

(1997) 08 MAD CK 0079
In the Madras High Court
Case No : C.M.A. No. 988 of 1988

Commissioner, Kovilpatti Municipality, Kovilpatti

APPELLANT

Vs

Tamilarasan and 3 others

RESPONDENT

Date of Decision : 14-08-1997

Acts Referred:

Workmens Compensation Act, 1923 — Section 3(1)

Citation : (1999) ACJ 876 : (1997) 2 CTC 449 : (1998) 1 LW 669 : (1998) 3 MLJ 342

Hon'ble Judges : N.V. Balasubramanian, J

Bench : Single Bench

Advocate : T. Ravikumar, for the Appellant; P. Rajendran, for the Respondent

Judgement

1. The appellant in this appeal was the respondent in W.C. No. 63 of 1987 on the file of the Deputy Commissioner of Labour for the Workmen

Compensation, Tirunelveli. The respondents herein are the petitioners in that proceedings. For the sake of convenience, in this order, the parties to

this appeal are referred to in the rank in which they are described in the proceedings before the lower Court.

2. One Subbiah was a workman employed by the respondent was not in dispute. The said Subbiah died on February 14, 1985 on account of

injuries sustained by him due to an attack by some miscreants is also not disputed. Though, he was assaulted on February 14, 1985, he died only

on February 15, 1985 is also not in dispute. Alleging that Subbiah died as a result of the injuries sustained by him arising out of and in the course of

his employment, a petition for compensation claiming a sum of Rs. 33,360 was filed by the petitioners before the Tribunal. Among other things, the

claim was opposed by the respondent stating that the deceased Subbian did not

receive any injuries, which resulted in his death, in the course of and arising out of his employment and therefore, no compensation can be awarded. It was also contended that the petitioners were also not the dependents of the deceased. However, the lower court by order dated May 10, 1988 awarded a sum of Rs. 36,854.05 and the correctness of this order is questioned in this appeal by the respondent before the lower Court. The Workmen Compensation Commissioner also reserved the issue of dependents to be decided later after the deposit is made.

3. I heard Mr. T. Ravikumar, learned counsel appearing for the appellant and Mr. P. Rajendran, learned counsel appearing for the respondents with regard to the question involved in this appeal, viz., whether the deceased received injuries resulting in his death in the course of and arising out of his employment and even if it is so, whether the petitioners would be dependents within the meaning of the Act. It is not in dispute that the deceased was employed as a Sanitary Worker in the "C" Division of the respondent Municipality. The allegation in the petition is that in the early morning of February 14, 1985, i.e. at 5.30 A.M. the deceased left his house to report for duty. After he travelled half a kilometre, from his residence and at 50 feet west of Mappillai Muthalali House at Ettayapuram Road, some miscreants unexpectedly and suddenly attacked him. He was taken by his co-workers in the the municipal cart to the Government Hospital from where he was shifted to Tirunelveli. There he is stated to have died at about 3. P.M. on February 15, 1985.

4. The first claimant examined himself on the side of the claimants as P.W. 1. He would state that the deceased Subbiah was attacked on February 14, 1985 when he left the house at 5.30 A.M. to report for duty. At a distance of half a kilometre from his house near the house of Mappillai Muthalali at Ettayapuram Road he was stabbed. Therefore, the pleading and the evidence is to the effect that the deceased workman was in a public road. How far away is the work spot where he is to report for duty, there is absolutely no evidence. Unless and until it is established that the injury was sustained by him in the course of and arising out of his employment, it is not possible to maintain a petition for compensation u/s 3 of the Workmen's Compensation Act, 1923 (hereinafter referred to as "the Act")

5. Learned counsel for the appellant brought to my notice the judgment of the

Supreme Court reported in Saurashtra Salt Manufacturing Co. Vs.

Bai Valu Raja and Others, the meaning of the words "in the course of his employment" appearing in Section 3(1) of the Workmen's

Compensation Act, 1923 was examined. The facts in that case are as follows at p 250 :

There, the appellant, a salt manufacturing company, employed workmen both temporary and permanent. The salt-works was situated near a

creek opposite to the town of Porbandar. The salt-works could be reached by atleast two ways from the town, one an overland route nearly 6 to

7 miles long and the other via a creek which had to be crossed by a boat. In the evening of June 12, 1952 a boat carrying some of the workmen

was drowned. One of the questions that came up for consideration was whether the accident had taken place in the course of the employment of

the workers. S. Jafer Imam, J., speaking for the Court, held :

As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has

left the place of employment, the journey to and from the place of employment being excluded.

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S. Jafer Imam, J. Observed at P. 251 :

It is well settled that when 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. A workman is not

in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment

if he reaches the place of work or a point or an area which comes within the theory of notional extension, outside of which the employer is not

liable to pay compensation for any accident happening to him. In the present case, even if it be assumed that the theory of notional extension

extends upto point D, the theory cannot be extended beyond it. The moment a workmen left point B in a boat or left point A but had not yet

reached point B, he could not be said to be in the course of his employment and any accident happening to him on the journey between these two

points could not be said to have arisen out of and in the course of his employment. Both the Commissioner for Workmen's Compensation and the High Court were in error in supposing that the deceased workmen in this case were still in the course of their employment when they were crossing the creek between points A and B. The accident which took place when the boat was almost at point A resulting in the death of so many workmen was unfortunate, but for that accident the appellant cannot be made liable.

