*

(c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate

or illegitimate or adopted if married and a minor or if widowed and a minor,
 (d) a **minor brother** or unmarried daughter sister or a widowed sister if a minor

16.3) Further as per **sec.2(ff)**, "**minor**" means a person who has not attained the age of eighteen years. Here in this case, looking to the age of applicant no 2 to 7 are minor and applicant No 1 is a wife of deceased. So, they are dependents of the deceased hence in this circumstance the widow and minors children of the deceased i.e. the present applicants will be the dependents of the deceased. Therefore, from this explanation, it is sufficient enough to conclude that the applicants of the present case comes under the purview of dependents and so answer to issue no.1 is given as "**affirmative**".

(17) Issues no.2 & 3.

17.1) Now looking to issues no.2 and no.3, the facts of both issues are interrelated hence to avoid repetition of facts both are discussed together. As per this issues it is to be decided that firstly, whether deceased was the 'workman / employee' of opponent or not, secondly, the incident of the accident occurred during the course of his employment and thirdly, whether the deceased died due to the injuries received by him in this accident which arose out of and in the course of his employment.

17.2) At this juncture, it is required to note that the **Workmen's Compensation Act, 1923** was lastly amended in the year **2009** and it came into force on **dt.18-1-**

2010 and was renamed as the **Employee's Compensation Act**. In the said amendment drastic changes were made and where ever the term "**workman**" was there in the old Act it was substituted by the word "**employee**" including the title of the Act as well as the definition in old Act of **workman** was as per **sec.2(1)(n)** which was omitted and in its place new definition of **employee** was introduced at **sec.2(1)(dd)** and the **wages limit of Rs.4,000/- prescribed for calculation of compensation in sec.4** was totally omitted and by newly inserted **sec.4(1-B)**, the monthly wages is to be specified by Central Government through notification, which is Rs.8,000/-, as notified in S.O. 1258 (E), dated 31st, May 2010. At present the Central Government has notified the monthly wages to be Rs.15000/- vide S.O.71(E) dtd.3/1/2020.If the said last notification is perused than the Ministry of Labour and Employment department of the Central Government by exercising the powers conferred to it by sub-section (1B) of sec.4 of the Employee's Compensation Act, 1923 and in super-session of the earlier notification dtd.31-5-2010, has specified the monthly wages to be fifteen thousand rupees. Further the said effect was given from the date when the said notification was published in official Gazette i.e. from dt.3-1-2020. In the instant case, admittedly the date of accident is dt.19-3-2018 which means it has occurred after the amendment of the Act in the year 2010. So the amended Act will apply to this case. Further when the effect of notification dtd.3-1-2020

related to ceiling to monthly wages is given from the very said date so looking to the date of accident in the instant case, primarily the said notification will not be applicable in the instant case. Even though now when this case is decided when the said notification has come in to force and is in existence so it is to be simultaneously decided that whether the said notification dtd.3-1-2020 related to enhancement of monthly wages will be applicable in this case. Therefore before going to the questions of para 17.1, it is necessary to decide that whether the effect of the notification dtd.3-1-2020 is retrospective or prospective.

For deciding this question, if the citation which is the case before hon'ble Himachal Pradesh High Court between State of H.P. & Brij Lal which is reported in 2005 LIC 4009 (H.P.) is perused then therein in said case the accident had occurred on dt.7-8-2000 and the Act was amended in the year, 2000 which came into force on dt.8-12-2000 and in sec.4 the wages limit was enhanced from Rs.2,000/- to Rs.4,000/-. The Commissioner awarded as per amended Act but the hon'ble High Court in the appeal held that, "rights of the parties are fructified on date of accident. In case, the legislature had intended to hold an employer liable on the basis of amended Act, nothing prevented it from making a provision in that behalf in the amended Act itself. Hence, the calculation of compensation is to be made as per the provisions of the Act which was applicable at the

date of accident."

Further if the citation which is the case before hon'ble Kerala High Court between Mary v/s Jose Mathew which is reported in ,2006 (110) FLR 1111 (Kerala H.C.) (DB) is perused than therein by relying on the decision of hon'ble Supreme Court, the case between Kerala State Electricity Board v/s Valsala, which is reported in 1999 (83) FLR 508 it was held that the relevant date is the date on which accident had occurred and even if the injury caused in the accident has aggravated and the injured dies then after when the Act was amended, then also the Act which was in force on the date of accident will apply to the facts of case.

