

(1961) 04 AHC CK 0031
In the Allahabad High Court

Dominion of India

APPELLANT

Vs

Kaniz Fatma and Another

RESPONDENT

Date of Decision : 17-04-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 225
Employees Compensation Act, 1923 — Section 19, 2
Employers Liability Act, 1938 — Section 3
Government of India Act, 1935 — Section 212

Citation : (1961) 2 LLJ 197

Hon'ble Judges : M. Lal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M. Lal, J.—This first appeal filed by the defendant-Union of India representing the Indian Railways arises out of a suit for recovery of Rs. 10,000 as damages by respondent 1.

2. The action was brought in forma pauperis on the ground that the plaintiff's son Azmatullah Khan employed as a fireman in O.T. Railway died as a result of an accident by the collision of two trains Nos. 377 U.P. and 374 D.N. between Haldwani and Kiohba railway stations on 8 March 1947. The deceased was a fireman on one of the engines which were involved in this accident. He received fatal injuries and was taken to Izatnagar railway hospital where he died on the night between 11 and 12 March 1947. At the time of his death he was of 21 years of age and was drawing monthly emoluments of Rs. 34-7-0 including dearness allowance. The expectation of life was said to be sixty years and the plaintiff, being deprived of the benefits of her son, brought this suit. The father of the deceased was impleaded as a defendant. They were said to be the only two heirs of the deceased. A notice u/s 80, Civil Procedure Code, was said to be given, and as the collision of the trains was said to have resulted from the negligence and misconduct of the servants of the defendant the plaintiff claimed

Rs. 10,000 as damages.

3. The defendant-appellant contested the suit on a variety of grounds including the bar of the suit by the Workmen's Compensation Act and the Indian Fatal Accidents Act. The doctrine of common employment was also set up as a bar and the plaintiff was said to be not entitled to any decree.

4. The learned Civil Judge, Bareilly, Sri G.C. Agarwal, overruled the defence and decreed the plaintiff's suit for Rs. 4,800 only. It is against this judgment and decree that the present appeal has been filed.

5. Three points have been contended in this appeal by Sri B.L. Gupta, learned Counsel for the defendant-appellant. The first is that the suit was not maintainable in view of the provisions of the Workmen's Compensation Act and the remedy which was open to the plaintiff was to proceed under the provisions of the said Act. For that purpose he relied upon the provisions of Section 19(2) of the Act. His second contention is that the deceased and the servants of the appellant being in the common employment of the appellant, the appellant could not be held responsible for any act of negligence or misconduct of a co employee. For that purpose he has invoked the doctrine of common employment. His third submission relates to the provisions of that Fatal Accidents Act and the contention is that the suit as framed not being a representative suit is defective in the eye of law.

6. Learned Counsel for the respondent, Sri Sadiq Ali, has controverted all the three arguments of the learned Counsel for the appellant. He submitted, that the deceased was a bachelor and the only heirs he left were his mother, the plaintiff-respondent 1, and his father, who was impleaded as defendant, the share of mother being one-third and that of the father being two-thirds and consequently both being on record if the court feels that the suit is defective it can award a decree in proportion to their shares. He has contended that the provisions of the Workmen's Compensation Act would not apply because, firstly, the provisions of Section 3 are limited to injuries caused by accidents arising out of or in the course of some employment which, according to his contention, should be by bare accident and not as a result of negligence or misconduct by a co-employee. According to him the provisions of Section 19(2) are applicable to only those cases where the question is required to be settled, decided or dealt with by a Commissioner under the provisions of the Act and as the question involved in the present suit is not one of those categories, the provisions of that Act had no application. In the alternative he has urged that it was at the choice of the plaintiff either to claim compensation under the Workmen's Compensation Act or to file a suit in the civil court. As against the argument of the doctrine of common employment, he has referred to the provisions of Section 3(d) of the Employers' Liability Act, 1938, and has contended that this provision has completely abrogated the doctrine of common employment and has now made the employers liable for the acts of omission or commission of a fellow employee of the deceased.