6. A learned single Judge on this Court in *Superintending Engineer, Parambikulam Aliar Project, Pollachi Vs. Andammal*, held as follows at p 328 :

The proper test to be applied for determining the question whether an accident arose out of employment or not has been laid down by the

Supreme Court in *Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmmed Issak*, . The Supreme Court has pointed out that the

expression is (sic) "in the course of the work which the workman is employed to do and which is incidental to it." The expression "arising out of

employment" should be understood, according to the Supreme Court to mean that "during the course of employment, injury has resulted from

some risk incidental to the duties of the service, which unless engaged in the duty owing to the master, it is reasonable to believe, the workman

would not have otherwise suffered.

The learned Judge in that case held,

In other words, there must be a causal relationship between the accident and the employment and if the accident had occurred on account of a

risk which is an incident of the employment, then the claim for compensation must succeed, unless the workman had by his own imprudent act

exposed himself to an added peril. It was also pointed out by the Supreme Court that in the case of death caused by the accident, burden of proof,

no doubt rests on the dependents of the deceased workman to prove that the accident arose out of employment as well as in the course of

employment, but that it may be inferred when the facts proved justify the inference.

7. Recently, the Supreme Court in the Judgment reported in *Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another*,

had an occasion to consider the scope and meaning of "Employment injury" occurring in E.S.I. Act.

2(8) "employment injury" means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.

The facts in that case was that Francis De Costa met with an accident on June 26, 1971 while he was on his way to his place of employment i.e.,

the factory at Koratty. The accident occurred at a place which was about 1 Km. away to the north of the factory. The time of occurrence was at

4.15 P.M. It has been stated that the duty-shift of De Costa would have commenced at 4.30 P.M. De Costa was going to his place of work by

bicycle. He was hit by a lorry belonging to his employers and sustained fracture in the collar bone. His claim for disablement benefit was allowed

by the Employees' State Insurance Court. The appeal filed against that order was dismissed by the High Court of Kerala and thus, at the instance

of the Regional Director, E.S.I. Corporation, the case went upto Supreme Court. In deciding that case, the Supreme Court has stated as follows at

pp 37-38 :

The definition given to "Employment injury" in sub-section (8) of Section 2 envisages a personal injury to an employee caused by an accident or

an occupational disease "arising out of and in the course of his employment." Therefore the employee in order to succeed in this case will have to

prove that the injury he had suffered arose out of and was in the course of his employment. Both the conditions will have to be fulfilled before he

could claim any benefit under the Act.

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The other words of limitation in sub-section (8) of Section 2 are "in the course of his employment". The dictionary meaning of "in the course of is

"during (in the course of time, as time goes by), while doing". (The concise oxford Dictionary, New Seventh Edition). The dictionary meaning

indicates that the accident must take place within or during the period of employment. If the employee's work shift begins at 4.30 P.M. any

accident before that time will not be in the course of his employment. The journey to the factory may have been undertaken for working at the

factory at 4.30 P.M. But this journey was certainly not in the course of employment. If employment begins from the moment the employee sets out from his house for the factory, then even if the employee stumbles and falls down at the doorstep of his house, the accident will have to be treated as to have taken place in the course of his employment. This interpretation leads to absurdity and has to be avoided.

We were referred to a number of cases of this point. In the case of *R.V. National Insurance Commr., ex. P Michael* the Court of Appeal in

England has to construe a phrase "caused by accident arising out of and in the course of his employment" in Section 5(1) of the National Insurance

(Industrial Injuries) Act, 1965. Lord Denning M.R. started his judgment with the observation :

So we come back, once again, to those all too familiar words "arising out of and in the course" of his employment. They have been worth, to

lawyers, a king's ransom. The reason is because although so simple, they have to be applied to facts which vary infinitely. Quite often the primary

facts are not in dispute; or they are proved beyond question. But the interference from them is matter of law. And matters of law can be taken

higher. In the old days they went up to the House of Lords. Nowadays they have to be determined not by the Courts, but by the hierarchy of

Tribunals set up under the National Insurance Act.

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Construing the meaning of the phrase "in the course of his employment", it was noted by Lord Denning that the meaning of the phrase has

gradually been widened over the last 30 years to include doing something which was reasonably incidental to the employee's employment. The test

of "reasonably incidental" was applied in a large number of English decisions. But, Lord Denning pointed out that in all those cases the workman

was at the premises where he or she worked and was injured while on a visit to the canteen or other place for a break. Lord Denning, however,

cautioned that the words "reasonably incidental" should be read in that context and should be limited to the case of that kind. Lord Denning

observed :

Take a case where a man is going to or from his place of work on his own bicycle,

or in his own car. He might be said to be doing something

"reasonably incidental" to his employment. But, if he has an accident on the way, it is well settled that it does not "arise out of and in the course of

his employment". (See *Alderman v. Great Western Rly Co.* 1937 (2) A. E.R. 408, *Netherton v. Coles* 1945 (1) A E.R. 227. Even if his employer

provides the transport, so that he is going to work as a passenger in his employer's vehicle (which is surely "reasonably incidental" to his

employment), nevertheless, if he is injured in an accident, it does not arise out of and in the course of his employment : See *Vandyke v. Kender*

1970 (2) AER 335 . It needed a special deeming provision in a statute to make it "deemed" to arise out of and in the course of his employment

(See Section 8 of the 1965 Act).

