Smt. Bhagya Laxmi And Ors vs Kalyan Singh & Anr on 12 August, 2015

Author: Rajiv Sharma

Bench: Rajiv Sharma

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

FAO No. 221 of 2007.
Reserved on: 11.8.201
Decided on: 12.8

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Smt. Bhagya Laxmi and ors. .....Appellants.

Versus

Kalyan Singh & anr. .....Respondents.

Coram
The Hon'ble Mr. Justice Rajiv Sharma, Judge.
Whether approved for reporting? Yes.

of

For the appellants: Mr. V.S.Chauhan, Advocate.
For the respondents: Mr. Sunil Chauhan, Advocate, for respondent No.
Mr. Ajay Kumar Sr. Advocate, with Mr. Dheeraj K.
Vashistha, Advocate, for respondent No. 2.

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Justice Rajiv Sharma, J.

This appeal is instituted against the award dated 28.3.2007, rendered by the learned Commissioner, Workmen's Compensation, Shimla (Rural), Distt. Shimla, H.P. in case No.9/2000.

2. Key facts, necessary for the adjudication of this appeal are that the appellants/claimants have filed a petition under Section 22 of the Workmen's Compensation Act 1923 (hereinafter referred to as the Act) for grant of compensation, being dependent of late Sh. D.D. Panday. Late D.D. Panday died in the accident during the course of employment with respondent No. 1 on 24.5.2000. The

respondent No. 1 was engaged by respondent No. 2 for construction of building. The deceased was getting salary of Rs. 5,000/- per month. His age at the time of accident was 34 years. He was admitted in IGMC, Shimla on 24.5.2000. He died on 17.6.2000. The FIR was registered. The post mortem was also conducted at IGMC, Shimla. The appellants claimed compensation to the tune of Rs.

11,00,000/-.

3. The petition was contested by respondent No. 1. He has denied the employer-employee relationship. According to him, he has .

undertaken the construction work of ground and first floor of the house of respondent No. 2 at New Shimla. Late Sh. D.D. Panday was not employed by him. He was not paying Rs. 5,000/- per month to the deceased. The petition was also contested by respondent No. 2. Respondent No. 2 has taken a specific stand that the service of late Sh. D.D. Panday were never of availed by her. She had given reference to agreement dated 9.10.1999.

4. The learned Commissioner framed the issues and dismissed rt the petition on 28.3.2007. Hence, this appeal at the instance of the appellants/claimants.

5. The appeal was admitted on 12.9.2007 on the following substantial questions of law:

> "1. If the witness is not confronted with his earlier statement, whether the said statement can be relied upon or taken into consideration for appreciation of evidence?
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> 2. Whether the work was being executed by the deceased at the time of accident was in continuity of earlier work, if so, whether the claimants are entitled for the amount of compensation?
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> 3. Whether the commissioner was right in holding that the deceased was not a workman under the provisions of Workmen's Compensation Act, 1923?"

6. Mr. V.S.Chauhan, Advocate for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that there was employer and employee relationship between the deceased and respondent No. 1. Respondent No. 1 had engaged the services of deceased on monthly sum of Rs. 5000/-. The deceased died due to electrocution.

On the other hand, Mr. Sunil Chauhan, Advocate for respondent No. 1 and Mr. Ajay Kumar, Sr. Advocate, for respondent No. 2 have supported the award dated 28.3.2007.

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7. I have heard learned counsel for the parties at length and gone through the records and award very carefully.

8. PW-1 Bhagya Laxmi testified that her husband was working as Plumber. He was working in the building of respondent No. 2. He was employed by respondent No. 1. The accident has taken place on of 24.5.2000. He was electrocuted. He was 34 years of age at the time of death. She has to support three children. The entire family including her rt in-laws were dependant on late Sh. D.D. Panday. Her husband was admitted in IGMC, Shimla. He died on 17.6.2000. She proved death certificate Mark-A. In her cross-examination, she deposed that her husband was working as Plumber. PW-2 HC Ramesh Chand has proved copy of FIR Ext. PW-2/A. PW-3 Dr. Piyush Kapila has conducted the post mortem examination. According to him, it was a case of electrocution due to high tension wire. He was working as plumber on 24.5.2000. He was admitted in the IGMC, Shimla up to 17.6.2000. The deceased died due to septicemia shock as a result of electrical injuries sustained by accidental electrocution by High Tension Wires. PW-1 Bhagya Laxmi was further cross-examined qua the certified copy Ext. PX.