7. I have heard learned Counsel for the parties. So far as the question of Fatal Accidents Act goes, it appears from the observations of the learned Civil Judge that Azmatullah Khan had no wife and children. The plaintiff is his mother and defendant 2 is his father. Both the heirs of the deceased are thus on the record. It is true that under the provisions of the Fatal Accidents Act, the suit or action for compensation to the family has to be for the benefit of the heirs of the deceased and the Court while passing decree has to divide the compensation amongst the different heirs. It is also true that by means of the proviso given in Section 2 a bar has been imposed on further suits. In the present case both the heirs of the deceased being on record the only defect in the plaint is that decrees for specific amounts in favour of the plaintiff and defendant 2 have not been asked for. Since under the Muhammadan Law the parents are the sharers and the share of the mother is one-third and that of the father is two-thirds, the appeal is dismissed, decrees can be passed for awarding one-third money to the plaintiff and two-thirds" money to respondent 2. It cannot at all be said that there is any such defect in the frame of the suit as to prove fatal resulting in the dismissal of the suit. The defect is curable and Sri Sadiq Ali. counsel for the respondents, has prayed that while passing the decree, decree for one-third amount be passed in favour of the plaintiff-respondent and for two-thirds amount be passed in favour of the defendant respondent. It may also be noted that in the written statement a plea was taken that the frame of the suit was defective as the suit was not a representative suit; yet it was nowhere specifically alleged that the defect was in not complying with the provisions of the Fatal Accidents Act. As already stated above, the defect is curable and the prayer made by the respondent's learned Counsel cures that defect completely.

8. As regards the arguments relating to the Workmen's Compensation Act, the lower court has held, and rightly too, that the suit is not barred by the provisions of that Act. Learned Counsel for the appellant has relied upon the provisions of Section 19(2) of that Act which lays down that no civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided, or dealt with by a Commissioner or to enforce any liability incurred under this Act. The question is whether the present suit was such as was required to be settled, decided or dealt with by a Commissioner. Reference to a Commissioner is made on the question which arises under the provisions of the said Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation, etc. Section 19(2) on which reliance has been placed will not have any application unless the question is such as must necessarily be dealt with under the provisions of the Workmen's Compensation Act, That certainly is not the matter in this case. The Act does not lay down or define the matters which are exclusively within the jurisdiction of this Act. The employer's liability given in Section 3 is in respect of accidents caused to a workman and which arise out of and in the course of employment. Firstly, it seems that the accident which is contemplated by that Act or which should lie within the exclusive jurisdiction of the Commissioner will be

an accident which is caused otherwise than by negligence or misconduct. In cases of accidents resulting from negligence or misconduct, the provisions of this Act may if chosen by the person aggrieved, be taken advantage of, but if such a person decides to file a civil suit, that suit cannot be deemed to be barred by the provisions of Section 19(2). That section can have application only in cases where the matter is such as is required to be settled or decided by the Commissioner, and as a matter of this type, or a matter relating to compensation arising out of accident resulting from the negligence or misconduct of its own employee, is not a matter which is required by the Act to be settled by a Commissioner, it cannot be said that the suit was not cognizable by the civil court. The Act does not define "accident," nor does, it lay down which of the matters are within the exclusive jurisdiction of the Commissioner, and as the present suit for damages is an action for tort because of negligence and misconduct it cannot be held that it was a matter required to be settled by the Commissioner to which the provisions of Section 19(2) applied. The court below took the correct view that the suit was not barred by the provisions of the Workmen's Compensation Act.

9. Reference may also be made to the authority in *Suppiah Chettiar v. Chinnathurai* 1967 I L.L.J. 517 in which his lordship of the Madras High Court held that the suit was cognizable by a civil court and the Workmen's Compensation Act was not a bar to such a suit. Learned Counsel contended that the decision in that suit is based upon the interpretation of Section 3(5) of the Act and his lordship did not consider the provisions of Section 19(2); and as such that authority cannot be treated to be an authority on the point involved in the instant case. It seems that as the learned Judge thought that the scope of the provisions of Sub-section (2) of Section 19 was limited inasmuch as those provisions applied only to matters-which were required to be dealt with by the Commissioner he did not think it worth while to make a reference to Section 19(2). I agree with the observations of the learned Judge that the obligation under the Workmen's Compensation Act is akin to that of an insurer and is independent of any negligence or breach of duty on the part of the master.

10. The last argument arises out of the doctrine of common employment which was laid down by this Court in the case of *Elizabeth C. Blanchette v. Secretary of State for India* 9 A.L.J. 173. That was also a case of collision between two passenger trains. The deceased was a driver on one of the two engines which collided, and in the suit which was filed by the legal representative of the deceased" a Division Bench of this Court held that in this country where there is no legislation analogous to Employers' Liability Act a servant has no cause of action against his master for the neglect of another servant in the common employment of the same master notwithstanding the fact that the servant suffering the injury and the servant whose neglect caused the injury were in employment of dissimilar nature.

