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SLR (2019) SIKKIM 753
(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Appeal (C) No. 01 of 2019
(S. 30 of the Employee's Compensation Act, 1923)

The Manager,
United India Insurance Co. Ltd. ….. APPELLANT

Versus

Smt. Kakali Sarkar Guha and Others ….. RESPONDENTS

For the Appellant: Mr. Pema Ongchu Bhutia, Advocate.

For Respondent No.1: Mr. Ranjan Chettri and Mr. Khem Raj Sapkota, Advocates.

For Respondent 2-3: Mr. Leonard Gurung,Advocate.

Date of decision: 4th October 2019

A. The Employee's Compensation Act, 1923 – Employer's Liability for Compensation –The Workmen's Compensation Act, 1923 was amended by the Workmen's Compensation (Amendment) Act, 2009 and consequently it is now known as the "Employee's Compensation Act, 1923" – Under S. 3 of the Act, it is the employer who is liable to pay compensation in accordance with the provisions of Chapter II of the Act, if personal injury is caused to an employee by accident arising out of and in the course of his employment – Statutory liability is on the employer and insurance is a matter of contract between the insurance company and the insured (*In re: P.J. Narayan referred*).

(Para 12)

B. The Employee's Compensation Act, 1923 – Employer's Liability for Compensation – Employer is not statutorily liable to enter into a contract of insurance. Where, however, a contract of insurance is entered into by and between the employer and the insurer, insurer shall be

liable to indemnify the employer – The insurer, unlike under the provisions of the Motor Vehicles Act does not have a statutory liability – Unlike the scheme of the Motor Vehicles Act, the Act of 1923 does not confer a right on the Claimant for compensation to claim the payment of compensation in its entirely from the insurer. The entitlement of the Claimant under the Act of 1923 is to claim the compensation from the employer – As between the employer and the insurer, the rights and obligations would depend upon the terms of the insurance contract (*In re: New India Assurance Co. Ltd. referred*).

(Para 12)

C. The Employee's Compensation Act, 1923 – Employer's Liability for Compensation – The insurance policy taken by the employer covers its liability under the Act. The liability of the Appellant as the insurer is to indemnify the employer for the compensation payable by it. The insurance policy issued by the Appellant in favour of the employer specified that the policy covers the employer's liability under the Act and the limit of indemnity was the amount of liability incurred by the employer. It is not the responsibility of the Appellant to pay the compensation awarded at the first instance. The statutory liability under the Act is upon the employer to pay the compensation and the insurance Company has a duty to indemnify the employer if the employer's liability under the Act has been insured by it.

(Para 13)

D. The Employee's Compensation Act, 1923 – Ss. 4, 4A and 5 – Determination of the Amount of Compensation – The Appellate Court is the *"court of error"* and its normal function is to correct the decision of the Court from whose decision the appeal lies – When a claim for compensation is made by the Claimant entitled to do so under the Act, it is the statutory duty of the Commissioner to quantify the said amount in accordance with Chapter II of the Act. This statutory duty binds the Commissioner to arrive at the quantum of compensation irrespective of the fact as to whether any plea in that behalf was raised by the Claimant or not – There is also no restriction under the Act that compensation should be awarded only up to the amount claimed by the Claimant and when the evidence is brought on record and the Commissioner comes to the conclusion that the Claimant is entitled to more compensation than claimed even then the Commissioner may pass such award as statutorily provided

for – It must be kept in mind that the Act is beneficial and welfare legislation and therefore the statutory duty under S. 3 of the Act to quantify the compensation correctly and award it, is salutary for the purpose – Although the Claimant has not preferred any cross appeal against the award of the Commissioner and the Commissioner has not determined compensation correctly, it is the duty of the Appellate Court to ensure that the award of the Commissioner is modified and the Claimant is awarded the compensation and all such amounts as are due and payable under Chapter II of the Act. After all the existence of Courts of justice is to ensure that justice is done and inherent in every Court is the power to undo the wrong and do the right.

(Para 15)

Appeal allowed.

Chronological list of cases cited:

1. J. Narayan v. Union of India and Others, (2006) 5 SCC 200.
2. New India Assurance Co. Ltd. v. Harshadbhai Amrutbhai Modhiya, (2006) 5 SCC 192.
3. Jaya Biswal and Others v. Branch Manager, Iffco Tokio General Insurance Company Limited and Another, (2016) 11 SCC 201.
4. Pratap Narain Singh Deo v. Srinivas Sabata and Another, (1976) 1 SCC 289.
5. Saberabibi Yakubbhai Shaikh v. National Insurance Company, (2014) 2 SCC 298.

JUDGMENT

Bhaskar Raj Pradhan, J

1. Two short questions arise for consideration in the present case. The first question raised is whether the Appellant-the Insurance Company can be held liable for the payment of compensation to the Respondent No.1-(the Claimant) for the accident that occurred at Mazitar when the insurance policy provides that the location of risk was Gangtok, East Sikkim? The second question is whether the learned Commissioner could have directed

the Appellant-Insurance Company to pay the claim amount in view of Section 3 of the Employees Compensation Act, 1923?

Facts in brief

2. On 18.06.2015 a First Information Report (FIR) No. 35/2015 was lodged at the Jorethang Police Station stating that the same morning at 00:30 hours the hired vehicle fell down from pressure shaft to power house at Mazitar and the operator (Ranjan Guha) got injured. It was further stated that they brought the operator to the Jorethang Hospital where the Doctor informed them that the operator was already dead.