9. Respondent No. 1 has appeared as RW-1. According to him, he has undertaken the work of construction of house of respondent No. 2 at New Shimla. He has undertaken the work of ground floor and first floor.

He has completed the work in the month of February, 2000. Thereafter, he handed over the same to respondent No. 2. He has never worked beyond first floor. He came to know about the death of late Sh. D.D. Panday in the month of May, 2000. He went to see him at IGMC, Shimla. He could .

speak at that time. He told him that he was working on the 3rd floor of respondent No. 2. He had gone to repair water tank. He told him that he was called by respondent No. 2. In his cross-examination by the learned Advocate appearing on behalf of respondent No. 2, he has admitted that on two floors he had undertaken the contract of electricity and water.

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10. RW-2 Krishna Devi has produced the requisitioned record.

11. RW-3 HC Baldev Singh deposed that FIR No. 89 of 2000 was rt registered on 24.5.2000 under Section 336 IPC. He proved the statement Ext. RW-3/A. He was the I.O. he has recorded the statement of late Sh.

D.D. Panday. According to the statement of the deceased, he was working as Plumber. He was working at the instance of respondent No. 2. Late Sh.

D.D.Panday, had gone all alone to the house of respondent No. 2. When he climbed on the roof of the building, he came in contact with 33 KV line.

He fell down and was taken to IGMC, Shimla. According to him, the death was not caused due to the negligence of respondent No. 1. He proved the statement of the deceased vide Ext. RW-3/A.

12. RW-4 Suman Kohli deposed that she has entered into agreement with respondent No. 1 vide agreement Ext. RW-4/A. She was not responsible to compensate the claimant. It was the responsibility of respondent No.1. She in her cross-examination has admitted that she has never got any work executed from any person beyond agreement Ext. RW-

4/A. She has taken over the complete possession of the house in December, 2001. She also admitted that when late Sh. D.D. Panday died, respondent No. 1 Kalyan Singh was the contractor.

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13. RW-5 Zhunna alias Kaushal deposed that he was working as Plumber with late D.D. Panday. He has worked with him in the house of Suman Kohli. They have affixed water tank in the house of respondent No.2. They were sent to affix the same at the instance of contractor in the year 2000. Suman Kohli had informed that water tank was leaking.

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14. RW-6 Satish Kumar Khera has deposed that the construction work was undertaken by respondent No. 1 as per agreement Ext. RW-4/A. rt He has signed the agreement.

15. What emerges from the evidence discussed hereinabove is that agreement was entered into between respondent No. 1 & 2 vide Ext. RW-

4/A. The respondent No. 1 was the contractor. He has undertaken the construction work of house of respondent No. 2 vide agreement. The deceased was employed as Plumber by respondent No. 1. He had gone to the house of respondent No. 2 to affix the water tank. While he was repairing, he came in contact with the live electric wire. The deceased died and post mortem examination was conducted. According to PW-3 Dr. Piyush Kapila, he died due to electric shock. The appellants have proved copy of FIR Ext. PW-2/A and post mortem report. The learned Workmen's Commissioner has come to a wrong conclusion that there was no relationship of employer and employee between respondent No. 1 and late Sh. D.D. Panday. There is ample evidence on record to establish this fact.

The learned Workmen's Commissioner has wrongly placed reliance upon the statement of late Sh. D.D.Panday, recorded under Section 161 Cr.P.C.

vide Ext. RW-3/A and the statement made by PW-1 Bhagya Laxmi dated 17.6.2004 in criminal case before the learned ACJM, Shimla. It is settled .

law that the statement under Section 161 Cr.P.C. has no evidentiary value.