11. The soundness of the proposition laid down in this authority was not

accepted by the Pull Bench of the Nagpur High Court in the case of AIR 1937 354 (Nagpur) . Their lordships held that the doctrine of common employment does not prevail in India in cases which in England would come under the Employers' Liability Act. The doctrine of common employment stands abrogated to a very great extent or at least the scope of that doctrine has been limited by the passing of the Employers' Liability Act in 1938 which was again amended in 1951. Clause (d) of Section 3 of that Act is the only material clause for our purposes. Since the accident in this case happened in 1947, the amending Act of 1951 will have no application and the case will be governed by the provisions as they stood prior to amendment. Old Clause (d) of Section 3 was as follows:

3. Where personal injury is caused to a workman--

(d) by reason of any act or omission of any person in the service of the employer done or made in obedience to any rule or bylaw of the employer.. or in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties, a suit for damages in respect of the injury instituted by the workmen or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service, of, or engaged in the work of, the employer.

12. By the amending Act of 1951, Clause (d) has been substituted and it reads as follows:

3. Where personal injury is caused to a workman

(d) by reason of the act or omission of any person in the service of the employer done or made-

(i) In the normal performance of the duties of that person; or

(ii) in obedience to any rule or by-law of the employer (not being a rule or bylaw which is required by or under any law for the time being in force to be approved) by any authority and which has been so approved; or

(iii) in obedience to particular instructions given by any other person to whom the employer has delegated authority in that behalf;

a suit for damages in respect of the injury instituted by the workmen or by any person entitled in case of his death shall" not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer.

13. This amendment was made because the legislature had assumed that the defence of common employment WEB barred by Section 3(d) of the Employers' Liability Act; but in the case of Governor-General-in-Council v. Constance Zena Wells AIR 1950 P.C. 22; 1950 A.L.J. 116 their lordships of the Privy Council having held that the scope of Section 3(d) was still limited and the defence of common employment was still available to the employer, the legislature made its

intention clearer beyond doubt. The facts of the Privy Council case were similar. In that case too on account of collision the fireman of one of the colliding engines died and the suit for damages against the Governor-General-in-Council was brought by the heirs of the deceased. The Lahore High Court, from whose decision the appeal to the Privy Council had been preferred, took the view that Para, (d) covered three categories--the act or omission of a fellow-servant done or made

(i) in obedience to any rule or bylaw of the employer;

(ii) in obedience to particular instructions given by a person to whom the employer has delegated authority in that behalf, and

(iii) in the normal performance of his the fellow-servant's duties.

Their lordships of the Privy Council, while commenting on the view of the Lahore High Court, observed that, if the interpretation placed by the Lahore High Court was correct and Clause (d) could be interpreted into three categories, the case would fall in the third category and the doctrine of common employment would not be any defence. In the view of their lordships of the Privy Council Clause (d) covered only two categories, because such an interpretation conformed better with the limited purpose of the Act. Their lordships further observed:

If, however, what may be called the three category construction were to prevail, the result would be to reduce the doctrine almost, if not altogether to the point of extinction and to render otiose much in Section 3 which is designedly detailed and specific.

14. Their lordships, while comparing the provisions of the British Employers' Liability Act of 1880, on which the Indian Act of 1938 was obviously modeled observed that the words "or in the normal performance of his duties" in Clause (d) did not find a place in the English enactment, and yet their lordships thought that these words were inserted--

with the idea of enlarging the class of persons in obedience of whose instructions the fellow-servant has done or made the act or omission causing the injury complained of.

15. This view of their lordships of the Privy Council is binding on this Court and it has to be accepted that Clause (d) did not cover a case of this type and a plea of common employment was still open.

16. The learned Counsel for the respondent submitted that, firstly, the view of the Privy Council is not binding on this Court after the passing of the Constitution of India and secondly, that view is no more a good law after the legislature expressed its intention in unambiguous terms in the amending Act of 1951. Both these contentions cannot be accepted. So far as the first contention goes, it has been held in the case of Radharani Das Vs. Sisir Kumar and Others, that the decision of the Judicial Committee is binding upon the High Courts until the

Supreme Court rules otherwise. This was followed in a later case of *Dass Bank Ltd. Vs. Smt. Kali Kumari Debi and Another*, wherein the learned Judges observed that even an obiter dictum of the Privy Council would be binding on the Courts in India. The same view has been expressed in the case of *Punjabai v. Shamrao and Anr.* AIR 1955 Nag. 293 in which that Court laid down that u/s 212 of the Government of India Act, and now Article 225 of the Constitution, the Privy Council decisions have a binding effect on all the High Courts. The Bombay Court in the Full Bench case of *State of Bombay Vs. Chhaganlal Gangaram Lavar*, held that so long as the Supreme Court does not take a different view from the view taken by the Privy Council the decision of the Judicial Committee was still binding upon the High Courts. There is also an observation of their lordships of the Supreme Court in the case of *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, that the Privy Council rulings are binding authorities on the Indian Courts and they could not refuse to follow them. In view of these authorities and the provisions in Article 225 of the Constitution, the law laid down by the Privy Council has a binding effect and has to be followed.

