

(1975) 10 KL CK 0019
In the High Court Of Kerala
Case No : W.A. No. 193 of 1975

M.J. George

APPELLANT

Vs

Sumathi and Others

RESPONDENT

Date of Decision : 31-10-1975

Acts Referred:

Constitution of India, 1950 — Article 226
Workmens Compensation Act, 1923 — Section 3, 3(1), 30

Citation : (1975) 10 KL CK 0019

Hon'ble Judges : P. Govindan Nair, C.J;T. Kochu Thommen, J

Bench : Division Bench

Advocate : K.A. Mohammed and P.P. Thambi, for the Appellant; M.V. Joseph and Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

T. Kochu Thommen, J.—This is an unfortunate case of a poor widow having had to wait for nearly 10 years to establish her claim for compensation under the Workmen's Compensation Act, 1923. Her husband Gopalan was a member of the crew of a fishing boat called "Marina" which belonged to the Appellant. The boat capsized in a storm while engaged in fishing at sea on 8-12-1965. Her husband was on board at the time of the accident and he lost his life by drowning. The widow filed, on behalf of herself and her minor children, an application dated 12-4-1966 under the Workmen's Compensation Act. The employer raised various objections before the Commissioner. He contended that the deceased was not a workman employed by him, but was in fact his partner; and that the accident did not arise out of and in the course of employment. The Commissioner took more than four years to decide the case. By his order dated 1-7-1970 he held that the deceased was not a workman and dismissed the application without deciding the other questions. This order was challenged by the widow before this Court in A.S. No. 588 of 1970, and this Court by its judgment dated 3-9-1973 held that the deceased was a workman and remitted the case to the Commissioner for disposal of the matter afresh on the various issues involved. The case was heard

by the Commissioner on merits. By his order dated 6-5-1974 he decided all the issues in favour of the claimant and awarded a sum of Rs. 7,000 as compensation. The employer challenged this order before this Court under Article 226 of the Constitution. He contended that Gopalan lost his life as a result of an act of God namely, the storm and the employer could not be held liable in respect of such accidents. He further contended that the accident which caused the death of Gopalan did not arise out of and in the course of his employment and therefore the employer had no liability to pay any compensation. As a reason for not exercising his statutory right of appeal he stated that he could not afford the payment of Rs. 7,000/- which was a condition precedent for filing the appeal. He there-fore prayed, for a writ of certiorari to quash the Ext. P4 order of the Commissioner.

2. The writ petition was dismissed by judgment dated 2-1-1975. The learned Judge held that the workman lost his life as a result of an accident which arose out of and in the course of his employment, and the employer was liable to pay compensation in accordance with the provisions of the Act. The learned Judge also held that a petition under Article 226 was not maintainable as the statute provided u/s 30 for a right of appeal.

3. This judgment is now challenged before us in the present appeal. The Appellant says that the Commissioner (2nd Respondent) did not enter a finding regarding the cause of the death. According to him, the Commissioner ought to have determined the question as to whether Gopalan's death was caused by an act of God and, if so, whether his employer had any liability under the Act to pay compensation as claimed by Gopalan's widow (1st Respondent). He further says that the alternative remedy by way of appeal was not a bar to a petition under Article 226 of the Constitution.

4. We shall first deal with the question of the employer's liability under the statute. The relevant portion of Section 3 reads as follows:-

3 (1) 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;

5. As held by this Court in A.S. No. 588 of 1970, Gopalan was a workman employed by the Appellant. It was one of the terms of his employment that he would go to sea for the purpose of fishing on behalf of his employer. While he was so engaged on behalf of and under orders of the Appellant, he met with an accident which caused his death. The question is whether the accident which caused the death arose "out of and in the course of his employment" so as to attract Section 3 of the Act. According to the Appellant, if the cause of the accident, as a result of which the employee died, was an act of God, the employer could not be visited with any liability under the Act. He says that although death occurred while engaged in the act of fishing, if the cause of the accident was act of God like storm as in the present case, the death could not be

considered to have been caused by an accident which arose out of employment.

6. The expression "arising out of and in the course of" has been considered in a number of cases by courts in England. In *Charles R. Davidson and Co. v. M. Robb* (1918) A.C. 304 Lord Haldane said:-

In order to come within the statute an accident must not only occur "in the course of", that is to say during actual employment; but in addition must arise "out of" it. In other words, there is required to be shown something in the nature of a casual relation between the accident and an order, expressed or implied, given by the employer.

This is further explained by Lord Dunedin in the same judgment as follows:

It is obvious that the addition of the words "and in the course of" are meant in some way either to qualify or further explain the words "out of". My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of the employment. But it may well be that the determination of the question whether at the moment of the injury the workman was in the course of his employment may go to solve the question of whether the injury arose out of the employment. Let me instance the case of the domestic servant who is run over in the street. Given but the two facts that the man is, e. g. a butler and that he is run over in the street, you would not be able to decide whether the injury arose out of the employment or not. The facts are consistent with either supposition. But given the further fact that either (1) he has been sent by the master on a message, or (2) that he is enjoying an evening out, then you can determine, whether he is in the course of his employment or not and from that, if being run over is one of the inherent dangers of the street, you will be able to determine whether the injury arose out of the employment or not.

