(2004) 07 SHI CK 0026

High Court of Himachal Pradesh

Case No: F.A.O. No''s. 445 of 2003 and 6 of 2004

Tapender Singh		APPELLANT
	Vs	
Jai Singh and Others		RESPONDENT

Date of Decision: July 23, 2004

Acts Referred:

- Railways Act, 1890 - Section 3
- Workmens Compensation Act, 1923 - Section 10, 2(1), 4, 4A

Citation: (2004) 3 ACC 775 : (2005) ACJ 962

Hon'ble Judges: Arun Kumar Goel, J

Bench: Single Bench

Advocate: Kuldip Singh Kanwar and Jatinder Thakur, for the Appellant; Jyotsna Rewal Dua, R.K. Gautam and Naveen Bhardwaj, for the Respondent

Judgement

Arun Kumar Goel, J.

Both these appeals have arisen out of order dated 7.7.2003, passed by the Commissioner for Workmen''s Compensation (SDM), Paonta Sahib in Case No. 14 of 1999 titled as Jai Singh v. Satnam Singh. As such, they are being disposed of by this common judgment.

2. Respondent Nos. 1 to 5-claimants filed proceedings u/s 4 of the Workmen''s Compensation Act, 1923 (hereinafter referred to as ''the Act''), against Satnam Singh, owner of the truck No. HR 11-2209, Sohan Lal its driver and one Tapender Singh. F.A.O. No. 445 of 2003 is by Tapender Singh, whereas F.A.O. No. 6 of 2004 is by (owner and driver of the truck. Tapender Singh is being referred to hereinafter as ''the appellant'' whereas the driver and owner are being jointly referred to as ''the appellants'', hereinafter.

3. The case of the respondent Nos. 1 to 5 was that the deceased was engaged as a labourer by Tapender Singh who was constructing his house on a daily wage of Rs. 60. Deceased while working as a labourer engaged by the said Tapender Singh was

unloading the marble sheets from the truck at the time of accident at his instance. In this process during the course of his (deceased) employment with the appellant former came under it and died at the spot on 6.4.1999. These marble sheets were brought by the appellant for his house construction. Of this accident, F.I.R. No. 144 of 1999 was registered at Police Station, Paonta Sahib. Deceased was aged 43 years. Autopsy on his body was conducted at Civil Hospital, Paonta Sahib by PW 4 Dr. Rakesh Kumar Dhiman on 7.4.1999. Since the incident had taken place causing fatal injury to the deceased during the course of his employment under the appellant, as such he was liable to pay compensation.

4. When put to notice appellants filed joint reply. Amongst other things they stated that the deceased had been engaged by the appellant and not by them. As such they were not liable for payment of any compensation. In his separate reply, the appellant resisted the claim of respondent Nos. 1 to 5. As according to him, there was no relationship of employee and employer between the deceased and him. His further case was that respondent Nos. 1 to 5 had no cause of action to file the claim petition against him. But a reference to the reply clearly indicates that while admitting the incident, his stand in fact is that loading and unloading of the truck was the job of the appellants and not the appellant. Petition was bad for mis-joinder of parties and was also not maintainable in its present form. His stand in paras 2 and 3 of reply, which to my mind has some relevance is extracted hereinbelow:

"(2) That para 2 of the petition as stated is not admitted hence denied, save and except the death of late Mohar Singh. Late Mohar Singh was not employed by respondent No. 3 for unloading of the truck bearing registration No. HR 11-2209. The loading and unloading work of the aforesaid truck was the work of the owner of the truck and the labour employed in the unloading of the truck was the workmen of the owner of the truck, therefore, any injury received by the workman at the time of unloading of the truck No. HR 11-2209 is attributable to the owner of the truck and the owner of the truck is only liable for the payment of compensation to the injury received by the workman and the respondent No. 3 has nothing to do with the loading and unloading of the said truck, therefore, the respondent No. 3 is not liable for the payment of compensation for the death of the deceased Mohar Singh. Deceased Mohar Singh was not the workman of respondent No. 3 in the course of unloading of the truck.

(3) That para No. 3 of the petition as stated is not admitted. Hence denied, save and except that late Mohar Singh received the injury at the time of unloading of the aforesaid truck. The detailed reply has already been given above."

5. Another fact that needs to be noted at this stage is that United India Insurance Co. Ltd. was added as party, as insurer of the truck, but was later on dropped as it was found that on the date of accident the vehicle was not insured with the said insurance company.

6. On the basis of the pleadings of the parties following issues were framed:

(1) Whether deceased was a workman within the meaning of the Act?

OPP

(2) Whether the accident arose out of or in the course of his employment?

OPP

(3) Whether the amount of compensation claim is due or any part of that amount?

OPP

(4) Whether the respondents are jointly and severally liable to pay the compensation as the same is due? OPP

(5) Whether the present petition is not maintainable?

OPR

(6) Relief.

7. Learned Commissioner below disposed issue Nos. 1 to 4 by deciding those in the affirmative. Whereas the issue No. 5 was decided in the negative. And finally awarded a sum of Rs. 1,57,986 being compensation plus interest at the rate of 9 per cent per annum w.e.f. 6.4.1999 to 7.7.2003, i.e., the date of decision of the petition. The liability for payment of the awarded amount was apportioned equally amongst appellant on the one side and appellants on the other. In case the awarded amount was not deposited within 45 days from the date of receipt of the copy of the order, penalty at the rate of 50 per cent of the amount awarded was made payable. The amount awarded was to be equally shared by the respondent Nos. 1 to 5. Amount payable to the minors was ordered to be deposited in the fixed deposit.