So looking to the ratio of above citation also it is very much clear that the new notification dtd.3-1-2020 has prospective effect and so it will not be applicable in the instant case but the earlier notification fixing the monthly wages limit as Rs.8,000/- will be applicable in the instant case.

17.3) Now on basis of this rival contentions, first we have to decide that whether the deceased was an employee of the opponent. In other words the question of relationship of an employer and employee is to be ascertained. If the said relationship is proved than only the adjudication of other question will fall for consideration. Here in this case the opponent No.2 has submitted written statement at Ex.12, wherein it is stated that the burden to prove relationship of an employer and employee lies on the applicants. At this

juncture the citation on this point is fruitful to refer. Looking to the citation which is the case before ***hon'ble Karnataka High Court*** between ***Divisional Manager, United India Insurance Co. Ltd. v/s Gujjamma*** which is reported in 2004 LLR 516 wherein it is held that the burden of proof lies upon the claimants claiming compensation in an accident, wherein it is alleged that the deceased workman was in the employment of the employer and died of an injury arising out of and during the course of employment hence if the claimants fail to prove these factors, they will not be entitled to compensation under the Workmen's Compensation Act. So as per the above citations the burden of proof for issues no.2 and 3 in the instant case lies on the applicant side. Further looking to the citation which is the case before ***hon'ble Supreme Court*** between ***Om Prakash Basit v/s Ranjit @ Ranbir Kaur*** which is reported in AIR 2008 SC 2143. wherein in para 16 it is held that in a proceeding initiated under the Workmen's Compensation Act, the provisions of the Code of Civil Procedure or of the Evidence Act are not applicable. The Commissioner could lay down his own procedures. He could, for the purpose of arriving at the truth, rely upon such documents which were produced before it. So in the instant case also this Court can decide the crucial question by relying on the documents which are produced in this case.

17.4) Now keeping the above ratios in the backdrop of our mind let us venture in to the discussion of the

question regarding the relationship of an employer-employee. now looking to the facts of the case, the applicant has stated that deceased Atulbhai was working as a driver with the opponent no.1 in truck bearing registration No.GJ-10-X-8645, said truck was of the ownership of the opponent no.1. The opponent no.1 was paying the deceased, Rs.8000/- and other allowance as monthly salary. Deceased Atulbhai was working under Opponent No.1 as a driver. Opponent No.1 was his employer. In this way there was a relationship of an employee and employer between the deceased and the opponent No.1. Deceased atulbhai was employed as a driver at the instruction of Opponent No.1. when Deceased Atulbhai was carrying out the pada pidhiya on truck from Jetalsar to village Chalamani, Ta.Bodeli, dist.Chhota Udepur, On date 19-3-2018 at 02-00 noon, Deceased Atulbhai was untying the rope on the truck,by accidentally Deceased atulbhai was fall down from the truck and received serious injuries on the head and body. Then after, Decd. Atulbhai was immediately admitted in the Sangam Multi Speciality Hospital Bodeli where got primary treatment,then after he was admitted in Civil Hospital, Ahmedabad and took treatment for two days as indoor patient. Then after he was admitted as indoor patient in H.J.Doshi Hospital, Rajkot on dtd.22-3-2018 where Atulbhai was died during treatment.The applicant No.1 has reiterated the above facts in her affidavit of chief examination filed at Ex.25. The opponent no.1, the employer of the

deceased has admitted relationship of employer and employee, therefore, relationship of employer and employee not disputed in present case. The opponent no.2 hasn't produced any cogent evidence which disproves the contention of the applicant. The applicant has even produced documents such as Medical papers respectively from Ex.46 ,47,and 37 wherein mentioned that deceased was fall down from 10 feet height from truck . These documents gives corroboration to the facts of relationship of employer and employee, incident of accident and death of deceased due to fall down from truck in the accident. .The Opponent No.1 has produced the registration certificate of the vehicle at Ex.58, wherein the name of the opponent no.1 is shown as owner of the vehicle involved in accident.

17.5)Now at this juncture the relevant definition of **Section 2 (dd)::**

"employee" means any person who is -

(i).....

(ii) (a).....

(b).....