In *Pierce v. Provident Clothing and Supply Co. Ltd.* (1911) 1 K.B. 997, Buckley, L.J. says that the words "out of" necessarily involve the idea that the accident arises out of a risk incidental to the employment. In *Simpson v. Sinclair* (1917) A.C. 127 the House of Lords considered the expression "arising out of". The facts of that case were.

On January 26, 1915, the Appellant, a fish worker in the employment of the Respondent, was engaged in packing herrings in a shed belonging to the Respondent. Whilst she was so engaged, a wall in the course of erection on adjoining property fell by reason of its own instability upon the shed, bringing down the roof and part of the wall, so that the Appellant was buried under the wreckage and seriously injured.

It was contended by the employer that if the wall on the adjoining property had not collapsed, the roof of the shed would not have fallen down upon the workman. The accident arose from nothing connected with the employment but from something out of it, namely, the collapse of a neighboring wall. Referring to

this contention,

Lord Haldane said:

Whether the remoter cause of the roof falling was the collapse of a neighboring wall, or the falling down of some high adjacent building, or a stroke of lightning seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the Appellant had to work in this particular shed, and was in consequence, injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment, none the less, if ultimately caused by the fall of someone else's wall than if it had been caused by inherent weakness of the employer's roof.

In *Dennis v. White* (1917) AC. 479 an employee was ordered to go on a bicycle on his master's business. While riding the bicycle, he collided with a motor car and broke his leg. The House of Lords, allowing the appeal of the employee, held-

the accident was due to the risk of collision, which, under the circumstances, was incidental to the use of a bicycle, and that it arose out of the employment. When once it was proved that the risk was one which the employment required the claimant to face, it was immaterial that it was a risk which was shared by all members of the public who used bicycles under the like conditions....

7. These principles were discussed by Lord Atkin in *Margaret Brooker v. Thomas Borthwick and Sons* (1934) 66 M.L.J. 225 (P.C) as follows:

The accident must be connected with the employment: must arise "out of" it. If a workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself has no kind of connection with employment, he cannot recover unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered.

x x x x

The substance of the matter is that in every case the words of the section alone are to be considered: "arising out of and in the course of the employment". It is with respect misleading to apply other terms whether derived from insurance law or other sources.

The principle enunciated in the cases cited above shows that if a workman is killed or injured by the happening of an event, in the premises where he is employed under orders of his master or in accordance with the contract of service, the accident necessarily arises out of and in the course of the employment. It is immaterial if the event itself was caused by an act of God like storm, lightning or. earth-quake. What directly caused the death of the workman

in the present case was the capsizing of the boat in which he was working under orders of his employer. Being drowned in such circumstances is one of the inherent dangers of fishing at sea. The accident arose out of a risk incidental to the employment. It was a risk which his contract of service required him to face, and it is immaterial that it was a risk which was shared by all members of the public who chose to go to sea. The remoter cause of the storm was not the immediate or direct or proximate cause of his death: yet by the very nature of his employment, the deceased was exposed in a special degree to suffer the consequences of what flowed from the perils of the sea such as storm and such consequences were, as Lord Atkin puts it, "sufficiently associated with his employment"" so as to make the employer liable under the Act.

8. Applying the above test to the facts of the present case, one is left with no doubt as to the liability of the employer. The 1st Respondent's husband died in the course of his employment. The death was caused by an accident which arose out of the employment. Consequently we have no doubt that Section 3 of the Workmen's Compensation Act is applicable to the case. In our opinion, the employer is liable to pay compensation in accordance with the provisions of the Act. With respect, we agree with the observations of the learned Judge on this question.

9. We also, with respect, agree with the learned Judge on the question of the alternative remedy being a bar, in the circumstances of the present case, to proceedings under Article 226 of the Constitution. This Court would not exercise its discretionary jurisdiction under Article 226 in cases where the statute had provided for an effective remedy by way of an appeal, merely because the Petitioner could not afford to pay the compensation before filing the appeal, unless exceptional circumstances existed such as total lack of jurisdiction in the appellate authority. *Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta*, In the present case, no such circumstances existed and the writ petition was not maintainable. Consequently, the present Appeal also is not maintainable, and we dismiss the same. As observed by the learned Judge, "to allow this matter arising out of Workmen's Compensation to prolong any further would not only be unjustifiable but also cruel, and therefore any extension of time to this litigation is most unwarranted". We respectfully agree. The learned Judge did not, however, award cost to the 1st Respondent. We would therefore limit our order as to cost to the present proceedings, and accordingly order the Appellant to pay the cost of the 1st Respondent in this appeal. Counsel's fee Rs. 300/- Dismissed.