The statement of PW-1 Bhagya Laxmi recorded before the learned ACJM, Shimla could not be relied upon in a civil case.

16. In the case of Onkarmal and another vrs. Banwarilal and others, reported in AIR 1962 Rajasthan 127, the learned Single Judge of has held that the judgment of acquittal in a criminal Court is irrelevant in a civil suit based on the same cause of action, just as a judgment of rt conviction cannot, in a subsequent civil suit, be treated as evidence of facts on which the conviction is based. It has been held as follows:

> "24. I now turn to the plaintiff's cross-objection. The learned District Judge has held that beyond the return of the money which the plaintiffs paid to the defendants, namely, Rs. 700/-, the former were not entitled to get any damages, special or general. The main reason which seems to have prevailed with the learned District Judge was that the defendants had been acquitted in the criminal case of the charge of wrongful confinement among other charges for which they had been prosecuted. As the learned Judge has put it, the accused had been acquitted by a criminal court and, therefore, it must be held that they had not kept the plaintiff Banarsilal under illegal confinement and were innocent in this respect. To me, it clearly appears that, in taking this view, the learned District Judge fell into a grave error of law.
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> From what I have stated in the foregoing part of my judgment, I have no hesitation in saying that, left to himself, the learned Judge would have been well disposed to hold, on the material which he was prepared to accept as true, that the plaintiff Banarsilal had been detained under illegal custody by the Sub-Inspector Jagannathsingh at the instance of the defendants. In fact, this is the entire foundation of his judgment in so far as he decreed the return of the sum of Rs. 711/-by the defendants to the plaintiffs. And yet, when he came to deal with the question of damages awardable to the plaintiffs in the same connection over and above the return of the money, which had been actually paid by them to the defendants, he thought that he was bound by the finding of the criminal court. There is, however, abundant authority for the proposition that a judgment of acquittal in a criminal court is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot, in a sub-sequent civil suit, be treated as evidence of facts on which the conviction is based. The correct position in law, therefore, is that the Civil Court must .
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> independently of the decision of the criminal court investigate facts and come to its own finding. Thus it was held in Venkatapathi v.
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> Balappa, AIR 1933 Mad 429 that in a suit for damages for malicious prosecution, under Section 43 of the Evidence Act, the judgment of the criminal court can only be used to establish the fact that an acquittal has taken place as a fact in issue in the civil suit, but the civil court cannot take into consideration the grounds upon which that acquittal was based and it would be for the civil court itself to undertake an entirely independent inquiry before satisfying itself of the absence of reasonable and probable

> cause. Again, it was held of in Ramadhar v. Janki, AIR 1958 Pat 49 that a judgment of a criminal court is admissible to prove only who the parties to the dispute were and what order was passed; but the facts stated therein or statements of the evidence of the witnesses examined in the case or the findings given by the court are not admissible at all and the civil court is bound rt to find the facts for itself. That this view is unchallengeably correct would appear from the judgment of their Lordships of the Supreme Court in Anil Behari v. Latika Bala Dassi, (S) AIR 1955 SC 566. I have, therefore, no hesitation in holding that the learned Judge was completely wrong when he thought that on the score mentioned above the plaintiffs were not entitled to recover any damages from the defendants for the unlawful detention of the plaintiff Banarsilal at the police outpost Jasrapur from the 31st May, 1952, to the morning of the 2nd June, 1952."

17. In the case of Municipal Committee, Jullundur City vrs.

Shri Romesh Saggi and others, reported in AIR 1970 Punjab and Haryana 137, the Division Bench has held that the judgment of a Criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunals. It has been held as follows:

> "35. For the reasons recorded in OUT separate judgments, we answer the question referred to us in the following manner, and direct that this appeal will now go back to the learned Single Judge for disposal on merits in accordance with law:--
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> "The Judgment of a Criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunals, dealing with .
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> a claim petition under Section 110-C of the Motor Vehicles Act, and its findings as to the guilt or otherwise of the driver are wholly irrelevant for the purpose of the trial on merits of the claim petition before the Motor Accidents Claims Tribunal. Such judgment can however, be relevant only for the purpose and to the extent specified in Section 43 of the Evidence Act"