In this judgment the Hon"ble Supreme Court of India also relied on and followed its earlier judgment reported in *Saurashtra Salt Manufacturing*

Co. v. Bai Valu Raja (supra).

8. Applying the law laid down by the three judgments referred to above, I have carefully applied my mind to the facts pleaded and proved. It only

shows that the deceased workman was attacked while he was in a public road. As said by the Supreme Court, the deceased in this case was there

as a member of the public and he was not definitely there in the course of his employment. There is nothing in this case to show that the nature of

the employment of the deceased workman made it necessary for him to be there. There is also no evidence to show that the deceased was in the

close proximity of his work spot. As already stated, there is nothing on record to show the distance between the work spot of the deceased and

the public road where the deceased was attacked. It is not the case of the petitioners nor can it be that the deceased was in his work site where he

had sustained the injuries. The Supreme Court in its judgment in *Regional Director, E. S. I. Corpn. v. Francis De Costa* (supra) has stated as

follows at p. 40 :

The employee was to report for duty at 4.30 P.M., The accident took place at 4.15 P.M. only one kilometre away from the factory. In our view,

this cannot be a ground for departing from the principle laid down by the aforementioned cases that the employment of the workman does not

commence until he has reached the place of employment"".

When this being so, I am of the opinion that a causal relationship between the accident and the employment has not been established in this case.

Unfortunately, the Workmen Compensation Commissioner had not decided this issue in the forefront which goes to the maintainability of the

petition itself. Subbiah, the deceased in this case did not receive the injuries out of his employment. "Out of", in this context must mean caused by

employment. The said word indicates that the injury must be caused by an accident which had its origin in the employment. A mere road accident,

while an employee is on his way to his place of employment cannot be said to have its origin in his employment in the factory. The phrase "out of

employment" is construed in the case of South Maitland Railways Proprietary Ltd. v. James 67 CLR 496 and when construing the phrase "out of

employment", Starke, J. held :

the words "out of" require that the injury had its origin in the employment.

Under these circumstances, it is not possible to hold that the deceased Subbiah in this case sustained injuries resulting in his death in the course of

and arising out of his employment.

9. The petitioners have also one other obstacle in their way. The petitioners are two brothers and two sisters of the deceased workman. There is

material to show that the parents of the deceased are no more and Petitioners 2 and 4 are his unmarried sisters. There is a one line allegation in the

claim petition that the petitioners are the dependents deceased workman being his brothers and sisters. In this context, it is necessary to refer to the

definition of the word "dependent" as found in Clause (d) of sub-section (1) of Section 2 of the Act. Several categories of dependents are brought

within this definition. Sub-clause (iii) of clause (d) of sub-section (1) of Section 2 of the Act is referred to for our purpose which is as follows :

"dependent" means any of the following relatives of a deceased workman, namely :

(i)

(ii)

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

(a) omitted

(b) omitted

(c) omitted

(d) a minor brother or an unmarried sister or a widowed sister if a minor

Therefore, to come within sub-clause (iii) of clause (d) of sub-section (1) of Section 2 of the Act, it is necessary that the claimants apart from being

minor brother or unmarried sister, also prove that they wholly or in part depend on the earnings of the workman at the time of his death. Petitioners

1 and 3 are not shown to be minor brothers. Therefore, they straightaway go out of the definition of dependents. Petitioners 2 and 4 are sisters of

the deceased. Though, there is no pleading that they are unmarried, yet in the evidence it is said that they are unmarried. As I already said, merely

because, the sisters are unmarried, they are not entitled to maintain an application for compensation u/s 3 of the Act. Besides, being unmarried

sisters, they must also plead and prove that they are either wholly or in part depend on the earnings of the workman at the time of his death. In this

case, there is neither a pleading nor proof in regard thereto. Therefore, even on this score, the petitioners are not entitled to maintain an application

u/s 3 of the Act.

10. Under these circumstances, I am of the opinion that on both grounds stated above, the appellant is entitled to succeed as a matter of right.

Accordingly, the appeal is allowed. The order dated May 10, 1988 in N. Ve.E. No. 63 of 1987 on the file of the Deputy Commissioner of Labour

for Workman Compensation, Tirunelveli is set aside. It is brought to my notice by the learned counsel for the appellant that the entire award

amount had been deposited. In fact, it is a statutory condition precedent for filing an appeal. In view of the appeal being allowed, the appellant is

entitled to withdraw the amount immediately. There will be no order as to costs.