
(2011) 08 BOM CK 0070
In the Bombay High Court
Case No : F.A. No. 366 of 2009

Kashinath Bhikaji Badgujar	Vs	APPELLANT
Abdul Rauf Abdul Hanif and Others		RESPONDENT

Date of Decision : 16-08-2011

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 11, 3(1), 7

Citation : (2012) 1 ALLMR 201 : (2012) 2 BomCR 803 : (2011) 131 FLR 731 : (2012) 2 LLJ 470 : (2011) 5 MhLj 922 : (2012) 4 TAC 227

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : N. R. Saboo, for the Appellant; M. V. Mohokar, for the Respondent

Final Decision : Allowed

Judgement

A.B. Chaudhari, J.—Being aggrieved by the judgment and award made by the Commissioner for Workmen Compensation/Labour Court, Buldhana, in W.C.A. No. 4/2006, decided on 10-12-2008, the appellant has filed the present appeal.

Facts

2. Respondent Nos. 1 to 3 had filed application u/s 10 of the Workmen's Compensation Act before the Commissioner for Workmen's Compensation, Buldhana, in respect of injury caused to respondent No. 1 in the course of employment of respondent No. 1 with the appellant. It was stated in the application that respondent No. 1 was working with appellant for last 11 years. Appellant is building contractor and is having mixer machine for preparing concrete. At the relevant time, the contract was taken for construction of a complex near Agrasen Bhavan, Shegaon. He was engaged for running the mixer machine. On 23-9-2005, during the course of employment respondent No. 1 suffered a head injury while working on the concrete mixer machine at 10 a.m. in the morning and he fell down from mixer machine and was unconscious. He was then brought in the hospital at Shegaon on the same day and was treated by

Dr. Ramesh Bhutada and a Computerised Tomography Scan (for short C.T. Scan) was also taken on 24-9-2005. Finally, he suffered 70% disablement. He lodged report with police on 18-11-2005 about the incident. After having failed to obtain compensation from the appellant, he sent a notice through advocate on 29-11-2005, but was given a reply denying the claim. He, thus, claimed an amount of compensation of Rs. 1,72,007.75 with penalty.

3. Appellant filed written statement and denied the averments made in the application. He stated that respondent No. 1 was engaged once or twice by him but not on mixer machine and on the date of alleged accident on 23-9-2005 neither he was engaged nor any work was going on nor any contract was taken. He denied all the averments relating to the accident. He stated that as a matter of fact respondent No. 1 had suffered paralytic attack on that day and with a view to recover money from the appellant the proceedings were filed.

4. The evidence was led by the respondents and the appellant. Respondent No. 1 was not examined but other witnesses were examined. The Commissioner for Workmen's Compensation, finally heard parties and passed the impugned award. Hence this appeal.

5. In support of the appeal the learned counsel for the appellant made the following submissions.

(i) Respondent No. 1 who is said to have suffered the injury was never examined before the trial Court and except filing pursis Exh. 12 under the signature of the advocate and the thumb impression of the respondent No. 1. nothing was placed on record in support of the contention that he was unable to speak. According to the counsel, therefore, the respondents withheld best evidence and was thus deprived of testing the case of the respondents by way of cross-examination,

(ii) The burden to prove that there was accident certainly lay on the respondents but then respondents failed to prove that there was an accident and on the contrary the evidence of doctor, C.T. Scan report show that the respondent No. 1 had suffered a stroke due to which he suffered paralytic attack. There is no evidence whatsoever about any external injury due to fall and none has deposed about any external injury to the head,

(iii) The material evidence of doctor and the contemporaneous record of the hospital and the CT Scan has been ignored by the trial Court, and therefore, there is a perverse approach on the part of the trial Court in the appreciation of evidence which constitute substantial question of law.

He relied on the decisions reported in Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, , Jyothi Ademma Vs. Plant Engineer, Nellore and Another, , and Rohini Shamrao Burud (Smt. vs. Hindustan Petroleum Corporation). 2005 (111) CL 915,

6. Per contra, Mr. Mohokar, the learned counsel for the respondents opposed the appeal and argued that High Court has a very limited jurisdiction, particularly in

respect of appeals under Workmen's Compensation Act and it is not possible to re-analyze or re-appreciate the evidence or substitute the view taken by the trial Court even if there is a slight deviation on the part of trial Court. The requirement, according to Mr. Mohokar, is that there should be a question of law, that too substantial question of law, and no interference can be made by High Court by substituting the view taken by the trial Court.