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

(d)

17.6)So from this explanation, it is sufficient enough to conclude that the deceased was employed as a driver by the employer i.e. opponent no.1. Hence he was an 'employee' of opponent no.1, as per the Employee's

Compensation Act. Further as discussed above it is also proved that the deceased met with an accident on dt.19/03/2018 while Deceased Atulbhai was untying the rope on the truck, by accidentally Deceased atulbhai was fall down from the truck and received serious injuries on the head and body so his death has occurred due to accident.

17.7) Discussion of the term "in course of and out of employment".

17.8) Now it is to be decide that whether the said incident i.e. the accident is said to be occurred out of and during the course of employment or not.

At this juncture, the citation on this point is fruitful to refer. Looking to the citation which is the case before **Hon'ble Supreme Court** between **National Insurance Co. Ltd. v/s Mastan & anr. Which is reported in** 2006 II CLR 739 wherein it is held in para 7 that negligence or contributory negligence of the offending vehicle is not a ground to be considered at all while awarding compensation under the W. C. Act. Further looking to the citation, the case between **Mackinnon Mackenzie and Co. Pvt. Ltd. v/s Ibrahim Mahmmod Issak** which is reported 1969 ACJ 422 (SC) it is held that the words, "in the course of employment" mean in the course of the work which the workman is employed to do and which is incidental to it. The words, "arising out of employment" are understood to mean that during the course of employment, injury has resulted from some risk incidental to the duties of the service, which,

unless engaged in the duty owing to the master, it is reasonable to believe, the workman would not have otherwise have suffered. In other words, there must be a causal relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of the factors the workman is brought within the zone of special danger, the injury would be one which arises "out of employment". The claim for compensation must succeed, unless the workman has exposed himself to an added peril by his own imprudent act. Further it was said that the burden of proof rests on workman, but this does not mean that a workman who comes to court for relief must necessarily prove it by direct evidence and the essentials may be inferred when the facts proved justify the inference. On the one hand the Commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate inference. There is no rule as to the degree of proof which is sufficient to justify an inference being drawn, but the evidence must be such as would induce a reasonable man to draw it.

17.9) *Ld advocate of opponent No.2 has submitted that FIR, panchnama, P.M report are not produced therefore opponent no 2 is not liable for any compensation.*

Other side applicant advocate has submitted his written argument at Ex. 69 wherein stated that fir, pm report, panchnama are not necessary .In support of his argument In support of arguments of applicant has produced various judgement of Hon'ble High Courts wherein held post mortem report is not must when it is established by evidence that victim met with accident and died due to injuries sustained. here in present case, applicant witness Dr Vivek Kamal Mittal has stated that deceased was fall down from truck and and died due to injuries sustained in accident. Furthermore there is not even a suggestion to the medical expert that the deceased had died because of any other ailment or disease. These evidence gives corroboration to the facts of incident of accident and death of deceased due to fall down from truck in the accident therefore p.m.report ,fir are not necessary. so this judgments are helpful to applicants. Here in this case the deceased was on his duty as a driver on the vehicle of the opponent no.1 and he was performing the work as a driver at that moment the accident had occurred. He died due to fall down from truck on dt.19/03/2018. So the incident of the accident has a casual connection with his employment and had he not been there, he might not have met with the said accident. Hence the incident of the accident has occurred in course of and out of the employment of the deceased with opponent no.1. So as discussed above the questions of para (17.7)(1) are proved hence the answer to issues no.2 and no.3

are given in "*affirmative*".

(18) Issue no.4.

18.1) Now it is to be decided that what was the monthly wages and age of deceased at the time of the accident.

18.2) The advocate of the applicant Mr.R.V.Parekh has submitted that the deceased was receiving Rs.8000/- as monthly salary and additional allowance at the time of accident. L.A. of the Opponent No.2 has submitted that there is no ample evidence of monthly income of the deceased.

18.3) To decide the just compensation the important factor is the income of the deceased. It is incumbent upon the applicant to prove the actual income. The applicant is required to lead the cogent evidence to establish the actual income. The applicant must have produced the reliable materials before the Commissioner upon which the Commissioner can rely and assess the exact income of the deceased.