3. A claim petition under the provisions of the Employees Compensation Act, 1923 (the Act) was filed on 28.09.2015 by the Claimant***** i.e. the wife of the deceased operator. It stated that the deceased was employed as an operator/driver of transit mixer (heavy vehicle) bearing No. WB29-7322 which on 18.06.2015 while being driven by the deceased fell down from the pressure shaft to power house at Mazitar, Jorethang, South Sikkim and the deceased succumbed to his injuries. Copies of the FIR as well as the death certificate were also annexed. It was asserted that the deceased was recruited as a driver on 25.05.2015 by Respondent No.3 (the Employer) and the said Company had deputed him with the Respondent No.2. It was asserted that the deceased workman expired in the course of employment. A copy of the appointment letter was also annexed. The Claimant***** asserted that on her inquiry it was found that the Employer had insured their liability under the Act with the Appellant and therefore the Appellant was also made a party. The Claimant asserted that the deceased was 36 years at the time of his death and a copy of the driving license reflecting the date of birth of the deceased was also annexed. The Claimant further claimed that the deceased was drawing a monthly salary of Rs.13,765/- only as evidence by the appointment letter dated 25.05.2015. The Claimant claimed compensation on the above facts without quantifying the amount.

4. Only the Appellant i.e. the insurance company filed a written objection to the claim filed by the Claimant. The Appellant contested its liability. The Appellant stated that the Employer i.e. the insured had not

* The words "Appellant" is replaced with the word "Claimant" vide order of this Court dated 23.10.2019 in Appeal (C) No.01 of 2019.

issued the mandatory notice as per clause 6 of the insurance policy and notified the Appellant about the event. The Appellant admitted that the Employer had taken an insurance policy for the employees. It was asserted that the liability of the insurer is to indemnify the Employer for the compensation paid and it was not the responsibility of the Insurance Company to pay the compensation awarded at the first instance. The Appellant admitted that the Employer had taken the insurance policy for the employees engaged at Hydro Power Project Plant at Haridwar Infrastructure Limited, Dikchu Project, but the location of risk was Gangtok. It was stated that the accident occurred at Mazitar, Jorethang and therefore, it was not covered by the policy. The claim for compensation against the Employer was not disputed by the Appellant.

5. The Respondent No.2 filed a reply to the written objection filed by the Appellant. It was asserted that the deceased was recruited by Employer and his monthly salary was also being paid by the Employer which was insured by the Appellant. It was asserted that therefore, the Appellant was liable to pay compensation.

6. The Employer also filed a reply to the written objection filed by the Appellant but did not contest the claim. The Employer asserted that the deceased was recruited and his salary paid by the Employer. It was asserted that the Employer was insured by the Appellant and hence it was the Appellant who was liable to pay the compensation to the Claimant. The Employer did not dispute that the Claimant was entitled to compensation.

7. On 04.12.2015 the learned Commissioner directed the office to make assessment of the compensation based on the papers available. On 23.11.2015 the office calculated the compensation payable as Rs.7,78,560/- taking the average salary per month as Rs.8000/-, the completed years of age of the deceased as 36 years and the relevant factor as 194.64. On 05.02.2016 the learned Commissioner held that the amount of compensation has been worked out by the office at Rs.7,78,560/- and the Appellant was directed to deposit the said amount in the Court of the learned Commissioner. The amount of compensation has not been made an issue.

8. On 25.10.2018 the parties were heard and on 17.11.2018 the impugned judgment was passed by the learned Commissioner.

9. There is no material to show that the Appellant had complied with the order dated 05.02.2016 passed by the learned Commissioner for deposit of the compensation amount during the proceedings. However, there is an application dated 18.01.2019 on record filed by the Appellant seeking to deposit the compensation amount as per Section 30 of the Employees Compensation Act, 1923 for preferring the present appeal along with a cheque bearing No.014508 dated 07.01.2019 for the said amount of compensation. The memo of appeal filed by the Appellant also asserts the said facts.

10. The Appellant is aggrieved by the order dated 17.11.2018 passed by the learned Commissioner by which it was directed to pay an amount of Rs.7,78,560/- (Rupees Seven Lakhs Seventy Eight Thousand Five Hundred Sixty) to the Claimant within a month. The Appellant has not contested the amount of compensation awarded. However, the Appellant prays that this Court *"re-compute"* the compensation awarded. The Appellant is aggrieved by the fact that it was directed to pay compensation in the first instance and that the award was passed although under the insurance policy the accident, which admittedly occurred at Mazitar, was not covered.

Answers to the two substantial questions of law

11. The first substantial question of law raised by the Appellant is directly relating to the merit of the insurance policy the privity of contract of which was between the Appellant and the Employer. It is not in dispute that the liability of the Employer under the Act was insured by the Appellant. What the Appellant contends is that the policy was limited to a specific area i.e. Gangtok only and therefore, when admittedly the accident occurred at Mazitar the same was not covered. The insurance policy provided that the policy shall not cover liability of the insured if the *"accident"* occurred at any other place other than the place or places of employment specified in the schedule, unless the employee was at such other place whilst on duty for the purpose of the business and on the direction of the insured or any of the officials authorised to exercise control and supervision over the employee. The record before the learned Commissioner reveals that the deceased was an employee of the Employer. The joining letter issued by the Employer to the deceased reflects that the effective date of joining was 25.05.2015*****. The Claimant has categorically stated in the claim petition that

* The date "25.05.2016" is replaced with the date "25.05.2015" vide order of this Court dated 23.10.2019 in Appeal (C) No.01 of 2019.