8. Tapender Singh neither stepped into the witness box nor did he produce any evidence before the Commissioner below.

9. On the other hand, on behalf of respondent Nos. 1 to 5, Jai Singh respondent No. 1 as PW 1 and Kundan Singh, a co-labourer with the deceased engaged by the appellant appeared as PW 2. In addition to these two witnesses, PW 3 Desh Raj, Head Constable, Police Station, Paonta Sahib, has proved the F.I.R. Exh. PW 3/A. PW 4 is Dr. Rakesh Pandey. He conducted the post-mortem on the body of Mohar Singh.

10. Driver of the vehicle, one of the appellants, Sohan Lal appeared as RW 1. Accident is admitted by both, i.e., the appellant as well as by the appellants. As such this is a question of fact which need not be gone into in these two appeals.

11. According to learned counsel for appellants keeping in view the evidence of PWs 1 and 2 as well as driver Sohan Lal, RW 1, it has been clearly established that the deceased was a workman employed by appellant Tapender Singh in the

construction of his house for which he had brought marble. And on the fateful day and during its unloading at the instance of the appellant, deceased died having come under one of the marble slabs.

12. On the basis of evidence on record and for the reasons to be recorded hereinafter, I am satisfied that the deceased met with accident during the course of his employment with the appellant who had engaged him in his house building activity and was thus his employer for all purposes in law as well in fact.

13. Mr. Kanwar, learned senior counsel urged that accepting everything to be correct for the sake of argument, and without conceding, deceased was not a workman within the meaning of Section 2 (1) (n) or Schedule II of the Act, so as to enable him to claim compensation from his client. For buttressing this submission, he laid great emphasis on the definition of workman and entries (i), (vii) and (xxxvii) of Schedule II to the Act. For ready reference it is extracted hereinbelow:

"2(1) (n) ''workman'' means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer''s trade or business) who is--

(i) a railway servant as defined in Section 3 of the Indian Railways Act, 1890 (9 of 1890), not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed, or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead includes a reference to his dependants or any of them.

SCHEDULE II

LIST OF PERSONS WHO, SUBJECT TO THE PROVISIONS OF SECTION 2 (1) (N), ARE INCLUDED IN THE DEFINITION OF WORKMEN

The following persons are workmen within the meaning of Section 2(1) (n) and subject to the provisions of that section, that is to say, any person who is--

(i) employed, otherwise than in a clerical capacity or on a railway, in connection with the operation or maintenance of a lift or a vehicle propelled by steam or other mechanical power or by electricity or in connection with the loading or unloading or any such vehicle; or

xxx xxx xxx

(vii) employed for the purpose of--

(a) loading, unloading, fuelling, constructing, repairing, demolishing, cleaning or painting any ship of which he is not the master or a member of the crew, or handling or transport within the limits of any port subject to the Indian Ports Act, 1908 (15 of 1908), or the Major Port Trusts Act, 1963 (38 of 1963), of goods which have been discharged from or are to be loaded into any vessel; or

XXX XXX XXX

(xxxvii) employed for the purpose of loading or unloading any mechanically propelled vehicle or in the handling or transport of goods which have been loaded in such vehicles."

14. Further, according to Mr. Kanwar, employment of the deceased was of casual nature and he had been engaged otherwise than for the purpose of his client''s trade or business. As such this fact goes to the root of assumption of jurisdiction by the Commissioner to have entertained the claim petition. There is no pleading to this effect in the claim petition. Per him by having decided the petition, Commissioner could not clothe himself with such jurisdiction, which he otherwise lacked, because of jurisdictional defect being there in the entertainment of the petition, its subsequent decision is of no consequence. Therefore, on this short ground alone his client''s appeal deserves to be allowed with costs throughout. He also pointed out that there was no pleading set out on behalf of respondent Nos. 1 to 5, that the deceased was covered as workman either u/s 2(1) (n) or under Schedule II entries (i), (vii) and or (xxxvii). Foundation had to be laid in the pleadings to show that the court/ Tribunal has the jurisdiction to have entertained the case and for that purpose on the doctrine of civil law, Mr. Kanwar urged that only averments made in the pleadings, i.e., petition in the present case were to be looked into. For this purpose he relied on the observation in case of Ramesh Chand Ardawatiya Vs. Anil Panjwani, These are as under:
"...The question of jurisdiction is to be determined primarily on the averments made in the plaint..."

15. In this behalf when a reference is made to the claim petition, it cannot be said that on the averments made in it, the Commissioner lacked inherent jurisdiction to have entertained the same. On the basis of submission of Mr. Kanwar at best it can be said that the pleadings are inadequate and/or insufficient. But such omission in the present case will not oust the jurisdiction, as was urged by learned senior counsel. In the facts and circumstances of this case it cannot be said that Commissioner had no jurisdiction to have entertained the petition and/or by deciding the case he had assumed jurisdiction which he inherently lacked.

