

(2012) 06 GAU CK 0125
In the Gauhati High Court
Case No : MFA No. 18 of 2012

Divisional Manager, United India Insurance Company Ltd.,
Bongaigaon

APPELLANT

Vs

Jasmina Khatun and Others

RESPONDENT

Date of Decision : 13-06-2012

Acts Referred:

Employees Compensation Act, 1923 — Section 30
Workmens Compensation Act, 1923 — Section 3

Citation : (2013) 1 ACC 343 : (2012) 4 GLT 588

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : M. Dutta, for the Appellant; A. Alam, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goswami, J.—This is an appeal filed by the Insurance Company u/s 30 of the Employee's Compensation Act, 1923 against the judgment and order dated 20.12.2011 passed by the learned Commissioner, Workmen's Compensation, Abhayapuri, Bongaigaon in WC Case No. 155/2010, whereby the learned Commissioner awarded an amount of Rs. 4,33,820/- as compensation for the accidental death of Late Rahim Badsha, who was the husband of the claimant No. 1 and father of the claimant No.2, in a vehicular accident on 16.9.2010. Out of the aforesaid amount awarded, 75% was given to the wife and 25% in favour of the son to be kept in fixed deposit in any nationalised Bank until the minor son attains the age of majority.

2. The deceased was a driver by profession having valid Driving Licence and he was working as a driver on the fateful day of Vehicle No. AS-18A-4282, which was owned by the opposite party No. 2 in the claim petition. At about 4.40 A.M. in the morning on 16.9.2010, after the vehicle had reached Barjharkuchi under Nalbari Police Station, the deceased got up to the top of the truck to check the LPG Cylinders loaded in the said vehicle and as he did so, he came in contact

with a live electric wire and died instantaneously due to electrocution. The vehicle in question was insured with the present appellant and in the claim petition, it was pleaded that the deceased, as a driver, earned an amount of Rs. 8,000/- per month as wages from his employer, the opposite party No. 2.

3. On the basis of the pleadings, issues were framed by the learned Commissioner and Issue No. 2 reads as follows :-

Whether the deceased died on 16.9.2010 in an accident during the course of employment of opposite party No. 2 ?

4. It is relevant to note that the opposite party No. 2 had admitted that the deceased was a driver employed by him. The appellant insurance company also had not denied in the written statement that the vehicle in question was not insured with them. Issue No. 2 was decided by the learned Tribunal holding that Rahim Badsha died on 16.9.2010 in an accident arising out of and in course of employment of opposite party No. 2.

5. The case has been listed for admission-hearing. I have heard Mr. M. Dutta, learned counsel for the appellant as well as Mr. A. Alam, learned counsel for the Respondent Nos. 1 and 2/claimants.

6. Mr. Dutta, learned counsel for the appellant submits that it is admitted position that the deceased had died as a result of electrocution, when he climbed up to the top of the vehicle to check the cylinders, and therefore, he did not die in an accident arising out of and in course of employment. The learned counsel contends that it is not the duty of the driver to go up to the roof of the truck to check cylinders and rather, it is the responsibility of the handyman. There is no evidence on record explaining as to why the deceased had to go to the top of the vehicle and by not taking care, he had invited his own peril, he submits. The learned counsel further submits that the Electricity Board was also not made a party to the proceeding and in absence of the Electricity Board, no effective adjudication could have taken place. The learned counsel relies on decisions rendered in the case of Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmmed Issak, as well as in Shakuntala Chandrakant Shreshti Vs. Prabhakar Maruti Garvali and Another, .

7. Mr. Alam, learned counsel for the Respondent Nos. 1 and 2/claimants submits that the vehicle was loaded with LPG Cylinders, a highly explosive and inflammable substance. He submits that the argument of the learned counsel for the appellant that the driver is only to drive the vehicle and it is not the business of the driver to go up and check the goods which are being transported in the vehicle, is wholly misconceived. It is submitted by him that the job profile of the driver also extends to ensuring that the goods that are being loaded in the vehicle for transportation is properly secured and the responsibility increases many-fold when the goods in question happen to be LPG Cylinders. Relying on the evidence of P.W.2, i.e. the Handyman/ Cleaner of the vehicle, Mr. Alam submits that the evidence is clear and categorical that the deceased had gone up

to the top of the truck to check the cylinders and, therefore, there cannot be any doubt that the accident had not occurred arising out of and in course of his employment. It is also submitted by him that at 4.40 AM in the middle of September, the electric wires are not likely to be that visible, if at all visible and therefore, by no stretch of imagination can it be said that the deceased had invited his own peril. Learned counsel submits that before the learned Commissioner, in the written statement filed, the Insurance Company had not taken the plea that the Electricity Board is a necessary party. He relies in support of his submission, on a decision of the Division Bench of Karnataka High Court rendered in the case of Oriental Insurance Company Ltd. Vs. Geetha & Ors, reported in 2010 (3) T.A.C. 345 (Kant.).