7. The son and wife of respondent No. 1 and the other two witnesses have deposed regarding accident and, therefore, there is no reason why the evidence of these witnesses should be kept aside. The trial Court has accepted the evidence of all the witnesses and no perversity can be found in the matter of appreciation of evidence of the witnesses.

8. The internal injury found in the CT Scan can be caused by the fall on the ground from a distance of 4 to 5 ft. and, therefore, there is no reason to disbelieve that the said internal injury was caused due to fall on the ground from the mixer machine. The Court is entitled to draw inference even on preponderance of probabilities and in the instant case, there is no reason for this Court to disturb the findings of fact recorded by the trial Court although on preponderance of probabilities.

9. The legislation being welfare legislation, the strict rules of pleadings are not applicable and, therefore, this Court must look at the matter in the right perspective rather than applying strict rules of pleading and evidence.

10. The accident having been established, there is little doubt about it having taken place during the course of employment and, therefore, the initial burden has been discharged by the respondents. In the alternative, Mr. Mohokar argued that the matter deserves to be remanded to the trial Court since the doctor did not depose completely or that the relevant questions were not asked to the doctor. He, therefore, prayed for dismissal of the appeal and in the alternative for remand of the case. He relied on the following judgments.

1. 1996 LAB. I.C. 307 (Orissa High Court) Divisional Manager, National Insurance Co. Ltd. v. Rama Jena and after him Khadika Devi and others. 2. 2006(110) FLR 989 (Madhya Pradesh High Court NTPC/VSTPP. Vindhya Nagar, Sidhi vs. Smt. Rajwati Panika and another and 1997 A I H C 1111111959 (Madras High Court) K. Saroja vs. Valliammal Animal and etc.

Consideration 11. I have heard learned counsel for the parties at length. I have gone through the record and proceedings of the case of the trial Court and the impugned judgment and award. I find that the following substantial question of law arises in the present first appeal. "Whether the Commissioner for Workmen's Compensation erred in holding that there was any "accident" and the respondent No. 1 was injured in the accident on 23-9-2005 and whether the finding recorded by the Commissioner is perverse and contrary to evidence on record?"
Consideration (II)

12. A few statements of law pronounced by the Apex Court are necessary as preface in the instant case. In *Jyothi Ademma Vs. Plant Engineer, Nellore and Another*, the Apex Court in paras 6 to 8 stated thus :-

6. u/s 3(1) it has to be established that there was some casual connection between the death of the workman and his employment. If the workman dies as a natural result of the disease which he was suffering or while suffering from a particular disease he dies of that disease as a result of wear and tear of the employment, no liability would be fixed upon the employer. But if the employment is a contributory cause or has accelerated the death, or if the death was due not only to the disease but also the disease coupled with the employment, then it can be said that the death arose out of the employment and the employer would be liable.

7. The expression "accident" means an untoward mishap which is not expected or designed. "Injury" means physiological injury. In *Fenton v. Thorley and Co. Ltd.*, it was observed that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed. The above view of Lord Macnaghten was qualified by the speech of Lord Haldane, A.C. In *Trim Joint District School Board of Management v. Kelly* as follows :

I think that the context shows that in using the word "designed" Lord Macnaghten was referring to designed by the sufferer.

8. In the present case it has been brought on record that the deceased was suffering from chest disease and was previously being treated for such disease. The High Court also noted that the job of the deceased was only to switch on or off and, therefore, the doctor had clearly opined that there was no scope for any stress or strain in his duties. In view of the factual findings recorded, the High Court's judgment does not suffer from any infirmity.

In *Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmmed Issak*, , it was held in para 6 thus--

In the case of death caused by accident the burden of proof rests upon the workman to prove that the accident arose out of employment as well as in the course of employment. But this does not mean that a workman who comes to Court for relief must necessarily prove it by direct evidence. Although the onus of proving that the injury by accident arose both out of and in the course of employment rests upon the applicant these essentials may be inferred when the facts proved justify the inference. On the one hand the Commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate inference.