18.4) Now so far as the income of the deceased is concerned, it is the claim of the applicants that deceased was earning Rs.8000/- and additional allowance per month at the time of accident by working as driver but the applicants have not produced any documentary evidence to prove that at the time of accident deceased was doing driver and earned monthly income from the said work at the same time. it is pertinent to be noted that no material evidence produced about income of deceased by the applicants. Now, in absence of material evidence on

record, rate of minimum wages for skilled Labour Prevalent at the time of accident can be considered. Deceased was a driver at the time of accident as per Gujarat Government notification, minimum wages rate was Rs.308.60 of skilled labour in zone two So the monthly wages of the deceased at the time of the accident is to be considered as Rs.9,258/-. But as discussed earlier the ceiling on monthly wages as per Notification of Central Government which was applicable on date of accident was Rs.8,000/-. Therefore, it is proved that monthly salary of applicant was Rs.9,258/- but for the purpose of calculating compensation as per the Act his monthly wages to be considered is Rs.8,000/- i.e. as per the maximum ceiling provided by the Central Government.

18.5) The other question is as to age of deceased at time of the accident. The applicant has produced the driving license of deceased respectively, at Ex.48, wherein his birth date is mentioned as dt.21-7-1979. The incident of accident has occurred on dt.19-3-2018, so considering the Explanation I, of sec.4(1) of the Act, the deceased had completed 38 years on said day. So the answer to issue no.4 is given accordingly i.e. monthly wages of deceased was Rs.8,000/- and his age was 38 years at the date of accident.

(19) Issues no.5, 6 .

19.1) Discussion of Compensation.

Now what is the amount of compensation which the applicants are entitled is to be decided first.

19.2) Now taking into consideration, the provision of **sec.4(1)(a)** and **Explanation II** to it, of the present Act following amount comes as compensation :-

50% of Rs.8000/- X 189.56(relevant age factor for 38 year as per Schedule - IV)
= Rs.7,58,240/-.

19.3) Further looking to the **sec.4(4)** of the Act, the applicant being the eldest surviving dependent of the deceased is also entitled for Rs.5,000/- as funeral expenditure.

So, the applicants are entitled for **Rs.7,58,240/- + Rs.5,000/-** in total **Rs.7,63,240 /-** as amount of compensation under **sec.4** of the Employee's Compensation Act.

19.4) The applicant side has prayed for medical expenditure which was incurred after the treatment of applicant. the applicant side has produced the medical bills at Ex.38 The total amount of these bill is worth Rs.44,114/- and as per provisions of **sec.4(2-A)**, the applicant is entitled to receive this amount as an actual medical expenditure.

19.5) Now the liabilities for the same amongst the opponents is to be decided. The applicant has produced the insurance policy at Ex.5/1 as well as the insurer has also produced the insurance policy at Ex.54. Looking to the same it is for vehicle no.GJ-10-x 8645 which is in the name of opponent no.1 and its period also covers the date of accident. Further extra premium for PA cover for driver as well as premium for liability of paid cleaners and conductors

was also paid by the employer. The insurer side hasn't raised any contention for breach of terms and conditions of this policy. The insurer hasn't raised such a question even during the cross examination of the applicant nor has lead any separate evidence from their side. So as per this insurance policy, the insurer is liable to indemnify the employer in respect of amount of compensation.

(20) Discussion of Interest and Penalty.

20.1) Now let us discuss regarding question of interest and penalty. At this juncture, the citation on this point is fruitful to refer. Looking to the citation of the case between **Ved Prakash Garg v/s Premi Devi** which is reported in LAWS (SC) -1997-9-1. the hon'ble Supreme Court relying on the provision of sec.4A(3) (a) of the 1923, Act said that, "*a simpliciter default in payment of compensation within the time of one month from the date it fell due would automatically attract the provision for simple interest under sec.4-A(3) as per rate prescribed therein and for such imposition of interest no question of justification for the delay is countenanced by the Legislature. But while imposing penalty justification for delay would be a good defense for the employer for meeting such claim for penalty.*" It was further held that, the liability to pay interest on the principal amount under the said provision remains a part and parcel of the statutory liability which is legally liable to be discharged by the insured employer. It was concluded that "when

an employee suffers from a motor accident injury while on duty on the motor vehicle belonging to the insured employer, the claim for compensation payable under the Compensation Act along with interest thereon, if any, as imposed by the Commissioner under Sec.3 and 4A(3)(a) of the Compensation Act will have to be made good by the insurance company jointly with the insured employer. But so far as the amount of penalty imposed on the insured employer under contingencies contemplated by sec.4-A(3)(b) is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that part of the penalty amount imposed on the employer. The latter because of his own fault and negligence will have to bear the entire burden of the said penalty amount with proportionate interest thereon if imposed by the Workmen's Commissioner."