the deceased workman expired in the course of employment due to accident of the transit mixer of which the deceased was a driver. The Appellant filed a reply thereto. However, all it stated was as per the insurance policy the location of risk was Gangtok and the accident occurred at Mazitar. It was not disputed that the deceased died as a result of an accident in the course of his employment. The Employer did not contest the claim made by the Claimant but contested the written objection filed by the Appellant. In the said written objection the Employer clearly stated that the deceased who is the husband of the Claimant was inducted by the Employer to work for Respondent No.2 and he expired during the course of employment while driving a transit mixer hired by the Respondent No.2. The FIR which was lodged immediately after the accident before the Jorethang Police Station on 18.06.2015 also records that the accident occurred when the hired vehicle fell down from pressure shaft to power house at Mazitar and the deceased got injured. The death certificate produced by the Claimant reflects that the deceased died on 18.06.2015 itself. The facts before the learned Commissioner thus clearly reflected that the accident occurred out of and in the course of his employment and the deceased was at Mazitar whilst on duty for the purpose of business and on directions of the Employer i.e. the insured. The first question therefore, is answered in the affirmative. The Appellant was liable to indemnify the Employer.

‡ **12.** The next question however, raises the issue of the scope of the Act. The Workmen's Compensation Act, 1923 was amended by the Workmen's Compensation (Amendment) Act, 2009 and consequently it is now known as the "Employee's Compensation Act, 1923". Under Section 3 of the Act it is the Employer who is liable to pay compensation in accordance with the provisions of Chapter II of the Act if personal injury is caused to an employee by accident arising out of and in the course of his employment. In re: ***P.J. Narayan v. Union of India & Ors.***[‡] the Supreme Court held that the statutory liability under the Workmen's Compensation Act, 1923 is on the Employer and insurance is a matter of contract between the insurance company and the insured. In re: ***New India Assurance Co. Ltd. v. Harshadbhai Amrutbhai Modhiya***[§] the Supreme Court had occasion to examine an appeal by the insurance company from the dismissal of his appeal under Section 30 of the Workmen's Compensation Act, 1923 against the order of the learned Commissioner directing it to pay the amount

[‡] **(2006) 5 SCC 200**
[§] **(2006) 5 SCC 192**

of compensation. Before the Supreme Court the Appellant contended that in terms of the insurance contract it was not liable to pay any interest on the awarded sum. The Supreme Court held that by reason of the provisions of the Act, an Employer is not statutorily liable to enter into a contract of insurance. Where, however, a contract of insurance is entered into by and between the Employer and the Insurer, insurer shall be liable to indemnify the Employer. The insurer, however, unlike under the provisions of the Motor Vehicles Act does not have a statutory liability. The Act does not contain a provision like Section 147 of the Motor Vehicles Act. The Supreme Court held that unlike the scheme of the Motor Vehicles Act, the Workmen's Compensation Act, 1923 does not confer a right on the Claimant for compensation under that Act to claim the payment of compensation in its entirely from the insurer himself. The entitlement of the Claimant under the Workmen's Compensation Act, 1923 is to claim the compensation from the Employer. As between the Employer and the Insurer, the rights and obligations would depend upon the terms of the insurance contract.

13. The insurance policy taken by the Employer covers its liability under the Act. It is apparent that the liability of the Appellant as the insurer (as it is not contested that the Appellant had insured the liability of the Employer under the Act) is to indemnify the Employer for the compensation payable by it. The insurance policy issued by the Appellant in favour of the Employer specified that the policy covers the Employer's liability under the Act and the limit of indemnity was the amount of liability incurred by the Employer. It is not the responsibility of the Appellant to pay the compensation awarded at the first instance. The statutory liability under the Act is upon the Employer to pay the compensation and the insurance company has a duty to indemnify the Employer if the employer's liability under the Act has been insured by it. The second question is answered***** accordingly.

14. The impugned order dated 17.11.2018 passed by the learned Commissioner of the Act is thus modified. The Employer is held liable to pay the compensation and is directed to pay the compensation in accordance with Chapter II of the Act. The payment shall be made on or

* The word "answer" is replaced with the word "answered" vide order of this Court dated 23.10.2019 in Appeal (C) No.01 of 2019

before 30.10.2019*****. However, the Employer shall be entitled to get reimbursement of such payment from the Appellant in accordance with law and under the insurance policy.

15. Having answered the two substantial questions raised it is incumbent upon this Court to ensure that the Claimant is paid the compensation as is statutorily provided. The learned Counsel for the Employer submitted that although apparently the calculation of the compensation amount is erroneous in view of the fact that no cross appeal has been preferred by the Claimant and the scope of Section 30 of the Act is limited to the questions of law formulated enhancement of the compensation is impermissible. Section 3 of the Act mandates that the Employer is liable to pay compensation in accordingly with the provisions of Chapter II of the Act. Chapter II consists of Section 3 to Section 18 (both sections included). Section 3, 4, 4A and 5 of the Act are relevant for the purpose of determining payments due and payable by the Employer. The learned Commissioner was duty bound to calculate the amount of compensation in accordance with the provisions of Chapter II of the Act. The learned Commissioner did not do so although there was no contest that the Claimant was to be awarded compensation. In fact the record reflects that it was only the office of the learned Commissioner which calculated the compensation amount. Section 30 of the Act provides for appeals against the orders of the learned Commissioner on the questions of law involved and formulated. The powers of the Appellate Court are coextensive with that of the learned Commissioner. The Appellate Court is the *"court of error"* and its normal function is to correct the decision of the Court from whose decision the appeal lies. The Claimant has not preferred any appeal against the quantum of compensation awarded by the learned Commissioner although the computation is apparently erroneous. The Appellant i.e. the insurer as well as the Employer are not aggrieved by the quantum of compensation but both agree that compensation is payable. The Appellant states that it is the Employer who is liable. The Employer on the other hand states that it is the Appellant who is liable. When a claim for compensation is made by the Claimant entitled to do so under the Act it is the statutory duty of the learned Commissioner to quantify the said amount in accordance with Chapter II of the Act. This statutory duty binds the learned Commissioner to arrive at the quantum of compensation irrespective of the fact as to whether any plea in that behalf was raised by the Claimant

