
(2008) 09 MAD CK 0134
In the Madras High Court
Case No : C.M.A. (NPC) No. 2338 of 2002

National Insurance Co. Ltd.

APPELLANT

Vs

A. Saroja and Others

RESPONDENT

Date of Decision : 17-09-2008

Acts Referred:

Workmens Compensation Act, 1923 — Section 3, 3(1)

Citation : (2010) ACJ 1221

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : N.B. Surekha, for the Appellant; N. Manoharan, for the Respondent

Final Decision : Dismissed

Judgement

S. Palanivelu, J.—The averments found in the claim petition are as follows:

The applicant No. 1 is wife, applicant Nos. 2 and 3 are parents of the deceased Annadurai and applicant Nos. 4 and 5 are the daughters of applicant No. 1 and the deceased. The deceased was aged about 28 years at the time of his death. He was employed by the opposite party No. 2 as cleaner-cum-driver in his K.P.R. Transports, Perundurai. He was paid a salary of Rs. 3,000 per month besides daily bhatta of Rs. 50 and bonus. Opposite party No. 1 is driver and the opposite party No. 3 is insurer of lorry belonging to the opposite party No. 2 bearing registration No. TN 37-D 5959.

2. The said Annadurai was going as a cleaner-cum-driver in the said lorry under the employment of opposite party No. 2 from Pune to Kerala on 25.3.1998. On the way at Karappalli Medu near Rayakottai Road in Hosur, the lorry was stopped. Annadurai got severe heart pain, vomited blood and was immediately admitted to Hosur Hospital. After examining him the doctor told that Annadurai died a minute before. The said lorry was loaded with iron and steel from Pune to Kerala. He died in the course of his employment under the opposite party No. 2 in the capacity of cleaner-cum-driver of the lorry. Hence both opposite party Nos. 2 and

3 are jointly and severally liable to pay compensation to the petitioners. Annadurai was hale and healthy at the time of accident. He was an experienced cleaner and driver. Applicants were solely depending upon the income of the deceased. Hence a compensation of Rs. 5,00,000 is prayed for.

3. The following are the allegations contained in the counter filed by the opposite party No. 3:

It is not admitted that the deceased was working as cleaner under the opposite party No. 2 at the time of death. The applicants have not proved the employment under the opposite party No. 2 by documentary evidence. It is denied that the deceased died in the course of employment and arising out of employment as "cleaner" under the opposite party No. 2. It is also incorrect to state that deceased was getting a salary of Rs. 3,000 per month and also daily bhatta of Rs. 50 and bonus from the opposite party No. 2. He died due to heart attack which proves that the death was due to pre-existing ailment or disease. Hence it is a death out of natural cause and not an accidental death. So the applicants are not entitled for compensation.

3.1. It is also false to state that the lorry of opposite party No. 2 was insured with this opposite party on the date of accident. This opposite party has not issued any policy of insurance indemnifying opposite party No. 2 against the claims made by workmen such as driver and cleaner. It is not admitted that the opposite party No. 1 was holding a valid driving licence with necessary endorsements by the competent authority to drive a heavy goods vehicle on the date of accident. It is not true that the applicants except minor children were depending upon the deceased income for their maintenance. It is more definite that the deceased died out of natural cause, i.e., heart pain which could not be attributed as an employment injury. The claim of Rs. 5,00,000 as compensation is without any basis which is highly excessive, exorbitant and fanciful. The claimants want to make an unjust enrichment out of the natural death of deceased. Hence the petition * may be dismissed.

4. On considering the matter, the Deputy Commissioner of Labour, Salem has entertained the claim petition, observing that the said Annadurai was going in the lorry as "cleaner" and he died in the course of his employment and directed the opposite party No. 3 to pay Rs. 1,93,174 as compensation within 30 days and in default of deposit, the same along with interest at the rate of 12 per cent.

5. The insurance company, aggrieved with the said award, carried the matter in appeal before this Court.

6. At the time of admission of appeal, this Court formulated the following questions of law:

(1) Has not the Commissioner, Workmen's Compensation (Deputy Commissioner of Labour), Salem, misdirected itself in law in assuming a jurisdiction which was not vested under the law in respect of the occurrence of the death which was not

duly established as having taken place due to the employment injury and in the course of employment thereby mulcting the appellant insurance company for payment of compensation?

(2) Has not the Commissioner for Workmen's Compensation misdirected itself in law in entertaining the claim petition when there was nothing on the record to show that the death was as a consequence of employment injury nor was it established that there was any nexus between the employment in relation to the nature of work in that the death had occurred only due to the course of travelling as a coolie and when it was also not established that the chest pain and the subsequent death due to the aftermath of strain in the work?