In *NTPC/VSTPP, Vindhya Nagar, Sidhi v. Smt. Rajwati Panika and another*, 2006(110) FLR 989 upon circumspection of principles stated in several judgments, the Division Bench of Madhya Pradesh High Court quoting Dr. G.

P.Singh J., stated thus -

Shri G. P. Singh, J. summarised his conclusions as follows insofar as relevant for our purposes may be stated as follows :

10. On a review of the authorities, the principles insofar as relevant for our purposes may be stated as follows :

(A) "Accident", means an untoward mishap which is not expected or designed by the workman, "Injury" are means physiological injury.

(B) "Accident" and "Injury" are distinct in cases where accident is an event happening externally to a man" e.g. When a workman falls from a ladder and suffers injury. But accident may be an event happening internally to a man and in such cases "accident" and "injury" coincide. Such cases are illustrated by bursting of an aneurism, failure of heart and the like while the workman is doing his normal work.

(C) Physiological injury suffered by a Workman due mainly to the progress of a disease unconnected with employment, may amount to an injury arising out of and in the course of employment if the work which "the workman was doing at the time of the occurrence of the injury contributed to its occurrence.

(D) The connection between the injury and employment may be furnished by ordinary strain of ordinary work if the strain did in fact contribute to or accelerate or hasten the injury.

(E) The burden to prove the connection of employment with the injury is on the applicant but he is entitled to succeed if on a balance of probabilities a reasonable man might hold that the more probable conclusions that there was a connection.

As to the importance of material pleadings even in the lis between employer and workman, the Apex Court in J.K. Iron and Steel Co. Ltd., Kanpur Vs. The Iron and Steel Mazdoor Union, Kanpur, , stated thus in para 24 -

Now the position in the present case is this. The Tribunals are directed by section 7 Industrial Disputes Act to adjudicate industrial disputes "in accordance with the provisions of the Act" and section 11 directs them to follow "such procedure as may be prescribed". The procedure for the Uttar Pradesh Tribunals is laid down by the U. P. State Industrial Tribunal Standing Orders, 1951.

Very broadly it follows the pattern of the civil Courts. Once the reference is made by Government, the Tribunal has to take the pleadings of the parties in writing and to draw up issues. Then it takes evidence, hears arguments and finally pronounces its "judgment" in open Court". It is evident from this that though these tribunals are not bound by all the technicalities of Civil Courts, they must nevertheless follow the same general pattern.

Now the only point of requiring pleadings and issues is to ascertain the real

dispute between the parties, to narrow the area of conflict and to see just where the two sides differ. It is not open to the Tribunals to fly off at a tangent and, disregarding the pleadings, to reach any conclusions that they think are just and proper.

13. Upon perusal of the application filed by respondents, it is seen that it was never the case of the respondents that on 23-9-2005 no activity of working on the concrete mixer machine was being undertaken or that the machine was lying idle or that the respondent No. 1 was merely cleaning the machine and greasing and oiling the same for keeping the machine ready for the work which was allegedly to start the nextday. At the outset, this Court is amazed to see that respondent No. 1, who is said to have suffered head injury and who is alive, was not at all examined by the respondents before the Court. A Pursis Exh. 12 under the signature of advocate for the respondents and thumb impression purported to be of respondent No. 1 thereon was filed on record in which it was stated that the respondent No. 1 was unable to speak and therefore he cannot examine himself. The Court made an order thereon "seen and filed". He, thus, was not brought before the Court even to find, out whether he could speak or not. Further, respondents examined Dr. Ramesh Bhutada from whose hospital he was discharged; but nothing was brought from Dr. Bhutada's evidence that he was unable to speak. The respondents, thus, withheld the respondent No. 1 from the Court and the appellant for being put to the test of cross-examination. The respondents Nos. 2 and 3 were examined before the Court but admittedly they were not the eye witnesses to the alleged accident. The other two witnesses who were examined namely Sanjay Sadashiv Tarapure (Exh. 15) and Sheikh Jakir Sheikh Munaf (Exh. 19) are chance witnesses and they deposed contrary to the case of the respondents in the pleadings. The first eye-witness Sanjay Tarapure stated that he and Sk. Jakir Sk. Munaf (the other eye-witness) were going on main road near Agrasen Bhavan. Machine was not on. Respondent No. 1 who was cleaning the machine fell down from machine. While Sk. Jakir Sk. Munaf says he does not know who had undertaken the work at Agrasen Bhavan. The work of construction of main gate was going on. The mixer machine was not on. The wife of Respondent No. 1 Saidabi deposed that her husband told her that while working on mixer machine he suffered head injury and in cross-examination she stated that it was internal injury due to which he was paralyzed. Similar is the evidence of son of Respondent No. 1. He also stated that no work was going on at the place. Witness No. 5 Sanjay Nivruti Kharche, a photographer, deposed about three photographs which were taken three years prior to the alleged incident. Hence, his evidence is of no use.