* The date "30.09.2019" is replaced with the date "30.10.2019" vide order of this Court dated 23.10.2019 in Appeal (C) No.01 of 2019.

or not. There is also no restriction under the Act that compensation should be awarded only up to the amount claimed by the Claimant and when the evidence is brought on record and the learned Commissioner comes to the conclusion that the Claimant is entitled to more compensation than claimed even then the learned Commissioner may pass such award as statutorily provided for. It must be kept in mind that the Act is beneficial and welfare legislation and therefore the statutory duty under Section 3 of the Act to quantify the compensation correctly and award it, is salutary for the purpose. This Court is therefore, of the view that although the Claimant has not preferred any cross appeal against the award of the learned Commissioner and the learned Commissioner has not determined compensation correctly it is the duty of the Appellate Court to ensure that the award of the learned Commissioner is modified and the Claimant is awarded the compensation and all such amounts as are due and payable under Chapter II of the Act. After all the existence of Courts of justice is to ensure that justice is done and inherent in every Court is the power to undo the wrong and do the right.

16. The learned Commissioner has calculated the compensation amount as Rs.7,78,560/- only taking the average salary per month as Rs.8000/-, the completed years of age of the deceased as 36 years and the relevant factor as 194.64. The Claimant had claimed that the deceased was drawing a salary of Rs.13,765/- only. In support thereof the appointment letter dated 25.05.2015 was also annexed. As per the letter the deceased gross salary was Rs.13,765/- per month. The Employer did not contest this. In the Employer's written objection to the reply filed by the Appellant it stated that the Employer was paying the monthly salary to the deceased. The learned Commissioner has held that the Claimant have proved that the deceased was drawing a monthly salary of Rs.13,765/-. However, the learned Commissioner directed payment of compensation of Rs.7,78,560/- only. As per note sheet dated 23.11.2015 the office of the learned Commissioner seems to have arrived at the figure taking the average salary per month as Rs.8,000/- only although, it had been proved that the deceased was drawing a salary of Rs.13,765/-. It is apparent that the learned Commissioner came to this conclusion on the basis of notification issued by the Central Government under Section 4(1B) of the Act which specified that for the purpose of sub-section (1) of the Section 4 of the Act the monthly wages in relation to an employee would be Rs.8000/-. A similar situation

arose before the Supreme Court in re: ***Jaya Biswal & Ors. v. Branch Manager, Iffco Tokio General Insurance Company Limited & Anr.***[3]. In the said case the learned Commissioner had taken Rs.8000/- as the limited wage to calculate the compensation. Since neither of the parties produced any document on record to prove the exact amount of wages being earned by the deceased the wage of the deceased was accepted as Rs.4000/- per month + daily bhatta of Rs.6000/- per month, which amounts to a total of Rs.10,000/- at the time of the accident. In the present case it has been proved that the monthly wages of the deceased was Rs.13,765/-. The learned Commissioner was thus required to calculate the Employer's liability for Compensation in the following manner:

> Rs.13,765 (monthly wages) x 50% x 194.64 (the relevant factor) = Rs.13,39,609.8/-.

17. The Employer was also liable to pay the expenditure for the funeral of the deceased to the eldest surviving dependent i.e. the Claimant herein. Section 4 (4) of the Act provides that if the injury of the employee results in his death, the Employer shall, in addition to the compensation under sub-Section (1), deposit with the Commissioner a sum of not less than Rs.5000/- for payment of the same to the eldest surviving dependent of the employee towards the expenditure of the funeral of such employee or where the employee did not have a dependent or was not living with his dependent at the time of his death to the person who actually incurred such expenditure. In re: ***Jaya Biswal (supra)*** the deceased was also a driver. The Supreme Court awarded Rs.25,000/- (Rupees Twenty Five Thousand) as funeral expenses for the death of the driver which occurred in the year 2011. The deceased in the present case died in the year 2015. Therefore, it would be appropriate to award an amount of Rs.26,000/- as funeral expenses to the Claimant.

18. Section 4A of the Act provides that compensation under Section 4 shall be paid as soon as it falls due. The Supreme Court in re: ***Pratap Narain Singh Deo v. Srinivas Sabata & Anr.***[4] and ***Saberabibi Yakubbhai Shaikh v. National Insurance Company***[5] has held that compensation has to be paid from the date of the accident.

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[3] (2016) 11 SCC 201
[4] (1976) 1 SCC 289
[5] (2014) 2 SCC 298

19. Section 4A (2) of the Act provides that in cases where the Employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may be without prejudice to the right of the employee to make any further claim. In the present case the Employer in spite of knowledge that its employee i.e. the deceased had succumbed to his injuries in an accident arising out of and in the course of his employment it failed to pay compensation as soon as the accident occurred (i.e. when it fell due) or even after knowledge taking a stand that since the liability was insured it was for the Appellant i.e. the insurer who was to pay the compensation. No amount was deposited by the Employer. The Appellant also did not deposit any amount until the impugned judgment was passed by the learned Commissioner. The Employer was therefore in default in paying the compensation due under the Act within one month from the date of the accident i.e. 18.07.2015. Therefore, in terms of Section 4A (3) of the Act the Commissioner was required to direct that the Employer shall, in addition to the amount of the arrears pay simple interest thereon @ 12% per annum or at such higher rate not exceeding the maximum of lending rates of any schedule bank as may be specified by the Central Government in the official gazette, on the amount due. The learned Commissioner has failed to do so.