20.2) From this enunciation it is clear that both the opponents will also be liable for amount of interest on the said amount of compensation and if no justification is shown for delay in payment of compensation then the employer will be also liable for penalty. Further under the Workmen's Compensation Act it is not obligatory on the employer to insure his employees and if he insures his employees then the insurance policy will bind them as a contract between the insured and insurer which will depend on terms and conditions of that policy. I advocate of

opponent No.2 has submitted that he is not liable for interest. In support of arguments of Opponent No.2 produced judgement of Hon'ble High Court in the case between **united india insurance co.ltd V/s Karansinh Amarsinh Chavda** which is decided on dt.22-8-2006 in First Appeal no.707 of 2006 and in the case between **New India Assurance Co.Ltd v/s Pababhai Mayabhai Harijan & Ors.** which is reported in 2008(2)G.L.R. 1091, wherein held that policy did not cover the liability to pay interest so insurance company is not liable for interest but present case is for motor accident policy therefore this judgments are not helpful to opponent No.2. Futhermore looking to the citation, the case before **hon'ble Gujarat High Court** between **Iffco Tokio General Insurance Co. Ltd. v/s Shobhaben w/o Arjun Mahajan & others** which is decided on dt.18-3-2016 in First Appeal no.2054 of 2015 wherein it is held that it is the duty of the employer to first pay the compensation to the workmen as and when it falls due and if he is insured, then, he may be reimbursed by the Insurance company for the amount, which is fixed by the Commissioner under Employee's Compensation Act. Therefore, practically, payment of interest is because of statutory negligence on the part of the employer and thereby, in absence of specific exclusion clause about interest in policy between the insurer and insured, it cannot be said that Insurance Company is not liable to pay interest on the amount of compensation that may be awarded under the Act. Hence in this

circumstance as discussed above and as per the ratio of above citation, the liability of interest will be part and parcel along with the amount of compensation and both the insured as well as insurer will be jointly and severally liable for the same.

20.3) Now when does the compensation becomes due is to be decided. Looking to the provision of **sec.4A**, of the 1923 Act, the compensation is to be paid within one month from the date it falls due and the compensation falls due on the date of accident. So within one month of the said date the compensation is to be paid.

20.4) At this juncture the citation on this point is fruitful to refer. In the citation of **hon'ble Supreme Court**, the case between **The Oriental Insurance Co. Ltd. v/s Siby George & ors** which is Reported in 2012 (3) GLH 344. it is held that *relevant date for determination of rate of interest is the date of the accident and not the adjudication of the claim.* Further looking to the citation which is also the case before **hon'ble Supreme Court** between **Saberabibi Yakubhai Shaikh & ors. v/s National Insurance Co. Ltd.** which is reported in 2014 ACJ 467 relying on the above citation same view is taken. Further looking to the recent citation which is also the case before **hon'ble Supreme Court** between **Shobha v/s chairman vithalrav shinde sahakari sakar karkhana ltd.** which is reported in 2022(0)aijel sc 68515 relying on the above citation same view is taken.

20.5) From this decisions it is clear that for determination of interest the relevant date is the date of the accident and as per provision of the Act, the compensation falls due on the date of accident and from that date within one month it has to be paid else the interest is to be paid. Looking to Section 4-A(3-a), the employer can be directed to pay simple interest @12% per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette. So, as per this provision the minimum rate of interest will be 12%. Here the date of accident is dt.19-3-2018, so the compensation is to be paid latest by dt.19-4-2018. Here in the instant case the applicants are not paid any amount nor is any amount deposited before this Court so they are also entitled to receive simple interest on the amount of compensation from dt.19-3-2018 till its realization @ 12% per annum from the opponents.

20.6) Now if we discuss on the issue of penalty, then in the instant case the applicants have prayed for awarding fifty percent of the amount of compensation as penalty. The employer hasn't deposited any amount of compensation. The Opponent No.1 has submitted in written argument that he has also inform to opponent no 2 about accident. Opponent No.1 has requested not to do penalty against him. Therefore looking to the overall conduct of the employer, it is required to pass an order for paying fifteen percent of the

amount of compensation as an amount of penalty against the employer for paying the same to the applicants.

