

(1959) 09 AHC CK 0033
In the Allahabad High Court
Case No : F.A.F.O. No. 44 of 1955

Divisional Supdt., Northern Rly., Moradabad

APPELLANT

Vs

Umrao

RESPONDENT

Date of Decision : 23-09-1959

Acts Referred:

Workmens Compensation Act, 1923 — Section 10, 3

Citation : AIR 1960 All 283

Hon'ble Judges : V.D. Bhargava, J

Bench : Single Bench

Advocate : B.N. Mulla, for the Appellant; K.C. Goel, for the Respondent

Final Decision : Allowed

Judgement

V.D. Bhargava, J.—This is an appeal u/s 30 of the Workmen's Compensation Act (Act VIII of 1923) by the Divisional Superintendent, Northern Railway, Muradabad, against the order, of the Commissioner, Workmen's Compensation Act, Lucknow, awarding a compensation of Rs. 1008/- in favour of Umrao against the appellant.

2. The facts of the case are that Umrao respondent was employed in the Northern Railway as a "Gateman" at the Railway Crossing gate No. 218 near Jalalpur. On 4-9-53 in the night, when he was at his quarters, he along with others was attacked by the dacoits, who had come to loot the wagons and he sustained injuries on the left hand and right eye. He, therefore, claimed that he got these injuries in the course of his employment and arising out of it and, therefore, he was entitled to compensation under the Workmen's Compensation Act.

3. The defence inter alia, of the appellant was that he had no information about this occurrence, that the respondent was on sick leave on that day and was not in the course of employment on that day, and also that no notice as required u/s 10, of the accident had been given within a reasonable time.

4. The Commissioner framed the following four issues:

1. Was there any occurrence of dacoity in the Railway Quarter?
2. Whether it was obligatory on the part of the workman to live in the Railway Quarter?
3. Did he sustain injuries in protecting Railway property?
4. Is the claim for compensation preferred within time? If so, to what amount of compensation the workman is entitled?

The finding of the Workmen's Compensation Commissioner is that Umrao received injuries in his eyes in an encounter with persons who wanted him and other gatemen to violate the instructions of the Railway authorities. Umrao, though on sick leave, was in the Railway quarters in the capacity of a workman and sustained injuries as such. He further held that the claim was not barred by time and, therefore, he awarded Rs. 1008/- as compensation to the respondent.

5. Aggrieved by that decision of the court below the Divisional Superintendent, Northern Railway, Moradabad, has come up in appeal.

6. Learned counsel for the appellant had first urged, that though an objection had been taken in the written statement about the validity of the claim on the ground of want of notice, yet no issue was framed on that point. It was contended by the learned counsel for the appellant that the words of Section 10 of the Workmen's Compensation Act are mandatory when they say that

"no claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof." According to the counsel for the appellant if no notice is given within a reasonable time, the claim of a workman should be thrown out in limine on that ground alone.

7. On behalf of the respondent it has been urged that though the words used in the opening portion of Section 10 are so, but their effect has been greatly taken away by the subsequent proviso to that very section. The second proviso is to the following effect:

"Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim -

(a)

(b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred:" It was argued on behalf of the respondent that by means of Ex. P-1 the P. W. Inspector had informed the appellant at least on 9-2-54 that an accident of this nature had taken place and the respondent while he was on sick leave had received injuries on his hand and

right eye while helping Ram Nath and Natha who were assaulted by thieves on 4-9-53 while on duty. It was further contended that in this particular letter there was reference to two other previous letters by the same officer to the appellant, which were dated 18-9-53 and 5-10-53. By an application the respondent had asked for the production of these documents, but they were withheld by the appellant and, therefore, it was argued that a presumption should be drawn against the appellant to the effect that the letters contained an intimation of this incident, and if the letter dated 18-9-53 had any reference to this accident then the respondent was protected by the second proviso to Section 10 of the Act. In my opinion, I do not think that want of notice in the present case is fatal to the claim.

8. Apart from this provision, there is another provision in the same section, which further provides, that the Commissioner may entertain and decide any claim to compensation in any case, notwithstanding that the notice has not been given, or the claim has not been preferred in due time as provided in this subsection, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause. In any event, if the Commissioner has entertained the claim in the present case, I do not think that I, sitting as an appellate court, would be justified in reversing its decision on that ground.

9. It was further contended by the learned counsel for the respondent that as a matter of fact this point was not pressed at all; otherwise he would have got an issue framed in the court below. In any event, as I have said earlier, this want of notice u/s 10 is not fatal to the claim, it is no use pursuing this matter further.

9a. The next ground urged by the learned counsel for the appellant is that the injury which the respondent sustained did not "arise out of and during the course of employment", and they are the first ingredients on which any employer can be made liable. Reliance was placed on the words of Section 3(1) of the Act which reads as follows:

"If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:....."

The sole question for consideration, therefore is whether this injury arose out of and in the course of the respondent's employment. Admittedly the employee was on sick leave on the date of the accident and he was not expected to do any work on behalf of the employer so long as he was on such leave. It was therefore, contended, that he cannot be held to be "in the course of employment" and secondly if he was not in the course of his employment, then the accident did not arise out of the employment.