14. In the above backdrop, looking at the averments in application u/s 10 of the Act filed by the respondents, it is seen that the application nowhere shows that on 23-9-2005 the mixer machine was lying idle or that the respondent No. 1 was merely cleaning, greasing and oiling the said machine for making the machine ready for work of the next day. There is thus material improvement in the evidence of all the above witnesses from the pleadings in the application; and a

different story altogether has been narrated in the evidence before Court. The application states that respondent No. 1 suffered head injury when he was working on the concrete mixer machine. But there is no external head injury found by anybody. Having realized that there is no external head injury, Sayeedabi deposed that there was internal injury. But the C.T. Scan report does not show any corresponding internal injury or for that matter any internal injury. Looked from the above angle, the submission made by Mr. Mohokar that strict rules of pleadings are not to be insisted upon in respect of beneficial legislation like the Workmen's Compensation Act does not impress me because in the instant case the story is being completely changed by the respondents from the pleadings and that assumes importance in the light of the other evidence which I would discuss hereinafter.

15. The evidence of respondent Nos. 2 and 3 Abdul Mobin, son of the respondent No. 1, and Sayeedabi, wife of respondent No. 1, shows that they are not the eye witnesses to the alleged incident. It is important to note that the appellant stoutly denied in the written statement as well as in his evidence that he had taken any construction work for construction of complex at Agrasen Bhavan, Shegaon. This part of his pleading and evidence has not at all been shattered. In my opinion, the burden of proof to show that on the fateful day the appellant had undertaken contract of construction of Agrasen Bhavan, Shegaon, was required to be discharged by the respondents, particularly because the evidence of the appellant has not at all been shaken. These witnesses, son and wife of respondent No. 1, as stated earlier, did not know anything about the incident. However, Abdul Mobin in his cross-examination stated that a wrong date namely 27-9-2005 was mentioned in the notice that was given by advocate by mistake. The age of his father at the relevant time was about 79 years. No documentary evidence was available with him to show that respondent No. 1 was working with the appellant. He used to work with two contractors. The mixer machine was not working on the date of incident nor any construction activity was going on. He admitted that his father was a chain smoker. He stated that some portion of the machine had hit his father and he fell down while Sanjay Tarapore and Sheikh Jakir stated that he had fallen down from the machine. He then stated in the cross-examination that he had admitted his father in the night on 23-9-2005 when the incident has taken place in the morning at 9 a.m. He further admitted that his father had returned from Ajmer a day earlier to the incident and had lodged the report of the incident three months after the accident because money was not paid to him. The alleged other two eye witnesses Sanjay Sadashiv Tarapore and Sheikh Jamir Sheikh Munaf stated that these two witnesses were going by main road near Agrasen Bhavan when they saw respondent No. 1 falling down from the mixer machine and they found him unconscious and informed the family members of respondent No. 1. In the cross-examination however both of them stated that the mixer machine was not working nor any work was going on. They could not show any paper that they were working in the nearby ginning factory. The respondent No. 1 must have been at the height of 7 to 8 ft. when he

fell down on the ground and became unconscious.