16. Another reason to take this view is that what was argued in this court was not the defence set out before the Commissioner below. Though Mr. Kanwar urged in this behalf, that question of raising the defence would only arise when there was a properly constituted petition before the Commissioner below.

17. In this behalf it may be worthwhile to say that case of the appellant was that the deceased was employed by the owner of the truck, i.e., one of the appellants. So in my view, fate of both the appeals will depend on the basis of the evidence produced by the parties in the proceedings before the Commissioner below.

18. Next decision relied upon by Mr. Kanwar was in Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, For ready reference relevant portion is extracted hereinbelow:

"...The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income Tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income Tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen. In our opinion, the Appellate Bench is wholly wrong in opining that the Income Tax Officer can ''decide either way''..."

19. As has been already observed, that this is not a case of inherent lack of jurisdiction by the Commissioner below in entertaining the petition for the grant of compensation; so this decision has no applicability to the facts of these appeals.

20. Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, was another decision relied upon by Mr. K.S. Kanwar. Again this decision does not advance the case of his client. Reason being that insufficient pleadings is not a jurisdictional defect so as to hold that the Commissioner lacked inherent jurisdiction in the present case. Case of respondent Nos. 1 to 5 was that Mohar Singh had been employed along with PW 2 Kundan Singh in the house building operation by the appellant. And during the course of his such employment, accident took place when marble sheet fell full weight on the deceased and he died. Therefore, with reference to Section 2(1) (n) and the Second Schedule of the Workmen''s Compensation Act, Commissioner lacked jurisdiction is not correct.

21. Lakshminarayana Shetty Vs. Shantha and Another, was also relied upon by Mr. Kanwar. This judgment for ready reference is extracted hereinbelow:

"(1) Leave granted.

(2) We have heard the counsel for the parties.

(3) The respondents are the daughter and wife of the deceased Ramu who was engaged by the appellant to paint the house. While he was doing this work, he unfortunately fell down and died. The claim for compensation under the Workmen''s Compensation Act was denied, but on a writ petition being filed the High Court has allowed the same claim.

(4) No reasons have been given by the High Court for coming to the conclusion that this was a case which fell within the domain of the Workmen''s Compensation Act. There was apparently a contract between the appellant and Ramu whereby Ramu had undertaken the work of painting the house. Whether the action of the appellant by engaging a person in this manner makes him an employee or a workman of the appellant, was a question to be decided. The case did not fall within the four corners of the said Act and, therefore, the decision of the High Court was incorrect. We, therefore, allow the appeal and set aside the decision of the High Court."

22. A reading of this decision shows that, it was a case where the deceased had undertaken a painting contract when he fell down while doing the said work. Thus it was for this reason, that the Apex Court held the deceased to be not a workman. Admittedly this is not the situation here. Thus it is a judgment on the facts of that case and besides being distinguishable.

23. A decision near to the facts of the present case relied by Mr. Kanwar was in the case of Mahendra Kumar and Another Vs. Mool Chand, After having gone through this judgment, I have not been able to persuade myself to follow the view taken by the learned Judge in this case.

24. Mr. Kanwar with a view to support his plea that the Commissioner below committed grave jurisdictional error in the absence of proper facts being set out before him, also placed reliance on a three-Judge Bench decision of the Apex Court in case of Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs., And urged that by passing the impugned order, the Commissioner below cannot be allowed to assume jurisdiction which he inherently lacked. In this case, two questions came up for consideration before the Supreme Court, i.e., whether civil court lacked inherent jurisdiction to entertain suit for ejectment and decree passed by it was, thus a nullity. And if so, whether the plea that a decree is nullity, can be raised in execution and further it will operate as res judicata. Apex Court, while allowing the tenant''s appeal in this behalf, upheld the contention.

25. This is not the situation in the present appeals before this court. Reason being lack of facts in a given situation is one that does not necessarily ousts the jurisdiction, as in the present case, whereas lack of inherent jurisdiction is another.

26. Mr. Kanwar, also placed reliance on a decision of the Supreme Court in the case of Kashi Nath (Dead) through Lrs. Vs. Jaganath, , on the point of variance between the pleadings and proof. In this behalf suffice it to say that when a reference is made to the evidence on record, it is consistent with petition filed by the respondent Nos. 1 to 5, i.e., that the deceased along with PW 2 was engaged as a labourer on a daily wage of Rs. 60 by the appellant for construction of his house. At appellant''s instance, both, i.e., deceased and PW 2 were deployed for unloading the marble sheets from the truck in question, when the accident took place resulting in the death of Mohar Singh. This was the case set out by respondent Nos. 1 to 5 in their

pleadings and evidence is consistent in this behalf. In this view of the matter, there is no question of variance between the pleadings and proof, as alleged. As such, this decision relied upon by Mr. Kanwar is wholly inapplicable to the facts of this case.

27. On the other hand, in Rathi Menon Vs. Union of India, it was observed that a court should avert an interpretation which would lead to a manifestly absurd fallout, unless of course, the court is compelled otherwise by any mandatory provision.

28. Another factor that needs to be determined in these appeals is as to whether in the facts and circumstances of this case it can be said that the deceased was not a workman, (whose death is admitted), having died during the course of his employment with appellant. And also whether it was for the appellant or the respondent Nos. 1 to 5 to have proved further that the deceased was a person whose employment was or was not of casual nature and he was not employed otherwise than for the purpose of employee''s trade or business.