18. In the case of Yoginder Paul Chowdhry vrs. Durga Dass of Punj and another, reported in 1972 A.C.J. 483, the learned Single Judge has held that the judgment of the Criminal Court was not binding on the Civil Court. It has been held as follows:

> rt "[5] The learned Tribunal was, no doubt, right in his view that the burden of proving that the accident occurred due to the rashness or negligence of the first respondent lay upon the appellant and that if he failed to discharge this onus satisfactorily, the weakness of the respondent's evidence would not matter. But the learned Tribunal did not take into consideration two factors which supported the

appellant's case, namely, (1) the admission made by the first respondent in the criminal Court that the accident was due to his rashness and negligence, and (2) the circumstances under which the accident occurred. The first respondent was challenged by the police in connection with this accident and when a charge was framed against him to the effect that the accident occurred due to his rashness and negligence, he pleaded guilty to the the charge and was convicted and sentenced to pay a fine of Rs. 600.00. The learned counsel for the appellants contends that the conviction of the first respondent by the Criminal Court was conclusive evidence of the rashness and negligence of the first respondent and that the judgment of the criminal Court was binding upon the Tribunal. In support of this contention, he has placed reliance upon the judgment of the Punjab and Haryana High Court in the case of Sadhu Singh v. The Punjab Roadways and another1, in which Mr. Justice D. K. Mahajan held that the Motor Accidents Claims Tribunal constituted under the Motor Vehicles Act, 1939 was a statutory Tribunal and was bound by the judgment of the criminal Court. In so holding, the learned judge has relied upon a decision of Madras High Court in Jerome D'silva v. The Regional Transport Authority3 and a judgment of the Mysore High Court in the case of P. Channappa v. Mysore Revenue Appellate Tribunal3 With respect, these two decisions do not really support the view taken by Mr. Justice Mahajan. In both these cases, the statutory Tribunal on which the judgment of the criminal .

Court was held to be binding was the Road Transport Authority. In these cases, the driver of the motor vehicle was prosecuted in a criminal Court and was acquitted. But the Road Transport Authority were seeking to cancel his licence on the same charge on which he was prosecuted and acquitted. It was on these facts that it was held in these cases that it was not open to the statutory Tribunal to make a fresh enquiry into the same charge which had already been enquired into by the criminal Court. On the other hand, there is a direct decision of of Madras High Court under the Motor Vehicles Act which lays down the scope of the power of the Motor Accidents Claims Tribunal. This is the case Krishnan Asari and another v. Adaikalam and others. After referring to the case law on the subject, the High Court held that any decision of a criminal rt case could not be relied on as one binding in a civil action and that equally the findings in a civil proceeding were not binding on a subsequent prosecution founded upon the same or similar allegations. There is a decision of the Mysore High Court on the point in Seethamma and others v. Benedict D'sa and others in which also it was held that the mere fact that the driver of the bus who was prosecuted for rash and negligent driving had been acquitted would not be a proof of the fact that he was not guilty of negligence. The acquittal order has to be construed in the circumstances of each case. The purpose for which such order of acquittal could be used was only to prove that there was an order of acquittal and nothing more. With respect, therefore, I cannot agree with the view expressed by Mr. Justice Mahajan in the case referred to by the learned counsel for the appellant and I cannot on the strength of the judgment of the criminal court alone hold that the respondent was guilty of rashness or negligence."

19. In the case of Prabhakar Babusso Chodankar and another vrs. Smt. Maria Victoria Periera, reported in 1977 Goa, Daman & Diu 15, the learned Single Judge has held that judgment of the Criminal Court is not binding on the Motor Accident Tribunal and it is not inhibited from coming to its own conclusion as to the veracity of the witnesses. It has been held as follows:

> "8. Learned counsel for the appellants argued that witness Fonseca had been disbelieved by the Criminal Court and that was a good reason to disbelieve him in these proceedings as well. The argument has no substance. Section 43 of the .
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> Evidence Act lays down that judgments other than those mentioned in Sections 40 to 42 are irrelevant unless the existence of such a judgment is a fact in issue. It is nobody's case that the judgment of the Criminal Court came under the ambit of Sections 40 to 42 of the Evidence Act. Therefore the fact that the Criminal Court did not rely on the statement of Fonseca did not in any inhibit the Tribunal from coming to its own decision about the veracity or otherwise of Fonseca's statement."

