

(2005) 08 GUJ CK 0049

In the Gujarat High Court

Case No : First Appeal No. 2117 of 2005 and Civil Application - For Stay No. 6791 of 2005

Branch Manager, New India Assurance Co. Ltd.

APPELLANT

Vs

Gitaben and Others

RESPONDENT

Date of Decision : 02-08-2005

Acts Referred:

Workmens Compensation Act, 1923 — Section 3, 30

Citation : (2006) ACJ 1784 : (2006) 1 GLR 620

Hon'ble Judges : M.C. Patel, J;B.J. Shethna, J

Bench : Division Bench

Advocate : Shalin N. Mehta, No. 1, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

B.J. Shethna, J.—The appellant - insurance company has challenged in this appeal, the impugned judgment and award dated 01st February, 2005 passed by the learned Workmen Compensation Commissioner, Labour Court, Kachchh in Workmen Compensation (Fatal) No. 12 of 2003 filed by the respondents - claimants whereby the learned Commissioner allowed the application of the claimants and ordered the appellant - insurance company to pay Rs. 4,19,840/- (Rupees Four lakh nineteen thousand eight hundred and forty only) to the claimants which may be deposited within 30 days from the date of the order alongwith interest at the rate of 12% per annum till the realisation from the date of the accident. The appellant - insurance company was also ordered to pay Rs. 1,000/- for funeral charges, Rs. 2,100/- for court fee stamps and Rs. 500/- towards costs. The respondent no. 1 - employer was ordered to deposit penalty of Rs. 2,000/- within 30 days from the date of the order. The appellant - insurance company has challenged the impugned judgment and award passed by the learned Commissioner in this appeal which is filed u/s 30 of the Workmen's Compensation Act.

2. Initially, in this appeal, substantial questions of law were not framed.

Therefore, Civil Application No. 6778 of 2005 was filed in this appeal and following three questions were framed as substantial questions of law:-

A. Whether an accident that takes place on a public road while the deceased employee is on his way to his work place, can be said to fall u/s 3 of the Workmen's Compensation Act, 1923?

B. Whether in light of the ruling of the Hon'ble Supreme Court of India in the case of Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another, the case of the deceased workman who died in a vehicular accident while on his way to his work place, can be said to fall within Section 3 of the Workmen's Compensation Act, 1923?

C. Whether in absence of cogent and reliable evidence to show the income of the deceased, other than the income certificate issued by the respondent No. 6 herein, the Commissioner of Workmen's Compensation was right in holding that the monthly income of the deceased was Rs. 4,000/-?

The said application was granted today.

2. Out of the aforesaid three questions, the third and last question cannot be said to be a question of law much less, substantial question of law. It is a pure question of fact or at the most, it is a mixed question of fact. The remaining two questions are, in fact, on one point i.e. Whether the deceased employee died while on duty or not and his case would fall u/s 3 of the Workmen's Compensation Act or not.

3. Learned counsel Shri Shalin Mehta for the appellant - insurance company vehemently submitted that in this case, the learned Commissioner has wrongly allowed the claim application of the claimants by holding that the deceased died in an accident while on duty. Relying on two decisions of the Hon'ble Supreme Court (1) Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja and Others, and (2) Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another, Mr. Mehta submitted that in the instant case, it cannot be said that the deceased died while on duty. Therefore, the learned Commissioner committed grave error in allowing the claim petition of the claimants.

4. Before appreciating the aforesaid contentions, few relevant facts of this case are required to be stated which are as under.

5. It is the case of the claimants that deceased Jivram Jethabhai Bambhania was serving as block-maker with the respondent no. 1 - Vinod Narshi Kataria (employer) for which he was paid Rs. 4,000/- per month. On the fateful day of accident i.e. on 7th December, 2001 at about 10.00 a.m. employer of deceased Jivram - Shri Vinod Narshi Kataria came on his scooter no. GJ/12/1A2/9120 at the house of the deceased and took the deceased on his scooter for immediate completion of his work at Kotda (Chandrani). While they were proceeding on scooter for the purpose of completing work, the scooter met with an accident near village Kotda and the deceased died due to serious head injuries received

by him on the next day i.e. on 8th December, 2001 in the Anjar Government Hospital. The said scooter of employer - respondent no. 1 was insured by the present appellant - insurance company. Though informed about the accident, the insurance company did not pay the compensation. Therefore, notices were issued but the same remain unreplied. Therefore, they have filed Fatal Application No. 12 of 2003 before the Workmen Compensation Commissioner, Labour Court, Kachchh claiming compensation of Rs. 4,19,840/- with interest at the rate of 12% on it as well as 50% penalty and also claimed Rs. 2,500 by way of funeral charges.