20. The Employer was given an opportunity to show cause as to why penalty should not be imposed in terms of the proviso to Rule 4 A (3) of the Act and the learned Counsel for the Employer was heard on this aspect. The learned Commissioner was required to consider and direct if mandated that the Employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding 50% of such amount by way of penalty. The learned Commissioner failed to either opine or direct the payment of penalty. The Employer has categorically admitted to the fact that the deceased was its employee and he had succumbed to his injuries in an accident arising out of and in the course of his employment. Having done so there was no justification for not paying the compensation when it fell due. In the circumstances, this Court is also of the opinion that the Employer is liable to pay a further sum as penalty. As the accident had occurred in the year 2015 and till this day the Respondent No.1 has not been paid a single rupee as compensation this Court is of the opinion that penalty of 50% of

the amount should be adequate penalty to be imposed. Therefore, the total amount of compensation would be as under:

Compensation (under Section 4(1) = (A) Rs.13,765 x 50% x Rs.194.64 =13,39,609.8/-.

Funeral expenses (under Section 4(4) = (B) Rs.26,000/-.

Total = (A) 13,39,609.8 + (B) 26,000 = Rs.13,65,609.8/-

(C) Interest of 12% per annum [under Section 4A (3) (a)] on Rs. 13,65,609.8/- on and from 18.07.2015 (one month from the date it fell due) till date of actual payment (30.10.2019) =Rs.7,01,362.22/-

(D) Penalty of 50% [under Section 4A (3) (b) of the arrears and interest thereon calculated on the sum total of the arrears (A+B) and the interest on it (C) to be calculated till the date of actual payment (30.10.2019) = Rs. 10,33,486.01/- Grand total payable on 30.10.2019 = Rs. 31,00,458.03/-.

21. The Employer shall deposit the total amount payable to the Claimant on or before 30.10.2019 with the learned Commissioner. On such deposit, the learned Commissioner shall disburse the same to the Claimant. The grand total payable is calculated as on 30.10.2019. If the Employer chooses to pay the amount on any date before 30.10.2019 suitable reduction in the calculation may be adjusted to the satisfaction of the learned Commissioner. The amount of Rs. 7,78,560/- deposited by the Appellant before the learned Commissioner may be used by the Appellant to satisfy its contractual liability and indemnify the Employer of its liability as insured by the Appellant. The appeal is disposed of accordingly.

22. A copy of this judgment shall be sent forthwith to the Court of the learned Commissioner, Employee's Compensation Act, 1923.

SLR (2019) SIKKIM 766

(Hon'ble the Chief Justice and
Honble Mr. Justice Bhaskar Raj Pradhan)

Criminal Appeal No. 06 of 2019

Shri Dinesh Baitha ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Ajay Rathi, Advocate (Legal Aid Counsel).

For the Respondent: Ms. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 25th October 2019

A. Protection of Children from Sexual Offences Act, 2012 – Proof of the Victim's Age – The parents are the near relations having special knowledge and are the best persons to depose about the date of birth of a person. If entry regarding date of birth in the School register is made on the information given by the parents or someone having special knowledge of the fact, the same would have probative value. The date of birth mentioned in the School register will, however, have no evidentiary value unless the person who made the entry or who gave the date of birth is examined.

(Para 17)

B. Protection of Children from Sexual Offences Act, 2012 – Appreciation of Evidence – While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth – It is undoubtedly necessary for the Court to scrutinize the evidence, more particularly, keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the

evidence given by the witness and whether the earlier evaluation of the evidence is shaken so as to render it unworthy of belief.

(Para 25)

Appeal partly allowed.

Chronological list of cases cited:

1. Yerumalla Latchaiah v. State of A.P., (2006) 9 SCC 713.
2. State of Rajasthan v. Babu Meena, (2013) 4 SCC 206.
3. State of Karnataka v. F. Nataraj, 2014 (16) SCC 752.
4. State v. Saravanan and Another, (2008) 17 SCC 587.

JUDGMENT

The Judgment of the Court was delivered by ***Arup Kumar Goswami, CJ***

This appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') is preferred against the Judgment dated 19.12.2018 and the Order on Sentence dated 20.12.2018 passed by the learned Special Judge, Protection of Children from Sexual Offences (POCSO) Act, 2012, East Sikkim at Gangtok, in Sessions Trial (POCSO) Case No. 05 of 2017. By the impugned Judgment, the appellant was convicted under Section 5 (m) punishable under Section 6 of the POCSO Act, 2012 and under Section 342 of the Indian Penal Code (for short 'IPC'). However, he was acquitted of the charge under Section 377 IPC. Resultantly, the appellant was sentenced to undergo rigorous imprisonment for a period of ten years and fine of Rs.5,000/- (Rupees five thousand) under Section 5 (m) punishable under Section 6 of the POCSO Act, 2012, in default, to undergo simple imprisonment for six months, and also to undergo imprisonment for a period of one year and fine of Rs.1,000/- (Rupees one thousand) under Section 342 of the IPC and in default, to undergo simple imprisonment for one month. Both the sentences were directed to run concurrently and the period of imprisonment already undergone by the appellant during investigation and trial was set off. A compensation of Rs.1,00,000/- (Rupees one lakh) was also awarded to the victim under the Sikkim Compensation to Victims or his Dependents Scheme, 2011.