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20. In the case of Hazari Lal vrs. The State (Delhi Admn.), reported in AIR 1980 SC 873, their lordships of the Hon'ble Supreme rt Court have held that statements made by witnesses in the course of investigation cannot be used as substantive evidence.

> "7. The learned counsel was right in his submission about the free use made by the Courts below of statements of witnesses recorded during the course of investigation. Section 162 of the Code of Criminal Procedure imposes a bar on the use of any statement made by any person to a Police Officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradicting the witness in the manner provided by s.145 of the Indian Evidence Act. Where any part of such statement is so used any part thereof may also be used in the re- examination of the witness for the limited purpose of explaining any matter referred to in his cross-examination. The only other exceptions to this embargo on the use of statements made in the course of an investigation, relates to the statements falling within the provisions of s. 32(1) of the Indian Evidence Act or permitted to be proved under s. 27 of the Indian Evidence Act S.145 of the Evidence Act provides that a witness may be cross-examined as to previous statements made by him in writing and reduced into writing and relevant to matters in question, without such writing being shown to him or being proved but, that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Courts below were clearly wrong in using as substantive evidence statements made by witnesses in the course of investigation. Shri H. S. Marwah, learned counsel for the Delhi Administration amazed us by advancing the argument that the earlier statements with which witnesses were confronted for the purpose of contradiction could be taken

> into consideration by the Court in view of the definition of "proved" in section 3 of the Evidence Act which is, "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man, ought, in the circumstances of the .
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> particular case to act upon the supposition that it exists." We need say no more on the submission of Shri Marwah except that the definition of proved does not enable a Court to take into consideration matters, including statements, whose use is statutorily barred."

21. Their lordships of the Hon'ble Supreme Court in the case of Baldev Singh vrs. State of Punjab, reported in (1990) 4 SCC 692, have of held that statement recorded under Section 161 Cr.P.C. shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162(1). It has been held as follows:

> rt "5. It is seen from the judgment of the High Court that though PW-10 in his chief examination has supported the prosecution version in all its material particulars has given a complete go- by and struck a death kneel to the prosecution in his cross-examination stating that due to darkness he could not identify the culprits. The High Court was inclined to place reliance on his evidence on the ground that this witness in his statement before the police; evidentially referring to the statement recorded under Section 161 of the CrPC during the investigation as well in the first information report Exh. P.O., has narrated all the relevant facts and had not whispered in those statements that he could not identify the appellant due to darkness.

This reasoning of the High Court in our view is erroneous. Needless to stress that the statement recorded under Section 161 of the CrPC shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso toSection 162(1) and that the first information report is not a substantial piece of evidence. The High Court has misled itself into relying upon these two statements and thereby has fallen into a serious error. It is pertinent to note in this connection that PW-7, an Advocate who is a disinterested witness has testified to the fact that both PWs 9 and 10 met him after the incident, but they did not tell the name of the appellant."

22. Their lordships of the Hon'ble Supreme Court in the case of Shanti Kumar Panda vrs. Shakuntala Devi, reported in (2004) 1 SCC 438, have held that decision by a Criminal Court does not bind the Civil Court while a decision by the Civil Court binds the Criminal Court. It has been held as follows:

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> " 15. It is well-settled that a decision by a Criminal Court does not bind the Civil Court while a decision by the Civil Court binds the Criminal Court (See Sarkar on Evidence, Fifteenth Edition, page

