
(2023) 11 KL CK 0207
In the High Court Of Kerala
Case No : M.F.A.(ECC). 106 Of 2021

Manager

APPELLANT

Vs

Kani @ Rajayya

RESPONDENT

Date of Decision : 20-11-2023

Acts Referred:

Employees Compensation Act 1923 — Section 3(1), 22, 30

Citation : (2023) 11 KL CK 0207

Hon'ble Judges : C.Pratheep Kumar, J

Bench : Single Bench

Advocate : B.Ashok Shenoy, C.G.Preetha, P.S.Gireesh, Arjun R Naik,
C.S.Manilal, S.Nidheesh

Final Decision : Allowed

Judgement

C.Pratheep Kumar, J

1. This is an appeal filed under Section 30 of the Employees Compensation Act by the respondent in E.C.C.209 of 2014 (WCC.31 of 2012) against the order dated 28.1.2021 of the Employees Compensation Commissioner (Industrial Tribunal), Idukki.

2. The above application was filed before the Employees Compensation Commissioner by the legal heirs and dependents of deceased Albert @ Suresh under Section 22 of the Employees Compensation Act, 1923 (in short, Act 8 of 1923) claiming compensation in view of his death followed by an accident on 7.1.2011, during the course of his employment under the appellant as a mechanic.

3. According to the respondents, while Mr.Albert @ Suresh was working as Mechanic under the appellant, he was entrusted with the repair works of an autorikshaw bearing registration No.KL-6C/6780, owned by one Mr.Kingsly and while he was test driving the autorikshaw, he met with an accident at about 5.30 pm on 7.1.2011 and sustained serious injuries and while under treatment in

Medical College hospital at Kottayam, he succumbed to the injuries on 16.1.2011 at 5.15 pm. The respondents claimed compensation of Rs.10,67,850/-treating the monthly income of the deceased as Rs.10,000/-. As per the impugned order, the Employees Compensation Commissioner awarded a compensation of Rs.4,27,140/- along with interest at the rate of 12% per annum, Rs.5,000/- towards funeral expenses and Rs.2,135/- towards cost. Aggrieved by the above order passed by the Commissioner, the respondent in the application preferred this appeal raising various contentions.

4. One of the contentions taken by the appellant is that the impugned autorickshaw was not received in the workshop of the appellant for repair works as it was brought after the period fixed for the purpose. The deceased, after his duty, at the request of the owner of the auto-rickshaw, at his own instance, driven the same and met with the accident. The incident in which he sustained injury did not occur out of and in the course of his employment under the appellant. Therefore, the learned counsel for the appellant submitted that the claim of the respondent will not come within the purview of Act 8 of 1923 and the impugned order passed by the Commissioner is illegal, erroneous, ultra virus and without jurisdiction. There is absolutely no evidence to prove that the alleged accident occurred out of and in the course of the employment of the deceased and therefore he prayed for setting aside the impugned order by allowing the appeal. According to him, the impugned order passed by the Employees Compensation Commissioner finding that the accident occurred out of and in the course of employment of the deceased under the appellant, is perverse and without any evidence.

5. Now the points that arise for consideration are the following :

1) Whether the impugned order passed by the Employees Compensation Commissioner that the accident occurred out of and in the course of employment of the deceased under the appellant, is perverse and without any evidence ?

2) Whether the impugned order passed by the Employees Compensation Commissioner calls for any interference in the light of the grounds raised in the appeal ?

6. Heard both sides.

7. Admittedly, the deceased Albert @ Suresh was working as Assistant Mechanic in the workshop of the appellant. According to the respondents, the autorikshaw bearing registration No.KL-6C/6780 was brought in the workshop at about 4.00 pm on 7.1.2011 and accordingly the repair work of the autorikshaw was entrusted with the deceased at about 5.30 pm on the same day. However, according to the appellant, the said autorikshaw was brought to the workshop after the stipulated time and hence it was not received in the workshop on 7.1.2011. In order to prove the same, they have relied upon Ext.R1 job card register. Ext.R2(a) is the relevant page in Ext.R2 register dated 7.10.2011. In Ext.R2(a), the details of the vehicles received in the workshop on 7.1.2011 were

entered and it does not contain the number of the autorikshaw involved in the incident.

8. Absence of the number of the auto-rickshaw involved in the incident in Ext.R2(a) job card register substantiates the case of the respondent that on 7.1.2011 it was not received in the workshop of the appellant. It will substantiate the appellant's case that after the duty hours, at the request of the owner of the autorikshaw, the deceased had driven the autorikshaw and while so, the incident occurred. If so, the accident occurred not out of and during the course of the employment of the deceased under the appellant. As per sub-section (1) of Section 3 of Act 8 of 1923, in order to claim compensation, personal injury is to be caused to an employee by accident arising out of and in the course of his employment.