16. The most important evidence adduced by the respondents themselves is of witness No. 6 Dr. Ramesh Ramgopal Bhutada and Exh. 35 discharge card produced by him. Dr. Bhutada in his evidence has stated no time when the patient was admitted to the hospital i.e. whether in the morning or night. It is not possible to believe that the person who became unconscious on the spot due to alleged head injury in the morning would not be taken immediately to hospital at some distance and would be admitted in the hospital in the night and at any rate there is no explanation for the same. That apart, Dr. Bhutada in his evidence did not state a word nor Exh. 35 indicates as to what was the history of the patient nor there is any mention about any accident in the clinical history of the patient when the patient was admitted. On the contrary, the history clause shows weakness on right side of the body since one hour, unable to speak since one hour and significantly enough that the patient was a chronic smoker. The age is 80 years which is also shown in the election card. He did not depose about any external injury to head or for that matter any injury on his body. When he examined him, he did not find any internal injury also. He had, therefore, referred the patient for CT Scan since he found that the right portion of the body was paralytic. Thus, Dr. Ramesh Bhutada has not proved that there was any injury caused in the accident to the patient. On the contrary, his evidence goes to show that the patient had loss of iron, was a chain smoker with BP ranging from 200/110. Obviously, such a blood pressure is on a very very higher side. With this evidence of Dr. Bhutada, who is an independent witness, it would be appropriate to see document No. 4 i.e. the CT Scan report given by Dr. Govind Khandelwal. The CT Scan report nowhere shows that any external injury was seen. On the contrary, the CT Scan report shows that there was a small nonhaemorrhagic infarct in the left middle cerebral artery. Added to this, it is reiterated in the report that there was no evidence of any intracranial haemorrhage. Thus the CT Scan report and evidence of Dr. Ramesh Bhutada show that there was neither any external injury nor internal intracranial haemorrhage but there was a infarct in the middle cerebral artery in the brain which means that respondent No. 1 had suffered a stroke and had thus become paralytic on the right side. In the light of the aforesaid evidence, which is the independent evidence, it is not possible to believe that respondent No. 1 fell down from a height of 7 to 8 ft. on the ground but still did not receive even any single external injury to the head or even any abrasion or as the case may be. Thus, the story planted by the respondents that he fell down from the mixer machine from a height of about 7 to 8 ft. and therefore injury was caused is totally unbelievable and no reasonable and prudent person would draw an inference that it was an accident. It clearly appears that the respondent No. 1 was a chain smoker of bidi as admitted by his son and Dr. Ramesh Bhutada and his B.P. at the relevant time was 200/110 which clearly indicates that he must have suffered a stroke, and that is why there is a "infarct". He had returned from Ajmer a day earlier. He is a person of 80 years old and it appears that the

respondent wanted to recover money from the appellant by laying claim under Workmen's Compensation Act in the Court and that is why the story of admission to the hospital in the night when respondent No. 1 had allegedly become unconscious in morning at 10 a.m. appears to have been brought on record. The report also was lodged after 10 months to the police station. The very fact that there is absolutely no evidence on record to show that the appellant had taken a contract for construction of complex at Agrasen Bhavan, Shegaon, or that any activity of construction by the appellant was at all going on the spot is another aspect which shows that no work was going on nor any accident had taken place. For all these reasons, therefore, I hold that there is a perversity on the part of the Court below in ignoring the important pieces of evidence brought on record by the respondents themselves through the independent witness i.e. Dr. Ramesh Bhutada and the CT Scan report and coupled with the fact that the respondent No. 1 was never brought in the witness box for the test of cross-examination. Therefore, the judgments relied upon by Mr. Mohokar, the learned counsel for the respondents have no application in the instant case. There is a failure on the part of the respondents in proving that there was accident which is a requirement for claiming compensation under Workmen's Compensation Act. In the result, the aforesaid substantial question of law will have to be answered in affirmative.

17. Mr. Saboo, the learned counsel for the appellant upon seeking instructions and without prejudice to rights of appellant stated that the ex-gratia payment of amount of Rs. 25,000/- would be made by the appellant to the respondent No. 1 and the same can be withdrawn out of the amount of Rs. 1,50,000/- deposited by the appellant in the Labour Court at Buldhana.

Hence, the following order.

ORDER

- (i) First Appeal No. 366/2009 is allowed.
- (ii) The judgment and award dated 10-12-2008 made by the Commissioner for Workmen's Compensation in W.C.A. No. 4/2006 is set aside.
- (iii) Civil Application (caf) No. 2550/2009 filed by the respondents is dismissed.
- (iv) In view of the statement in para No. 16, the amount of Rs. 25,000/- be paid to the respondent No. 1 from the deposit made with the Labour Court, Buldhana. Balance amount be refunded to appellant.
- (iv) No order as to costs.