2. Prosecution case, in brief, is that on 08.12.2016 at around 1650 hours, victim (hereinafter also referred to as 'X') accompanied by his father and mother had appeared at Rangpo Police Station and based on the oral complaint of 'X', which was reduced into writing, FIR No. 70(12)16 dated 08.12.2016 under Sections 341, 377 IPC read with Section 4 of the POCSO Act, 2012 was registered against the appellant. It was alleged that on 08.12.2016 when 'X' was on his way home after playing with his friend Deepan, he had met the appellant who took him to one building. Though he had wanted to come back, as the appellant promised him to give Rs.10/-, he stayed back and then he was pressurized to remove his half-pant and the appellant had inserted his finger in his anus. After that he ran away from the place of occurrence and reaching his house he narrated the incident to his mother, who, thereafter, along with 'X', went in search of the appellant, who was found sitting in a room and thereafter, they had gone to the Police Station along with the appellant.

3. During investigation, the Investigating Officer (PW 10) had forwarded 'X' to Rangpo PHC for medical examination, where he was examined by PW 5. The appellant was also sent for medical examination to Rangpo PHC and he was also examined by PW 5. On 08.12.2016 itself the appellant was arrested. Statement of 'X' was also recorded under Section 164 Cr. P.C. by the Chief Judicial Magistrate, East Sikkim at Gangtok (PW 4). The victim was also medically examined by the Doctor in STNM Hospital, Gangtok (PW 8). On completion of investigation, finding, *prima facie*, sufficient materials for proceeding against the appellant, charge-sheet under Section 377 IPC read with Section 5 (m)/6 of the POCSO Act, 2012 as well as Section 342 IPC was submitted and accordingly S.T. (POCSO) Case No. 05 of 2017 was registered in the Court of Special Judge, POCSO Act, 2012, East Sikkim at Gangtok.

4. Upon hearing learned counsel for the parties and on perusal of the materials on record, charges under Section 5 (m)/6 of the POCSO Act, 2012, Sections 377 IPC and 342 IPC were framed. Charges being read over and explained to the appellant in Hindi, the appellant pleaded not guilty and claimed to be tried.

5. During trial, prosecution examined ten witnesses while the appellant adduced no evidence. The appellant was examined under Section 313 Cr. P.C. wherein the plea taken was of denial.

6. As noted earlier, the victim was examined as PW 1. The father and mother of the victim were examined as PW 2 and PW 6, respectively. PW 3 is the Principal of the school in which 'X' (PW 1) was studying. PW 4 is the Magistrate who recorded the statement of 'X' under Section 164 Cr. P.C.. PW 5 is the Doctor of Rangpo PHC who had made preliminary examination of both the appellant and the victim. PW 7 is the Doctor of STNM Hospital. PW 8 is the Station House Officer, who had registered the case. PW 9 is the Sub-Inspector of Police, who, at the relevant time, was at Rangpo Police Station and had recorded the statement made by 'X' under Section 154 Cr. P.C. in his own handwriting (Exhibit 2). PW 10 is the Investigating Officer.

7. Mr. Ajay Rathi, learned Legal Aid Counsel appearing for the appellant has submitted that the conviction of the appellant, on the basis of sole testimony of PW 1, is not sustainable in law in absence of any corroboration from other witnesses. There are material contradictions in the evidence of PW 1, PW 2 and PW 6 in so far as age of PW 1 is concerned as also with regard to class in which the victim was studying at the relevant point of time, he submits. It is submitted by him that the version of the victim is belied by the medical evidence of PW 7. The wearing apparel of the victim was also not seized and sent for forensic examination and the learned trial Court failed to consider these aspects of the matter while convicting the appellant. Learned counsel strenuously argued that though there were a number of persons in the building where the alleged incident had taken place, non-examination of even one of them on behalf of the prosecution has seriously dented the prosecution case. It is also contended by him that there is a failure on the part of the prosecution to establish that the victim was below 12 years of age in absence of certificate of age of the victim and reliance could not have been placed on the evidence of PW 3, who had merely produced an extract of the register containing dates of age of the students, wherein the age of the PW 1 was recorded on the basis of information given by the father. According to PW 2, his statement was not recorded by the police and yet he was examined as a witness and his statement is also available in the case diary, which indicates that the investigation was not conducted in a fair manner. It is submitted by Mr. Rathi that the appellant was denied an opportunity of adducing evidence of his witnesses, as after closure of the prosecution witnesses and recording of statement under Section 313 Cr. P.C., arguments were heard without fixing any date for defence evidence and therefore, great

prejudice has been caused to the appellant. He contends that such denial of opportunity has vitiated the trial and therefore, the impugned judgment is liable to be set aside and quashed on that ground alone.

8. Learned counsel in support of his submissions relied on the following cases, (i) Yerumalla Latchaiah vs. State of A.P., reported in (2006) 9 SCC 713, (ii) State of Rajasthan vs. Babu Meena, reported in (2013) 4 SCC 206, (iii) State of Karnataka vs. F. Nataraj, reported in 2014 (16) SCC 752, and (iv) State vs. Saravanan and another, reported in (2008) 17 SCC 587.

9. Ms. Pollin Rai, learned Assistant Public Prosecutor has placed reliance on Section 29 of the POCSO Act to contend that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of the POCSO Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. She submits that the argument of Mr. Rathi that no opportunity to adduce defence evidence was granted to the appellant is factually not correct as, on a specific query during the course of examination under Section 313 Cr. P.C., the appellant had declined to adduce any evidence on his behalf. In the instant case, except taking the plea of denial, no evidence was adduced by the appellant to rebut the presumption. That apart, evidence of PW 1 has not been impeached in any manner and evidence of PW 1 is also corroborated by the evidence of PW 6, to whom PW 1 had disclosed about the incident immediately after the occurrence. She also refers to the evidence of PW 5 to contend that evidence of PW 1 is also corroborated by medical evidence. Though PW 7, who examined PW 1 on 09.12.2016, had opined that no injuries were observed, the same will not in any manner negate the prosecution case, as it was possibly due to application of Pilorute cream prescribed by PW 5 in the injured area, no injury was noticed by him.