6.1 Written statement (Exh.11) was filed by the appellant - insurance company wherein they denied the averments made in the claim application. They have gone to that extent by submitting that the scooter was not insured by them. They have also denied the fact that the accident took place while the deceased was on duty. However, before the learned Commissioner, the main contention of the appellant - insurance company was that the said scooter was never insured by them. The learned Commissioner came down very heavily in his judgment and heavily criticized irresponsible officers of the appellant - insurance company in view of the documentary evidence (Exh.38) - the policy of the scooter. The learned Commissioner also held that the deceased was also having driving license and it was proved beyond reasonable doubt that the scooter of the respondent no. 1 was duly insured by the present appellant - insurance company. The second contention that was raised before the learned Commissioner at the time of oral arguments was regarding the income of the deceased at the time of accident. However, at the time of arguments, it seems that the contention raised in the written statement that the deceased died while not on duty was never pressed into service. However, learned counsel Shri Mehta for the appellant - insurance company vehemently submitted that when this point was specifically raised in the written statement, then it being a substantial question of law, should be considered and decided by this court in view of the aforesaid two judgments of the Hon"ble Supreme Court on which he was relying.

6. To take a contention in the written statement is a different thing than to argue and press it at the time of hearing before the authority. If for the reasons best known to the appellant - insurance company, such contention was not pressed into service at the time of oral hearing, then we would not permit learned counsel Shri Mehta to raise such contention for the first time in this appeal.

7. Even if we had permitted Mr. Mehta to raise this contention, then on facts of this case, the said contention was totally without any merits. It is proved on the evidence on the record that the deceased died while on duty. It is clear from the averments made in the application as well as the oral evidence which was not substantially shaken in the cross-examination. Except the bare denial on the part of the appellant - insurance company, there is no other evidence which has come on record to destroy the case of the claimants.

8. It may be stated that deceased Jivram died at an young age of 29, leaving

behind his young widow and four minor children. It has come in evidence that on 7th December, 2001 at about 10.00 a.m. Vinod Narshi Kataria - respondent no. 1 - employer of deceased Jivram came to his (deceased) house and took him on his scooter for immediate completion of his work at Kotda (Chandrani). Unfortunately, near village Kotda, their scooter met with an accident and the deceased died on the next day with serious head injuries in the Anjar Government Hospital. Thus, his duty started as soon as his master came to take him on scooter for completion of work at Kotda village.

9.1 In case of Bai Valu Raja (supra), the facts were totally different. In that case, the boat, carrying the workman employed by the employer, while crossing the creek from point B to point A capsized due to bad weather and over-loading. On facts of that case, the Hon''ble Supreme Court held that the deceased could not be said to be in the course of his employment and any accident happening to him on the journey could not be said to have arisen out of and in the course of his employment.

9.2 In the case of Francis De Costa (supra), the deceased was going from his home to his place of work but he suffered injury in an accident on the way. Therefore, the Hon''ble Supreme Court held that it cannot be said to be an accident arisen out of and in the course of his employment.

10. At the cost of repetition, we may state that in the instant case, the facts are totally different. On the fateful day of the accident, the employer of deceased Jivram came to his house specially on scooter and took the deceased on his scooter to Kotda for immediate completion of his work. Unfortunately, near village Kotda, they met with an accident in which the deceased died. Therefore, on facts of this case, we are of the clear opinion that the learned Commissioner has not committed any error in holding that the deceased died in the course of his employment and rightly allowed the claim application of the claimants - young widow and four minor children of the deceased. Thus, in our considered opinion, none of the aforesaid two judgments of the Hon''ble Supreme Court will have any application on the facts of this case.

11. First Appeal No. 1106 of 2005 filed by Divisional Manager, Railways against the judgment and award passed by the Workmen Compensation Commissioner was dismissed by this court. It was a case of a deceased workman who was on duty as Engine Driver. On the fateful day i.e. 5th October, 1984, he received a call to bring Valsad-Ahmedabad 9 Down Locomoto from the Yard. When he was on his way to the yard, because of stress and duress, he received massive heart-attack in the midnight hours and died on the spot. Though he had actually not reached the train, it was held that he died in the course of employment and the appeal was dismissed. In case of Bai Valu Raja (supra), the Hon''ble Supreme Court has clearly observed that SWhen a workman is on a public road or a public place or on a public transport, he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. The facts of this case clearly

establish that the nature of the employment of the deceased made it necessary for him to be there on scooter as his master had come to take him on his scooter for immediate completion of work at other place.

12. Before parting, we may state that since the workman died in a Motor Vehicle accident, his heirs and dependants could have filed claim petition claiming compensation under the Motor Vehicles Act and looking to the age and income of the deceased workman, they might have been awarded more compensation than the amount awarded by the Commissioner as the scooter was insured by the appellant - Insurance Company. 13. In view of the above discussion, we do not find any substance on merits in this appeal and accordingly, it fails and is hereby dismissed. The amount which is deposited by the appellant - insurance company shall now be disbursed/invested by the Commissioner to the respondents - claimants in accordance with law.