29. This matter had been attending the attention of different courts. Some precedents are being referred to hereinbelow:

In Orissa Cooperative Insurance Society Ltd. v. Sarat Chandra Champati 1975 ACJ 196 in the context of Workmen''s Compensation Act as well as the Motor Vehicles Act following contention was raised:

"(3) The appellant took various defences in the claim case. The quantum of compensation claimed was challenged as excessive. It was also said that the claimant was not an employee of the owner of the truck, nor was he getting a monthly income of Rs. 150 and that there was negligence on the part of the driver of the truck at the time of the accident. He disowned his liability...

(4) ...As a subsidiary point, it is contended that the claimant who was a khalasi is not a ''workman'' as defined u/s 2 (1) (n) (ii) of the Workmen''s Compensation Act, 1923 and, consequently, even if the policy is held to cover liabilities arising under the Workmen''s Compensation Act, it would not cover the liability in respect of the claimant."

While examining Section 2 (1) (n) of the Act it was held as under:

"(6) The next question is whether this employee can be said to be a workman as defined in Section 2 (1) (n) (ii) of the Workmen''s Compensation Act, if he is not so covered, then certainly the insurer would not be liable. Section 2(1)(n) of the Workmen''s Compensation Act defines ''workman''. The relevant portion of the definition is extracted here:

""workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer''s trade or business) who is--

XXX XXX XXX

(ii) employed on monthly wages not exceeding five hundred rupees, in any such capacity as is specified in Schedule II.''

XXX XXX XXX

The relevant portion of Schedule II of the Workmen''s Compensation Act, 1923 is extracted below:

''The following persons are workmen within the meaning of Section 2 (1) (n) and subject to the provisions of that Section, that is to say, any person who is--

(i) employed, otherwise than in a clerical capacity or on a railway, in connection with the operation or maintenance of a lift or a vehicle propelled by steam or other mechanical power or by electricity or in connection with the loading or unloading of any such vehicle;

xxx xxx xxx''

The claimant was a khalasi employed for the purpose of loading or unloading of the truck, involved in the accident. To attract this clause the other question to determine is whether the truck is a vehicle propelled by mechanical power. The dictionary meaning of the word ''mechanical'' is as follows:

''pertaining to machines, dynamical, worked or done by machinery or by mechanism; machine like; of the nature of a machine or mechanism; without intelligence or conscious will;''

Though gasoline provides the power, truck is propelled by manual operation of gear, clutch and steering wheel, and other mechanical parts of the engine. To my mind, truck is a vehicle which is propelled by mechanical power. I have not been shown any judicial decision to the contrary. Therefore, the claimant is covered by this description of an employee in Schedule II and as such is a workman as defined in Section 2 (1) (n) of the Workmen''s Compensation Act. A workman who suffers injury in course of his employment is entitled to compensation under the provisions of the Workmen''s Compensation Act, which the employer is liable to pay. Therefore, the insurer would be liable in this particular case to pay compensation to the claimant. It is not said that the claimant initiated any proceedings under Workmen''s Compensation Act, for compensation and he apparently opted to come to the Tribunal for his compensation to be assessed under the Motor Vehicles Act."

30. In Smt. Swaran Kaur and Another Vs. Sardari Lal Kapur and Others, following plea was raised:

"(8) Only two questions remain. These are, whether Budh Singh was a ''workman'' within the meaning of the Act and the validity of notice served in this case.

(9) Clause (n) of Section 2 (1) of the Act defines ''workman'' in the following words:

""workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer''s trade or business) who is--

xxx xxx xxx

(ii) employed in any such capacity as is specified in Schedule II,

whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.''

The relevant part of Schedule II in terms of Clause (n) (ii) above is as follows:

''The following persons are workmen within the meaning of Section 2 (1) (n) and subject to the provisions of that section, that is to say any person who is--

xxx xxx xxx

(viii) employed in the construction, maintenance, repair or demolition of--

(a) any building which is designed to be or is or has been more than one storey in height above the ground or twelve feet or more from the ground level to the apex of the roof; or

xxx xxx xxx''

31. What was held and is relevant for these appeals is as under:

"(12) A perusal of Clause (viii) of the Schedule II, reproduced above, shows that the various parts of Sub-clause (a) are separated by use of the word ''or'' and not by the use of ''comma''. This necessarily implies that the various parts of Sub-clause (a) have to be read disjunctively and not conjunctively. Thus construed, the first part of Sub-clause (a) would read ''employed in the construction, maintenance, repair or demolition of any building which is designed to be or is''. It follows that a person employed in connection with the aforesaid purposes in respect of any building, which is a building properly so-called or which is designed to be one such, ''would satisfy the requirement of the above definition. It is not disputed that the repair which was being carried out when the accident took place was of the building of the Higher Secondary School. The other parts of Sub-clause (a), namely, a building having more than one storey in height or having a height of 12 ft. or more from the ground level, are not applicable and the absence of any pleadings on that score is not sufficient to throw out the claim of the petitioners-appellants.