845). A decision given under Section 145 of the Code has relevance and is admissible in evidence to show :- (i) that there was a dispute relating to a particular property; (ii) that the dispute was between the particular parties; (iii) that such dispute led to the passing of a preliminary order under Section 145(1) or an attachment of under Section 146(1), on the given date, and (iv) that the Magistrate found one of the parties to be in possession or fictional possession of the disputed property on the date of the preliminary order. The reasoning recorded by the Magistrate or other findings arrived at by him have no relevance and are not admissible in evidence before the rt competent court and the competent court is not bound by the findings arrived at by the Magistrate even on the question of possession through, as between the parties, the order of the Magistrate would be evidence of possession. The finding recorded by the Magistrate does not bind the Court. The competent court has jurisdiction and would be justified in arriving at a finding inconsistent with the one arrived at by the Executive Magistrate even on the question of possession. Sections 145 and 146 only provide for the order of the Executive Magistrate made under any of the two provisions being superseded by and giving way to the order or decree of a competent court. The effect of the Magistrate's order is that burden is thrown on the unsuccessful party to prove its possession or entitlement to possession before the competent court."

23. Their lordships of the Hon'ble Supreme Court in the case of Ram Swaroop and others vrs. State of Rajasthan, reported in AIR 2004 SC 2943, have held that attaching undue importance by Court to statements made in course of investigation and recorded under S. 161 Cr.P.C. is not proper. It has been held as follows:

"23. We have also noticed that the High Court has attached undue importance to the statements made in the course of investigation and recorded under Section 161 of the Code of Criminal Procedure. It is well settled that a statement recorded under Section 161 of the Code of Criminal Procedure cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness. We find that in paragraph 6 of the judgment, the High Court while dealing with the evidence of PW-7 has clearly treated the statement of PW-7, recorded in the course of investigation, as substantive evidence in this case. The High Court observed :-

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"He is consistent in his statement U/s. 161 Cr. P.C. that while he along with Kishore (PW-10) were sitting in front of the house of Kishore, which is just near the Shiv Temple, Ramswaroop and his sons Ram Kalyan and Hiralal armed with lathies came and gave beating to Bhanwar Lal and specifically head injury is attributed to Ramswaroop. In the statement in court, he only attributed injuries to Hiralal and Ram Kalyan. Even he is consistent on the fact that while Madan Lal and his mother came and tried to save Bhanwar Lal from these persons, they were caught hold by

Dakhan and Ram Kanya and of Dakhan and Ram Kanya have given beating to Mdan Lal and his mother."

24. In our view the High Court ought to have considered his deposition rather than his statement recorded under Section 161 of rt the Code of Criminal Procedure. The inconsistency between the two versions is obvious from the fact that the prosecution had to declare the witness hostile. The approach of the High Court, therefore, is clearly erroneous."

24. In the instance case, the evidence which has been led by the parties before the learned Workmen's Commissioner was to be looked into instead of giving undue importance to statement recorded under Section 161 Cr.P.C of late D.D. Pandaty and his wife vide Ext. PX, especially when it has come in the evidence of RW-4 Suman Kohli that she has got the work executed as per agreement Ext. RW-4/A. The respondent No. 1 has also failed to deposit the compensation amount with the Commissioner, Workmen's Compensation and thus he is liable to pay penalty @ 20%. The substantial questions of law are answered accordingly.

25. The deceased was 34 years of age. It has come in the evidence that the claimants were dependent upon the deceased. The deceased was earning Rs. 5000/- per month. The accident has taken place on 24.5.2000. The salary of the deceased was to be taken as Rs. 2000/- per month. The petitioners, being the legal heirs of the deceased, are entitled to compensation amount and penalty as under:

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(1) Age 34 years, salary Rs. (2000 - 1000) = Rs. 1000 per month, for the purpose of compensation i.e Rs. 1000 x 199.40 = 1,99,400. (2) Simple interest @ 12% per annum from 24.5.2000, till date, comes out to Rs. 3,63,944.88.

(3) Penalty @ 20% comes out to Rs.39,880.

of (4) Total amount comes out to Rs. 6,03,224.88.

26. Accordingly, the appeal is allowed. The claimants are entitled to compensation of Rs. 6,03,224.88 , as computed hereinabove.

rt The amount shall be paid by respondent No. 1 to the claimants within a period of six weeks from today.

August 12, 2015, (Rajiv Sharma),
(karan) Judge.