10. We have considered the submissions of learned counsel appearing for the parties and have perused the materials on record.

11. Section 3 (b) of POCSO Act, 2012 lays down that a person is said to commit penetrative sexual assault if he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or

anus of the child or makes the child to do so with him or any other person. Section 5 (m) of POCSO Act, 2012 provides that whoever commits penetrative sexual assault on a child below twelve years is said to commit aggravated penetrative sexual assault and Section 6 of the POCSO Act provides that whoever commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

12. The evidence of PW 1 was recorded after the learned Trial Court, on the basis of answers given to questions put to him, found that he was competent to testify despite his tender age. In his evidence, he stood by the version given by him which was recorded in the form of FIR. The evidence is also consistent with the statement given by him under Section 164 Cr.P.C. In his evidence, PW 1 narrated the manner in which he came to accompany the appellant and how the offence was committed in detail and such evidence of PW 1 was not shaken in any manner. The suggestion put to PW 1 that someone else was present with PW 1 when the appellant had called and given a banana reinforces the version of PW 1 that the appellant was with PW 1. PW 1 stated that as he felt pain, he narrated the incident to his mother (PW 6).

13. PW 6, thus, was immediately reported to about the incident and she has corroborated the version of PW 1 in her evidence. She had gone with PW 1 to find out the appellant, who was identified by PW 1. Though not very clear from her evidence at what point of time the father of PW 1 had joined them, it appears from the evidence that PW 2 was also present when the appellant was taken to the Rangpo Police Station with PW 1.

14. PW 2 was at home when PW 1 reported the incident to PW 6 and after PW 6 and PW 1 had gone in search of the appellant, he had also followed them and found the appellant in a building under construction. He clarified in his cross-examination that the appellant was intercepted in a small hut near the building under construction.

15. From the evidence of PW 1, PW 2 and PW 6, it appears that PW 2 was working as a driver of a utility pick-up vehicle while the appellant was a labourer by occupation, who used to reside a little distance away from the residence of PW 2. It is evident that the identity of the appellant is

not in doubt as he was identified as the person who had committed the offence when PW 6 had taken PW 1 in search of the offender, though in the 164 Cr.P.C. statement, PW 1 had referred to the appellant as „Madehesi Vaiyya. It appears from the statement under Section 164 Cr.P.C., PW 1 came to know the name of the appellant subsequently from the police.

16. Though Mr. Rathi had submitted that it is not understood how the statement of PW 2 found its place in the case diary, as he himself had stated that police had not recorded his statement, we are of the considered opinion that statement of PW 2 has to be considered in the context in which such statement had been made and if it is considered in that perspective it will appear that the statement was made in connection with recording of statement of PW 1 by police at Rangpo Police Station. It is not the case of the prosecution that statement of PW 2 was also recorded at the police station. Therefore, the contention urged that investigation was conducted in a partisan manner without any merit.

17. PW 3, the Principal of the school where PW 1 was studying, had stated that the date of birth of PW 1 is 11.04.2007 and had issued the certificate dated 19.01.2017 (Exhibit 4) on that basis. She had deposed that in 2016, PW 1 was studying in UKG and his name is recorded at Sl. No. 7 of the statement with regard to the students studying in UKG containing, amongst others, dates of birth. It appears from the cross-examination of PW 3 that the school admission register was not exhibited and it also appears that the date of birth was recorded as per statement made by the parents at the time of admission and not on the basis of any birth certificate produced. Mr. Rathi sought to contend that the admission register having not been produced, no credence can be placed on the date of birth of PW 1 as deposed by PW 3, and as no ossification test was conducted, the prosecution has failed to prove that PW 1 was a minor or aged about less than 12 years at the time of occurrence. A close look at the evidence of PW 1, PW 2 and PW 6 including the cross-examination of the said witnesses would go to show that PW 1 was less than 12 years had not even been contested. While PW 1 in the FIR had stated his age as 7 years and the age was also recorded as 6-7 years while recording the statement under Section 164 Cr.P.C., PW 1 had stated his age to be 9 years at the time of recording of evidence. It is seen from the evidence of PW 2 and PW 6 that both the parents had stated that their son was 9 years old at the

relevant point of time. The parents are the near relations having special knowledge and are the best persons to depose about the date of birth of a person. If entry regarding date of birth in the school register is made on the information given by the parents or someone having special knowledge of the fact, the same would have probative value. The date of birth mentioned in the school register will, however, have no evidentiary value unless the person who made the entry or who gave the date of birth is examined. Even if evidence of PW 3 is taken out of consideration with regard to the age of PW 1, the school admission register having not been produced, it is of crucial importance to note that the age of PW 1, as deposed by PW 2 and PW 6, had remained un-impeached and therefore, there is not a shadow of doubt that PW 1 was below the age of 12 years at the time of incident. In the aforesaid view of the matter though the contention is sought to be advanced that of age of PW 1 was not established, such argument does not commend for acceptance.

18. PW 9 had recorded the statement of PW 1 (Exhibit 2) at Rangpo Police Station in presence of PW 8. PW 8, who was the Station House Officer of Rangpo Police Station, had deposed that he had directed Rajeev Mukhia (PW 9) to record the statement of PW 1. He had also deposed that the victim and his parents had affixed their signature in Exhibit 2 after the same was read over to them. His version was corroborated by PW 9 stating that he had recorded the statement (Exhibit 2) of PW 1. PW 10, who was the Investigating Officer, had categorically stated that the appellant was brought to the Rangpo Police Station by the victim party and that he had forwarded the appellant for his medical examination to Rangpo PHC under a requisition proved as Exhibit 13. There is no cross-examination of PW 10 in that respect.