(15) Coming to the last contention, the word ''casual'' occurring in the definition has not been defined under the Act. It has been observed in more than one decision that the word is not capable of a precise definition. The sum and substance of

various decisions dealing with this aspect of the matter whether employment is of a casual nature or otherwise, depend on the facts and circumstances of each case. The onus of proving that the employment was of a casual nature is on the employer and where the employer fails to discharge that onus, it would follow that the workman was covered under the Act. In Raj Rani v. Narsing Das Mela Ram 1965 ACT 439 the facts were that a person was employed on wages for painting the premises of a shop. While painting the premises, he touched a live electric wire and died on account of electric shock. It was held that the deceased was a workman within the meaning of the Act. Shamsher Bahadur, J. (as he then was) observed that in construing what is an employment of a casual nature, it is the nature of the service which has to be looked at and not its duration. It was further observed that with the progress of times the concept and the circumstances in which a workman is entitled to compensation has considerably widened and a liberal construction has to be put on this phrase. The learned Judge made reference to several other authorities of various High Courts, which included cases where a person employed for executing repairs to the building fell from the scaffolding while executing repairs and the heirs were held entitled to compensation under the Act. In a more recent case in Rakha Ram v. Harcharan Dass 1983 CLJ 175 the aforesaid decision of Raj Rani''s case (supra), was followed and it was held that the employer having failed to establish that the employment of the workman was of a casual nature, the person concerned was covered by the provision of the Act. Law laid down in Raj Rani as well as Rakha Ram clearly applies to the facts and circumstances of the present case. It is, therefore, held that Budh Singh was a workman within the meaning of the Act and petitioners-appellants are entitled to succeed."

32. In Resident Engineer, Patel Engineering Co. Ltd. v. Chanda Bewa1973 Lab IC 618 appellant company had employed one contractor Bachu Babu for the purposes of collecting building materials, such as boulders, chips, sand, etc. He had employed one Nabin Sahu, as a coolie in one of his transport trucks. This employee met with accident. Claim under the Act was filed. Commissioner ordered payment of Rs. 7,000 as compensation on 16.4.69. One of the questions in the appeal was whether the deceased at all was a workman or not. After taking note of Section 2(1) (n) of the Act, it was held as under:

"...Mr. Palit for the respondent takes the stand that these are broad classifications, but each of these classifications must be given the widest amplitude and must be taken to cover the entire field that would answer the classification. As found, the appellant company was engaged in raising of residential houses and laying of the road. The collection of materials was also for the aforesaid two purposes. No distinction can be made between one who actually works at the site of the building or where the road is laid and one who works at a distance to collect building materials to be used for the same purposes. In that view of the matter a person who assists the loading and unloading of the building materials to be carried to the site for the purpose of construction may also come within the Clause (viii) of Schedule II.

The Workmen''s Compensation Act is a beneficent legislation and in that view of the matter a liberal construction must be given to its provisions..."

33. On the basis of proved facts on the file of this case, there is no difficulty in holding that Mohar Singh was a workman and was employed by the ''appellant'' and not by the ''appellants''.

34. In Pattammal v. Janankiramakounder 1975 Lab IC 984 it was held that list given in Schedule II of the Act is exhaustive and not illustrative.

35. In Amri Naran v. Saukem Employees Cooperative Society Ltd. 1987 ACJ 451 it was held that requirement of Section 2 (1) (n) of the Act, namely, employment of a casual nature, as also employment otherwise than for the purpose of the employer''s trade or business are required to be proved for justifying the exclusion of a person from the definition of workman. Para 16 of this judgment wherein this aspect has been dealt with is extracted hereinbelow:

"In the instant case it is amply proved, rather it is admitted, that the deceased workman was employed for the purpose of milking the buffaloes and for looking after them. In the written statement as well as in the evidence led on behalf of the respondent society, it is an admitted position that maintaining buffaloes was the main business and object of the respondent society. As stated hereinabove and as held by a Division Bench of the Kerala High Court in the case of Kochu Velu v. Purakkattu Joseph 1982 ACJ 486 two requirements, namely, employment of a casual nature as also employment otherwise than for the purpose of the employer''s trade or business are required to be proved for justifying the exclusion of a person from the definition of workman. These two factors are to be taken cumulatively. In case one of them is absent, the workman cannot be excluded from the purview of the definition. If it is shown that a workman is employed on monthly wages not exceeding Rs. 500 in any capacity as specified in Schedule II, his case cannot be taken out of the purview of the Act simply by showing that he was employed as a daily wage earner."

36. In Sumitra Devi Vs. Executive Engineer, Udar Asthan Irrigation Division it was held by a Division Bench of High Court of Patna as under:

"...Before a person will not be treated as a workman, two conditions are to be proved, i.e., his employment is of a casual nature and he was not employed for the purpose of employer''s trade or business. Both the requirements have to be read conjunctively and both the conditions have to be proved by the employer before employee is denied the benefit under the Act. As the Act has provided for payment of compensation by the employer to his workmen, the onus is on the employer to prove that the particular person claiming compensation is not a workman..."