8. In the written statement, admittedly, no plea was set up by the Insurance Company that the Electricity Board is a necessary party to the proceeding. That the deceased died of electrocution is not disputed. The tenor of argument of Mr. Dutta is suggestive of the fact that the Insurance Company is trying to attribute some negligence on the part of the Electricity Board. In absence of any pleading in the written statement, this Court is not inclined to entertain such a plea that the award is vitiated for not making the Electricity Board a party to the proceeding.

9. In order to attract the charging provisions contained in Section 3 of the Workmen's Compensation Act, 1923 (for short "the Act"), it is necessary that -

(i) an injury must be caused to a workman;

(ii) such injury must have been caused by an accident; and

(iii) it arose out of or in the course of his employment.

10. In *Shakuntala* (supra), the deceased was working as a Cleaner in a vehicle belonging to the Respondent No. 1. He was travelling in the said vehicle at night and he suddenly developed chest pain and was admitted to a Government hospital, where the doctor declared him dead. It was not disputed that the incident had occurred while the deceased was performing his duties. The autopsy was conducted wherein the cause of death was opined as cardiac arrest due to rupture of aortic aneurysm.

11. On the aforesaid facts, the question that fell for consideration of the Apex Court was as to whether the deceased died of accidental injury in the course of and out of employment. The death had occurred at a time when the deceased was getting down from the vehicle. The Apex Court noted that in the claim petition, there was no allegation that the deceased met with his death by reason of strain of work. There was also absence of material regarding the quantum or nature of work required to be performed by the deceased as well as how strenuous his service was.

12. The Apex Court in *Shakuntala* (supra), laid down the following in paragraphs 24 and 25:-

24. There is a crucial link between the causal connection of employment with death. Such a link with evidence cannot be matter of surmise or conjecture. If a finding is arrived at without pleading or legal evidence the statutory authority will commit a jurisdictional error while exercising jurisdiction.

25. An accident may lead to death but that an accident had taken place must be proved. Only because a death has taken place in course of employment will not amount to accident. In other words, death must arise out of accident. There is no presumption that an accident had occurred.

13. The Apex Court also quoted the decision rendered in *Dover Navigation Co. Ltd. Vs. Isabella Craig*, reported in (1939) 4 All ER 558 (HL), wherein it was held as follows :-

Nothing could be simpler than the words arising "out of and in the course of the employment". It is clear that there are two conditions to be fulfilled. What arises "in the course" of the employment is to be distinguished from what arises "out of the employment". The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment - that is, directly or indirectly engaged on what he is employed to do - gives a claim to compensation, unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified.

14. From the above, it becomes clear that there must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.

15. In *Mackinnon* (supra), the Apex Court held as follows :-

5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words "in the course of the employment" means "in the course of the work which the workman is employed to do and which is incidental to it". The words "arising out of employment" are understood to mean that "during the course of the 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 otherwise have suffered". In other words there must be a causal relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of the employment. The expression applies to employment as such - to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises "out of employment". To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act.

16. In *Geetha (supra)*, the basic facts were that the deceased driver at about 4 AM, got down from the vehicle to attend first call of nature and when he was urinating near an agricultural field, which was fenced with live electric wire, came into its contact resulting in his death due to electrocution. The Division Bench of Karnataka High Court had held that the risk of accidental death for a driver of a lorry during journey is inherent in the nature of employment and the nature of accidental death may be for varied reasons, such as, accidental death while driving or when the driver is off the vehicle for the reasons like attending to nature's call, taking food etc. It was held that the driver under the circumstances, although is off the vehicle, he is still continued to be in the course of journey and deemed to be in the course of employment and accordingly, dismissed the appeal preferred by the Insurance Company against the award of compensation.

17. A driver's duty is not merely to drive the vehicle. He is in-charge of the vehicle and, therefore, he has to take all reasonable precaution to ensure that no untoward incident and/or accident happens because of not paying attention to finer details connected with the vehicle like whether the goods transported in the vehicle is properly secured or not. This Court finds it difficult to accept the contention of the appellant that the driver should leave all other things except driving to the supervision of the handyman. The evidence on record discloses that immediately after halting at Barjharkuchi, the driver had gone up to the top of the truck to check the cylinders. Therefore, this Court has no hesitation to hold that the accident had occurred out of and in the course of the employment. This Court is also unable to accept the contention, having regard to the time of accident when the visibility was decidedly poor, that the workman had exposed himself to added peril by his own imprudent act. In view of the above discussion, there being no substantial question of law involved in this appeal, the same is dismissed. No costs.