10. Learned counsel for the respondent relied on a Full Bench decision of this Court reported in *Works Manager, Carriage and Wagon Shop, E.I. Rly. Vs. Mahabir*, where it was observed as follows:

"The word "employment" is of wider import than the word "work" or "duty"". The expression "in the course of employment" means not only the actual work which the man is employed to do but what is incident to it, in the course of his service. The expression is not to be regarded as confined to the "nature of the employment." It applies to employment as such i. e., to its nature, its conditions its obligations and its incidents. It would thus include not only the period when he is doing the work actually allotted to him but also the time when he is at a place where he would not be but for his employment."

The counsel for the respondent had laid great stress on the words "nature, conditions and obligations of the employment" and also on the words "when he is at a place where he would not be but for his employment." According to him the Rules of the Railway Administration direct that all gatemen shall be in their quarters at the gate and, therefore, the respondent was at that place owing to one of the conditions of his employment and as such he should be deemed to be in the course of his employment.

The facts of this case were entirely different from the facts of the present case and do not help the respondent in this case. That was a case, where the accident had happened in the railway yard while the employee was going to his duty and the question was whether he would be deemed to be in the course of his employment. So far as the periods when an employee leaves his house for the place of his employment and also the time when he leaves it for his residence are concerned, it has been held in numerous cases that time and place will be deemed to be during the course of his employment. It would be saying entirely a different thing altogether that if gatemen are supposed to live in their quarters, they should be deemed to be all the twenty-four hours "in the course of employment", and if anything happened at any time, during this period the employer would be responsible.

When a person is on leave, he is not at all in the course of his employment. He is not supposed to do any work for the employer and, therefore, by no stretch of the words "in the course of employment" it could be said that such a case would be covered by Section 3 of the Act. The first ingredient that is necessary in order to establish that the employee was "in the course of employment" was that the person injured must have been on duty at that time and must be supposed to do some work. Whether he is doing that work or not, or he is doing some other work is immaterial but if he is supposed to do some work then he would be deemed to be in course of the employment.

A gateman when he is on duty, whether any train is passing at that time or not would be supposed to be on duty. He may at that time be doing nothing or relaxing yet he would be in the course of employment. On the other hand, if a person is not on duty and he takes upon himself to do something which he thinks ought to be done for his employer, he will not be deemed to be in the course of his employment. It is not the work which is being done that determines whether a person is in the course of employment or not. It is only, whether he is expected

to do anything during that period or not. It is immaterial whether he is doing any particular work or sitting idle, but he must remain there. Thus as I have said that if a person is on leave he is not supposed to do any work, and would therefore not be on duty.

11. Learned counsel for the respondent further relied on the case reported in *K. C. Nath v. Salima Khatoon* AIR 1938 Ban 439. In that case an engine driver was employed on a steam launch during the whole round voyage. In the course of the voyage a temporary halt was made. During that halt an accident took place to the engine driver while doing certain repairs to the engine and the boiler as a result of which he died. It was held therein that because during the voyage a temporary halt was made, it could not be said that the engine driver's employment did not continue during that halt. The accident, therefore, arose out of and in the course of his employment. The facts of that case are entirely different from the facts of the present case. If that engine driver had taken two days leave and was not expected to do any work in that period, and even then doing the same work he would not be deemed to be in the course of employment. At the time of the incident he was not actually working the engine but if the cargo had been loaded earlier he would have had to start earlier and therefore he was to be on the launch and was supposed to be on duty all the time. Under these circumstances, this case does not support the respondent's case.

12. Another case relied upon by the learned counsel for the respondent is *National Iron and Steel Co. Ltd. Vs. Monorama Dassi*, . In that case a boy was employed by the appellants in a canteen or tea shop and it was part of his duty to take tea from the tea shop which was outside the factory gates to various persons in the factory. On 28-4-1949, late in the afternoon the boy was returning to the tea shop, after having served tea to certain persons in the factory when he had to pass a mob of workmen who were leaving the factory. This mob was attacking the notice and the police had to fire in self-defence. Unfortunately a bullet struck this boy and he was severely wounded. He was taken to hospital but unfortunately died the following day. It was held that:

"the accident arose in the course of the employment, because the boy had been delivering tea to persons in the factory as it was his duty to do and was returning with a tea tray and tea-pot thereon to the canteen or tea shop as he was bound to do. Whilst so returning he received this bullet wound and it is clear that he received it in the course of his employment, that is, whilst he was actually doing what he was employed to do,"

There cannot be any doubt, in the case cited above that during that period the boy was expected to do certain work that is, to carry tea from the canteen to the factory and therefore this case will fall under the category given by me above. Under the circumstances I think this case too does not help the respondent in any way.

13. As regards the question whether the accident arose out of the employment or not there may be some doubt but as in my opinion the accident did not take place during the course of the employment of the respondent, he is not entitled to lay any claim against the appellant.

14. I accordingly set aside the order of the court below and dismiss the respondent's claim. The appeal is allowed, but in the circumstances of the case I order the parties to bear their own costs.