19. PW 5, who had examined PW 1 at the earliest point of time as well as the appellant, had deposed that there was slight bleeding and a small tear over upper margin of anal orifice and he proved the medical report (Exhibit 12) in respect of PW 1 as well as medical report (Exhibit 14) in respect of appellant. In his evidence, PW 5 had stated that there was smell of alcohol in the breath of the appellant. He stated that he had prescribed Pilorute cream to be applied to the injured area. The evidence of PW 5 as well as Exhibit 12 corroborates the evidence of PW 1, who in his statement under Section 164 Cr.P.C., had also stated that he felt burning sensation when he attended to the call of nature.

20. The incident had taken place when PW 1 was studying in UKG. By the time trial had commenced, PW 1 was a student of Class I. The evidence of PW 6 that PW 1 was in Class I has to be seen in that light and therefore, there is no contradiction in that regard. It is not the projected case of the prosecution that any of the occupants of the half-constructed building had seen PW 1 and the appellant together or that they had been informed about any incident. Therefore, there is no merit in the contention of Mr. Rathi that non-examination of any of the occupants of the building has raised doubts about the prosecution case. Having regard to the overwhelming evidence on record pointing to the guilt of the appellant, we are also of the opinion that it cannot be held that because of the Investigating Officer not seizing the wearing apparel of the PW 1 and sending the same for forensic examination the entire prosecution case has to be thrown over-bored, as canvassed by Mr. Rathi.

21. In *Yerumalla Latchaiah* (supra), the age of the victim was only 8 years and no injury was found on any part of the victim including on private part. The medical report specifically stated that there was no sign of rape at all and it was on the background of the above factual matrix the evidence of the prosecutrix having been belied by the medical evidence, the conviction was set aside. The learned Legal Aid Counsel has sought to rely on the aforesaid judgment in the context of the evidence of PW 7, to contend that the evidence of PW 1 is belied by the medical evidence of PW 7. It is to be remembered that PW 7 had examined PW 1 on the next day of the occurrence. PW 5 had already examined PW 1 on the previous day when he found slight bleeding and small tear over the upper margin of anal orifice. He also prescribed a medicinal cream to be applied on the injured area. Some time had elapsed by the time PW 7 had examined PW 1 and in the meantime treatment had also commenced. Therefore, in the present factual matrix, on the basis of the evidence of PW 7, prosecution case cannot be jettisoned.

22. Reliance placed by Mr. Rathi in *Babu Meena* (supra), is misplaced. In *Babu Meena* (supra) Hon ble Supreme Court found the evidence of prosecutrix to be wholly unreliable. In that circumstance it was observed that it would be unsafe to base the conviction on the sole testimony of the prosecutrix, although conviction can be founded on the basis of sole reliable testimony of a witness without corroboration.

23. In *F. Nataraj* (supra), the accused was a teacher in the school where prosecutrix was studying and she had fallen in love with him. On the threat held out by the prosecutrix that if the accused would not give consent to marry her, she would commit suicide, the accused had agreed to marry her and the relationship had continued for about three months. She started pressurizing the accused to marry her when the parents were about to get her married to somebody else and prompted by the threats as held out earlier, both of them had fled away. The father of the prosecutrix had filed a missing complaint as well as a complaint later on stating that the accused might have kidnapped his daughter. The accused was held to be entitled to benefit of doubt by the Honble the Supreme Court as the gaps in the evidence of the prosecutrix and the medical officer made it highly improbable that sexual intercourse had taken place. It was held that the solitary evidence of the prosecutrix, in absence of any corroboration by the medical evidence, is not of such quality which can be relied upon.

24. In *Saravanan* (supra), the Honble Supreme Court, observed that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety.

25. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Having said that, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly, keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken so as to render it unworthy of belief.

26. Section 29 of the POCSO Act, 2012 reads as under: -

> "***29. Presumption as to certain offences***.- *Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.*"

27. A perusal of the aforesaid provision goes to show that in respect of Sections 3, 5, 7 and 9 of the POCSO Act, 2012, there is a presumption with regard to committing or abetting or attempting to commit such offence unless the contrary is proved. In the instant case, defence adduced no evidence. The suggestion given to PW 1 that the appellant was falsely implicated because the parents were having inimical relation with the appellant or the suggestion given to PW 2 and PW 6 that they had falsely implicated the appellant do not dislodge the statutory presumption. The submission of Mr. Rathi that the appellant was not given the opportunity to lead his evidence by examination of witnesses as no date was fixed for such purpose and that after closure of evidence of prosecution witnesses, the court proceeded to hear the arguments, does not merit acceptance, in as much as, as rightly submitted by Ms. Pollin Rai, no occasion for fixing a date for defence evidence had arisen in view of the statement made by the appellant during the course of his examination under Section 313 Cr.P.C. that he would adduce no evidence.

28. In view of the above discussions, we are of the opinion that the learned trial court committed no illegality in convicting the appellant under Sections 5 (m) punishable under Section 6 of the POCSO Act, 2012. However, we are of the considered opinion that conviction under Section 342 IPC cannot be sustained as evidence on record does not disclose ingredients of wrongful confinement and therefore, the conviction of the appellant under Section 342 IPC is set aside.

29. In the result, the appeal is partly allowed by upholding the conviction and sentence under Section 5 (m) punishable under Section 6 of the POCSO Act, 2012, while setting aside the conviction and sentence under Section 342 IPC.

30. Registry will send back the lower court records.

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