9. In the decision in *Jyothi Ademma v. Plant Engineer, Nellore and Another* [2006 KHC 824] after interpreting Section 3(1) of Act 8 of 1923, the Hon'ble Apex Court held that :

"Under Section 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 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. "

10. In *Malikarjuna G.Hiremath v. Branch Manager, Oriental Insurance Company Limited and Another* [(2009) 13 SCC 405], the Hon'ble Supreme Court quoted with the approval the earlier decision in *Regional Director, ESI Corporation and Another v. Francis De Costa and Another* [(1996) 6 SCC 1] in which the tests for attracting the provisions of Section 3 of Act 8 of 1923 were enumerated as follows :

"(1) There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.

(2) The onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

(3) If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case."

11. In *Regional Director, ESI Corporation and Another v. Francis De Costa and Another* [(1996) 6 SCC 1] the Hon'ble Apex Court held that :

".....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."

12. It was argued by the learned counsel for the 2nd respondent that as per the proviso to Section 30 of Act 8 of 1923 in order to entertain appeal there should be a substantive question of law involved in the appeal. As argued by the learned counsel for the appellant, a question of law would arise even when the finding is perverse, in the sense that no legal evidence was brought on record or jurisdictional facts were not brought on record. In the decision in *Sakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali And Another* [(2007) 11 SCC 668], the Hon'ble Apex Court held that :

"A question of law would arise when the same is not dependent upon examination of evidence, which may not require any fresh investigation of fact. A question of law would, however, arise when the finding is perverse in the sense that no legal evidence was brought on record or jurisdictional facts were not brought on record."

13. In this case, it is interesting to note that the only witness examined on the side of the respondents is the wife of the deceased, AW2, who was not present at the time of the evidence. Admittedly, with regard to the details of the accident, she has got only hearsay information. Though the father of the deceased Rajayya had filed proof affidavit, before his cross-examination he died and as such, his evidence could not be relied upon. More over, he was also not an occurrence witness to the accident. The crucial witness namely, the driver of the autorickshaw was not examined on the side of the respondents.

14. On the other hand, on the side of the appellant, RWs 1 to 3 were examined. All of them in clear terms deposed that the autorikshaw involved in the incident was not received in the workshop of the appellant on 7.1.2011 as it was brought after the period stipulated for receiving vehicles for work. They also deposed that after the duty of the deceased under the appellant is over, at the instance of the driver of the autorikshaw, the deceased had driven the vehicle and the accident occurred at that time. They have further made it clear that the accident involved in this case has no connection with the employment of the deceased under the appellant.

15. It appears that RWs 1 to 3 were not cross-examined by the learned counsel for the respondents. In the evidence of RWs 1 to 3, no cross is recorded for the respondents. The learned counsel for the 2nd respondent/mother of the deceased, has not offered any explanation for not cross-examining RWs 1 to 3. During the pendency of the appeal, the first respondent died and it was recorded that respondents 2 to 4 are his legal heirs. It is also interesting to note that respondents 3 and 4 who are the widow of the deceased and his daughter did not turn up at the time of arguments.

16. The evidence of RWs 1 to 3 remained unchallenged as they were not cross examined. Therefore, from the evidence of RWs 1 to 3 it is revealed that the accident occurred after the working hours of the deceased under the appellant. It is also revealed from their evidence that the autorickshaw involved in the accident was not received in the appellant's workshop on 7.1.2011 and it was not entrusted by the appellant to the deceased for any repair work as alleged by the respondents.

17. At the time of argument, an attempt was made by the learned counsel for the 2nd respondent to show that the alleged incident occurred at 5.00 pm as seen from Ext.A2 reference letter. However, the above time mentioned in Ext.A2 has little relevance in view of the amendment in the claim petition to the effect that the time of accident is corrected as 5.30 p.m. Since from the evidence of RWs 1 to 3 it is revealed that the accident occurred after the working hours of the deceased in the workshop of the appellant and the deceased had driven the autorickshaw involved in the accident at the instance of its own owner and not as per the direction of the appellant, it is to be held that the deceased sustained injury by accident arising not out of and in the course of his employment under the appellant. Therefore, the respondents are not entitled to get any compensation from the appellant as prayed for. The finding of the Employees Compensation Commissioner to the contrary, ignoring the clear evidence of RWs 1 to 3 is against the available evidence and perverse and as such, the same amounts to a question of law enabling this court to interfere under section 30. Accordingly, the impugned order awarding compensation to the respondents is liable to be set aside. Points answered accordingly.

In the result, this appeal is allowed. The impugned order awarding compensation to the respondent is set aside.