17. So far as the second argument relating to the intention expressed by the legislature in the amending Act of 1951 goes, such an expression of the intention cannot be treated to be a good criterion for the interpretation of the former law, particularly when that law was interpreted by the Judicial Committee and it was held that the effect of the passing of the Employers' Liability Act was not to completely abrogate the doctrine of common employment.

18. So far as the provisions of Clause (d) of Section 3 of the Employers' Liability Act are concerned, this Court is bound to follow the law laid down by the Privy Council in the aforementioned case. It must be held in view of that authority that the case was not covered by Clause (d) and the plea of common employment was still open to the defendant and a suit would be barred by that doctrine.

19. The learned Counsel for the respondent also relied upon Clause (3) of Section 3 of the Employers' Liability Act of 1938 which lays down:

Where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence.

20. The said clause of the Employers' Liability Act would not apply to the facts of the present case because there is no evidence to show that there was negligence on the part of any person in the service of the railway administration who had the superintendence entrusted to him and the accident was the result of that negligence and further that the negligence was caused in the exercise of such superintendence. I agree with the respondent's learned Counsel that some sort of negligence or misconduct should be presumed on the part of the servants of the railway administration because trains do not collide in the ordinary course of events nor are they allowed to run on the same line when coming from opposite directions. I am also prepared to agree with him that collision must have taken

place when something out of the ordinary happened and that it was for the defendant to prove that there was no negligence or misconduct on the part of the defendant's employees because the defendant had special knowledge as to how this accident happened and who was guilty of negligence in the performance of his duties. This presumption alone, however, would not make Clause (b) applicable because the clause will only apply when the negligence is of the person who is entrusted with the superintendence of such work. There is nothing on record to show whether it was due to the mistake of the pointsman that the accident occurred or whether there was any defect in the railway track or what other factor brought about this collision. On the facts as they stand and in view of the circumstances of the case it cannot be said that the case can be brought under Clause (6) of Section 3.

21. There is nothing aspect (sic) of the matter and it is that if the decisions of the Privy Council have a binding effect as already stated, the declaration of law by implication by the Judicial Committee will be as much binding as the declaration of law in express terms. The High Court cannot go behind such law even though it may be in the form of an obiter dictum or a mere enunciation of a principle of law or may be presumed to have been laid down by implication. The case before their lordships of the Privy Council was similar in nature and they thought that the only material cause of the Employers Liability Act which was applicable to the case was Clause (b), that is by implication their lordships laid down that Clause (b) did not apply. The said authority of the Privy Council therefore will again be binding to show that in such a case Clause (b) has, no application, particularly when there is no evidence to show the negligence of the supervisory staff.

22. Having regard to the law laid down by the Privy Council, the defence of common employment was open to the appellant, and in this case the deceased and the servants of the railway administration being in the common employment of the appellant, the appellant could not be held responsible for the act of negligence or misconduct of the co-employees of the deceased.

23. The result is that the appeal must succeed.

24. Before I part with the case I may state that there is no doubt in my mind that the accident occurred due to the negligence of the employees of the railway and the deceased met with his death because of such a negligence. The deceased was a young man and his old parents have been deprived of his services and support. The case to my mind is a very hard one and extremely sad and merits the consideration of the railway administration for a gratuitous award of compensation to the respondents. I would strongly recommend the case of the deceased to the railway administration for consideration by them the point of view of gratuitous relief and human consideration, technicalities of law apart. The sum of Rs. 4,800 awarded by the Civil Judge was not at all high and the railway administration will do well to consider the case sympathetically by awarding suitable amount of compensation. I direct that a copy of this judgment be sent to

the railway administration and it is hoped that appellant's learned Counsel will also take the matter up with the railway administration for a gratuitous relief to the respondents.

25. In the result, the appeal is allowed, but, having regard to the circumstances of the case, I make the parties to bear their own costs.