37. In D. Venu and Others Vs. Senen Fernandez and Others, Division Bench of Kerala High Court while considering a certificate for assessing the loss of earning capacity

held that its probative value is to be examined and the provisions of the Evidence Act do not apply to proceedings before quasi-judicial Tribunals. What was held in this behalf by the Division Bench was as under:

"(6) We are firmly of the view that the Evidence Act would apply only to judicial proceedings in or before any court and that administrative or quasi-judicial Tribunals are only fact-finding bodies, and the method of fact-finding varies from that sanctioned by law in courts. If it is insisted that the doctor should be examined then perhaps, in this particular case, the very purpose of the Act will get defeated and the Commissioner will not be able to adjudicate on the issue before him. The learned Judges of the Division Bench in United India Insurance Co. Vs. Sethu Madhavan, have held:

''The administrative and quasi-judicial proceedings are not fettered by technical rules or evidence and the Tribunals are entitled to act on materials which may not be accepted as evidence in a court of law. But they should adhere to the rules of natural justice.''

(7) Considering all the materials we are of the view that the Commissioner did not commit any error in accepting the medical certificate without the doctor being examined."

38. In Moideen Vs. Gopalan, Division Bench of Kerala High Court speaking through Mr. Justice K.T. Thomas, (as his Lordship then was), while dealing with Section 2 (1) (n) of the Act and dismissing the appeal of the employer held as under:

"(7) Even assuming that the claimant''s employment on that day was of a casual nature, that by itself is not enough to push him out of the ambit of the definition of workman. If a person has to be ousted out of the contours of the definition, the casual nature of his engagement must couple with the succeeding postulate in the definition that such employment should not be for the trade or business of the employer. The word ''and'' used in the definition is for the conjunction of the two postulates together in one person. No interpretation to make the two postulates disjunctive is warranted in the context...

(8) Even otherwise, we cannot hold that the claimant''s employment was of a casual nature as envisaged in the definition clause. The word ''casual'' must be given its normal meaning in the context in which the definition is formulated. The word ''casual'' here only means just informal or a happening by chance or undesignated, etc. Way back in 1936 Beaumont, C.J. was not inclined to give a different meaning to the term ''casual'' in the definition [vide Nadirsha Hormusji Sidhwa Vs. Krishnabai Bala, The learned Judge has observed that even in England the expression ''casual employment'' was not given any strait-jacket definition as there are some cases in which the employment is not casual. Taking cue from the said observation, Chhangani, J. held in the case of Madanlal v. Mangali 1958 ACJ 41 that the term ''casual'' in the definition of workman ''in the Act is not a matter of precision, but is a

colloquial term and is not capable of being exactly defined''. At any rate, we are not disposed to treat employment of the claimant for cutting down the tree as one of casual nature on the facts of this case..."

39. On examination of the case-law referred to hereinabove and also keeping in view the evidence produced by the parties before the Commissioner as discussed in the preceding paras and also particularly keeping in view the finding based on the record that the deceased was employed by appellant Tapender Singh for his house building with PW 2, and at the time of accident he (deceased) was unloading the marble sheets from the truck in question; and the appellant having not produced any evidence to substantiate his plea as urged in these appeals there is no difficulty for this court to reaffirm its finding that the deceased was a workman employed by the ''appellant'' and not by the ''appellants''. Further, the accident having been caused during the course of employment with the appellant is also proved.

40. Plea based on Section 2 (1) (n) and case of the deceased being not covered by the relevant entry of Schedule II of the Act, was admittedly not raised in the written statement filed before the Commissioner below. In fact it is being raised for the first time in appeal in this court. Whether the appellant can be permitted to raise such plea has been attracting attention of the courts. Reference is being made to some precedents in this behalf hereinafter.

41. In the case of Executive Engineer (Construction), West Division, Department of Industries and Commerce, Madras v. T.L. Thyagarajan, AIR 1965 Mad 372 it was held as under:

"(7) Having found that the Executive Engineer was the employer of the deceased, the next question for consideration is whether the deceased was a workman under the Workmen''s Compensation Act. Admittedly, he was a workman, because he was in charge of the supervision of the construction of the building. He was not a holder of any diploma but was appointed to supervise the labourers, who were actually given charge of the construction of the building. He was a workman as defined under the Workmen''s Compensation Act. The learned counsel for the State has stated that in order to attract the definition of workman in Clause (viii) of Schedule II of the Workmen''s Compensation Act it has to be proved that the building was more than one storey in height above the ground or 20 (Sic. 12) ft. or more from the ground level to the apex of the roof. No doubt, this point is taken for the first time in this court, I do not see any discussion either in the judgment or in the pleadings filed by the State Government. Therefore, in the absence of a finding it is not possible for me to say that the deceased was not a workman under Clause (viii) of Schedule II of the Act. When the respondents filed this application it is the duty of the State to prove that the deceased was not a workman by placing sufficient materials before the Additional Commissioner for Workmen''s Compensation. As they did not place any material before the Additional Commissioner for Workmen''s Compensation, they are not entitled to urge this point in this court."

42. Where no objection was taken in the written statement, it was held in United India Insurance Co. Ltd. Vs. Roop Kanwar and Others, as under:

"(14) The next question for consideration is whether the insurance company is liable to indemnify the insured employer only when the accident takes place in a public place. No such objection was taken by the appellant in its written statement filed before the Workmen''s Compensation Commissioner. Neither an issue was framed nor any evidence was produced on this point by the insurance company. As such this objection cannot be allowed to be raised at appellate stage. Reference of United India Insurance Co. Ltd. v. Gangadharan 1988 ACJ 296 may be made here."