20.7) From this explanation and evidence, it is sufficient enough to conclude that both the opponents will be jointly and severally liable for the amount of compensation along with funeral expense and medical expenses as well as interest but the opponent no.1 i.e. the employer will alone and independently be liable for the amount of penalty.

(21) Discussion regarding cost of litigation:

21.1) Now in this case when the applicants have succeeded on all the aspects than as per the principle of cost follows conclusion it is required to pass the order of cost also. For discussing on this aspect of cost, the factors such as defense raised by the opponent, conduct of opponent, undue delay caused by the opponent, etc. are required to be considered.

21.2) It is required to refer some enunciations on the point of awarding costs.

Looking to the citation which is the case before **hon'ble Supreme Court** between **Ashokkumar Mital v/s Ramkumar Gupta** which is reported in 2009(2) SCC 656 wherein para 9 it is observed that *"the present system of levying meagre costs in civil matters (or no costs in some matters), no doubt, is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation borne out of ego or greed, or resorted to as a "buying time" tactic. More realistic approach relating to costs may be the*

need of the hour. Whether we should adopt suitably, the western models of awarding actual and more realistic costs is a matter that requires to be debated and should engage the urgent attention of the Law Commission of India."

21.3) Further looking to citation which is also the case before **hon'ble Supreme Court** between **Salem Bar Association, T. N. v/s Union of India** which is reported in 2005(6) SCC 344 wherein it is observed that "judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to the taking up of frivolous defenses. Further wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reason therefore. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court

fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow."

21.4) So the general principles for awarding of cost can be summarized as such that costs should ordinarily follow the event, realistic costs ought to be awarded keeping in view the ever increasing litigation expenses and the cost should serve the purpose of curbing frivolous and vexatious litigations. Hence considering the above principles as well as the facts of the instant case which are discussed earlier, it will be appropriate and reasonable if Rs.5,000/- is awarded as cost of this litigation to the applicants from the opponents of this case.

21.5) From this explanation and evidence, it is sufficient enough to conclude that the opponents will be liable for the amount of compensation, interest, penalty and cost. So, the answer to issues no.5 to 6 are given accordingly in "affirmative" i.e. The opponents no.1 & 2 both are jointly and severally liable to pay the applicants Rs.7,63,240/- as an amount of compensation including funeral expense and simple interest @ 12% per annum on said amount from dt.19-3-2018 till realization of this amount. Further the opponent no.1 i.e. the employer will be alone and independently liable for fifteen percent of the amount of compensation i.e. fifteen percent of the amount of

Rs.7,63,240/- which comes to **Rs.1,14,486/-** as an amount of penalty for paying the same to the applicants. Further the opponents no.1 & 2 both are jointly and severally liable to pay the applicant **Rs.44,114/-** as an Medical Expenses Therefore answer to issue no.7 is given as per final order which is passed as follows in the interest of justice.

-:: ORDER ::-

- (1) The present claim petition of the applicants is hereby partly allowed.
- (2) The applicants are entitled to receive **Rs.7,63,240/-(in words rupees seven lacs sixty three thousand two hundred and forty only)** as an amount of compensation including funeral expense along with simple interest @ 12% per annum on the said amount from dt.19-3-2018 till its realization from both the opponents jointly and severally.
- (3) The applicants are entitled to receive **Rs.44,114/-(in words forty four thousand one hundred fourteen only)** as an amount of actual Medical expenses from both the opponents jointly and severally.
- (3) The applicants are entitled to receive fifteen percent of the amount of compensation i.e. fifteen percent of the amount of Rs.7,63,240/- which comes to Rs.1,14,486/- as an amount of penalty from the employer i.e. the opponent no.1, alone and independently.

- (4) Both the opponents has to jointly and severally pay Rs.5,000/- as cost of this proceeding to the applicants and has to bear their own cost.
- (5) The opponents have to deposit the said amount of compensation along with interest, penalty and cost within 30 days from today.

Pronounced in the open court on this 17th, February 2023.

Dt.17-2-2023.
Junagadh.

(Nagdanbhai K Dabhi)
Ex-Officio Commissioner for
Employee's Compensation Act &
Judge (S.D.)
Labour Court, Junagadh
Judge Code : GJ01030