43. At the risk of repetition it may be appropriate to observe that no plea was raised before the Commissioner below. And where plea having not been taken in original proceedings, it was not allowed to be taken in appeal for the first time. [See Rawal Das Nichal Das Vs. Jagarnath Ekka,

44. When a plea had not been raised during trial under Workmen''s Compensation Act that claimant was not a workman it was held by a learned single Judge of Punjab & Haryana High Court in Shahabad Farmers Cooperative Marketing-cum-Processing Society Ltd. v. Chajju Ram 1989 ACJ 641 as under:

"(1) Chajju Ram was working with Shahabad Farmers Cooperative Marketing-cum-Processing Society, Shahabad (for short ''the Society''). On 15.1.1975 when he was getting the bags loaded, some bags from the heap fell on his left leg as a result of which the same was badly crushed. On 10.10.1977 he filed application u/s 10 of Workmen''s Compensation Act, 1923 (for short ''the Act''), before the Commissioner under the Act, for award of Rs. 16,000 for the permanent disability caused in his left leg. The application was contested on the point of limitation and whether the accident arose out of and during the course of employment. It was nowhere pleaded in the written statement that the claimant was not a workman nor this point was raised during trial of the application. But at the time of arguments in appeal, this point was sought to be raised but was not allowed to be raised for want of pleadings.

45. It was held in Madanlal v. Mangali 1958-65 ACJ 41 that in order to succeed that a labourer was not of the category of workman, both the conditions must be satisfied, (a) that the employment must be casual, and (b) that employment must be otherwise than in the employer''s trade or business. And these conditions are required to be established by the employer. Para 14 of this judgment which is relevant, is extracted hereinbelow:

"With regard to the third point that Miss Gopi was not employed for the employer''s trade or business, I consider that this again is a pure question of fact. The house in which the construction was going on, was let out to other persons and the employer was deriving benefit therefrom. This is certainly a subsidiary business though not the principal business within the terms of Section 2 (1) (n) of the Act. T. Vinayaka

Mudaliar Vs. Mindala Pottiamma, is a clear authority in support of this proposition.

On these facts the Compensation Commissioner has in my opinion correctly found that Miss Gopi was employed for the purposes of the employer''s trade or business. It will be further pertinent to point out in this connection that the word ''and'' occurring in the definition of ''workman'' has been used conjunctively and, therefore, in order to take out a labourer from the category of a workman, both the conditions must be satisfied:

(1) That the employment must be casual.

(2) That the employment must be otherwise than in the employer''s trade or business. Absence of only one of these conditions will not result in taking out a labourer from the category of a workman. In this particular case, however, both the conditions have been found to be absent by the Commissioner and as observed above, the findings in this connection being on questions of fact, are not liable to be challenged in this appeal. I must, therefore, hold that Miss Gopi was workman within the meaning of Section 2 (1) (n) of the Act."

46. Constitution Bench of Apex Court in Union of India (UOI) Vs. T.R. Varma, while dealing with a service matter took the view that the Evidence Act has no application to inquiries conducted by Tribunals, even though they may be judicial in character. Law requires that such Tribunals should observe rules of natural justice in the conduct of the inquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a court of law. Record of the Commissioner below shows that evidence of the appellant was closed after sufficient opportunity was allowed to the appellant.

47. In Juthi Devi and Others Vs. Pine Chemicals Ltd. and Another, Jammu & Kashmir High Court speaking through Mr. Justice R.P. Sethi (as his Lordship then was), held that traditional, conservative and literal approach should be avoided. What was held and is relevant for the purpose of these appeals is extracted hereinbelow:

"The Act was enacted with the object of realisation that a legislation was necessary for the achievement of the ideals of social security of the workmen employed in the industry and dealt with the subject of protecting their hardships arising from accidents. The Act assumes a greater importance after the nation committed itself to the ideals incorporated in the Constitution of India, particularly in the preamble for achieving socialistic society in the country. The general approach of the authorities under the Act should, therefore, be ordinarily to award compensation to the workman who sustains injuries arising out of and in the course of employment. The authorities are not expected to adopt a technical approach inconsistent with the provisions of law with the object of taking away the benefit from the workmen and depriving compensation to their families for which the Act was enacted. The employer is liable to pay compensation at the fixed rates as specified in the Schedule I of the Act leaving no discretion with the authorities in the matter of

quantum of compensation. The authorities under the Act should avoid adopting the traditional, conservative and the literal approach while interpreting the provisions of the Act and should not ignore the consideration of fairness, justice, inconvenience, absurd, arbitrary and the mischievous results which may follow on account of the verdict given by them. The present trend and the stress of judicial interpretation is on the ''purposive approach'' and not the orthodox ''literal approach''."

48. To similar effect is the decision of Gujarat High Court in Baria Guman Hamji and Another Vs. Rajanikant J. Shah, wherein it was held that strict principles of evidence and technical rules of CPC are not applicable while dealing with the matters under the Act and the Commissioner has to see that eligible victim of employment injuries are awarded proper compensation under the Act.

49. In Gorelal v. Dropadibai 1965 ACJ 248 while considering as to who is a workman within the meaning of Section 2 (1) (n) of the Act, it was held that even person employed for a day, week, month or an year is a workman. Employment of person for construction work of building on wages, was not held to be casual in nature. It was further held in this decision that onus to prove the casual nature or otherwise depends upon the nature of the employment.

50. When the matter was taken up for further hearing on 16.7.2004, the learned counsel for the appellant was specifically called upon to explain as to how his client has been prejudiced for want of inadequate and/or insufficient pleadings of respondent Nos. 1 to 5. He was also called upon to explain whether it has resulted in failure of justice. He reiterated his earlier submissions that in order to assume jurisdiction under law, unless adequate and proper facts as envisaged by the statute were set out in the claim petition, Commissioner could not in law have entertained the petition, as in the present case. For the view that has been taken in the preceding paras of this judgment, this plea has no merit.

51. So far as F.A.O. No. 6 of 2004 filed by appellants is concerned, there is substance in what was urged by learned senior counsel for them. Driver appeared as RW 1. He has pledged his oath and has also withstood the test of cross-examination. He could not be dislodged on behalf of appellant Tapender Singh. Even otherwise, on the basis of the evidence, as discussed hereinabove, plea of the appellants needs to be upheld. Again at the cost of repetition, it may be appropriate to observe here that no good reason has been given for not leading any evidence by appellant. Thus, his plea that deceased was engaged by the truck owner, is merely on paper without being there any evidence to support or prove it. On the other hand, evidence of respondent Nos. 1 to 5 and statement of RW 1 has remained uncontroverted which proved the case of the respondents to the hilt. As such their appeal deserves to be allowed.

52. In view of the aforesaid conclusions, next vital question is that with the acceptance of the appeal of the appellants, who has to pay the compensation. In my

view, it is employer, i.e., the appellant Tapender Singh and none else.

53. Here another argument addressed by Mr. Kanwar on his clients'' behalf also needs to be noted. Per him even if appeal of his client is dismissed and that the other appeal is allowed, his client cannot be held liable for payment of amount of compensation assessed by the Commissioner below, i.e., for which appellants were held liable. Reason being that the respondent Nos. 1 to 5 have neither filed any cross-objections nor have initiated any other suitable legal proceeding so as to enable them to claim full amount from the ''appellant''. It hardly needs to be pointed out that the Workmen''s Compensation Act, 1923 and other similar labour laws are beneficial legislations. They have to be given a liberal meaning unless there is something to the contrary compelling to give restricted or limited meaning to their provisions. Nothing was brought on record or to the notice of this court at the time of hearing as well as rehearing that restricted meaning is to be extended to the provisions of Workmen''s Compensation Act.

54. In addition to this, compensation payable under the Act is by the employer. Appellant Tapender Singh has been held to be the employer of Mohar Singh deceased. It has also been held that accident occurred during the course of the employment of the deceased with his employer while he was working along with PW 2.

55. At this stage combined reading of Sections 4 and 4-A of the Act suggests that compensation is payable by the employer, therefore, the argument of Mr. Kanwar in the absence of any cross-objection or any other legal proceeding on the part of respondent Nos. 1 to 5, in no case liability of his client can be extended, is without any force in law. It hardly needs to be clarified in the context of assessment of compensation under the Act that it is precise and mathematical depending upon proof of income, monthly wage as well as age of the deceased. Once these factors are determined, then Commissioner has no option but to calculate the compensation and in a given case, if he is satisfied about delay in its payment as per law, then interest and penalty can also be levied. In the instant case Commissioner below had fallen into error when he apportioned the liability between the appellant on the one side and the appellants. This finding has been set aside. As such it is the appellant Tapender Singh who is liable to pay the entire amount of compensation. For the fault on the part of adjudicatory authority, claimants cannot be left high and dry.

56. Another reason to take this view is that so far as respondent Nos. 1 to 5 are concerned, they were duly compensated by the Commissioner when it assessed compensation, but fell in grave error in apportioning the liability for payment of compensation. Therefore, these respondents were well advised not to file any cross-objection and/or initiate any other action. Last but not the least on what grounds they could have filed cross-objection and/or any other litigation, could not be spelt out and rightly because they had been awarded compensation as per law.

Thus on this basis also, argument of Mr. Kanwar needs to be rejected.

57. No other point is urged.

58. In view of the aforesaid discussion F.A.O. No. 6 of 2004 is hereby allowed, and as a result of it impugned order of the Commissioner is modified, thus, holding the appellant Tapender Singh liable for payment of entire compensation assessed and his appeal, i.e., F.A.O. No. 445 of 2003 stands dismissed. Consequently, it is ordered that he shall deposit the remaining 50 per cent of the amount with interest, etc., that was held payable by appellants by or before 31.8.2004, failing which, he shall be liable to pay 50 per cent amount of penalty on the amount that was held payable by appellants. Amount deposited by the appellants with up-to-date interest is ordered to be remitted to their bank accounts, numbers whereof Mr. Gautam submitted will be furnished within two weeks.

59. Parties are left to bear their own costs.

60. Both these appeals were taken up at the joint request of learned counsel for the parties, who submitted that these may be disposed of at this stage only, as according to them pendency is not in favour of either of them. It was for this reason that these were heard.

61. Interim order(s), if any, shall stand vacated. Pending application(s), if any, shall also stand finally disposed of.