7. Learned Counsel for the appellant would vehemently argue that inasmuch as there is no proof to show that deceased was cleaner-cum-driver, much less a cleaner in the lorry of respondent No. 2 and there was no material to show he died in the course of employment.

8. Per contra, learned Counsel for the claimants would submit that there is no impediment on the part of the Commissioner to reach a conclusion that the death occurred during the course of employment and in the absence of any adverse evidence, i.e., on the side of the insurance company, there was no obstacle for Commissioner to hold that the insurance company is liable.

9. The Deputy Commissioner of Labour, even though has not dealt with the matter in extensive, in the backdrop of oral and documentary evidence on record, has decided that Annadurai was cleaner under opposite party No. 2 and he died out of employment and anchored liability upon the insurance company. He has also observed that as per the existing government order, monthly wages payable to the cleaner is Rs. 1,809 and adopting factor 213.57, he has arrived at the quantum of compensation through the below mentioned formula:

Age: 27 Factor: 213.57 Monthly salary: Rs. 1,809 Compensation: $(Rs. 1,809 \times 50 \times 213.57) \div 100 = Rs. 1,93,174.06$ (or) Rs. 1,93,174

10. Before entering into the arena of settled legal principles to be followed in this proceedings, it is advantageous to have a glimpse of the oral evidence on record.

11. Before the learned Commissioner, the claimant No. 1, wife of the deceased alone was examined and there was no further evidence on the part of the claimants and no oral evidence was let in on behalf of the opposite parties. Even though on the previous hearings the opposite party Nos. 1 and 2 have been appearing before the authority, subsequently, they did not make their appearance and hence they were set ex parte.

11.1. F.I.R. was lodged by respondent No. 1, who was the driver in the lorry, in which he has stated that Annadurai was cleaner in the lorry and he used to inform him that he was a heart patient for which he was taking allopathic drugs, that on 25.3.1998 he was driving the lorry from Pune with the machinery load. On 27.3.98 at 5.30 a.m. he told him that he had to attend call of nature and that

he was also feeling uncomfortable and hence asked him to stop the lorry, thereafter he took water in a cup and went to toilet and since he did not turn up for a long time on suspicion, opposite party No. 1 went there and found Annadurai unconscious. He was taken to Hosur Government Hospital in the lorry and while he was taken in the lorry for treatment he was found dead and that the doctor also pronounced him dead.

11.2. It is admitted fact that deceased was in the course of employment in the lorry at the time of his death. But it is stated that it was a natural death. In order to establish the versions of the claimant, it must be shown that he suffered heart pain due to the strain and stress which arose in the course of employment.

11.3. Though in the F.I.R. it is alleged by opposite party No. 1 that he was previously having the heart ailment, in order to prove that allegation, he was not at all examined before the authority. When the burden of proof on the part of the claimants has been shifted to the side of the opposite parties, with reference to the death in the course of employment, it is incumbent upon them to establish that he was already suffering from cardiac disease. In this context, it is worthwhile to note that the deceased was a valid licence holder to drive transport vehicle. Exh. P6 is photocopy of the licence issued to Annadurai, which shows that he was licensed to drive light motor vehicle and the endorsement thereon goes to show that he was authorised to drive transport vehicle w.e.f. 4.1.1996. In the backdrop of this circumstance, it can be observed that since he was a qualified driver, opposite party No. 2 should have employed him as a "cleaner-cum-driver". Two other surfacing circumstances would vouchsafe this observation.

11.4. Firstly, in the long route goods carrying vehicle, usually the owner of the lorry would employ two drivers to drive the vehicle on shift basis. It is clear that excepting opposite party No. 1 and the deceased no other person was in the cabin of the lorry. So, necessary presumption to be drawn is that the deceased was going as cleaner-cum-driver.

11.5. Secondly, the versions in the F.I.R. candidly establish the fact that the deceased was driving the vehicle on that day. The relevant portion in F.I.R. is extracted below in vernacular language which is as follows:

(Omitted as in vernacular)

12. While the above said statements are carefully dissected it comes to light that on 25.3.1998, deceased drove the lorry from Pune towards Kerala and on 27.3.1998 at about 5.30 a.m. he suffered heart pain. The cumulative effect of those statements would clarify the fact that due to continuous driving the deceased sustained strain and stress which led him to suffer the heart pain. Hence, there is no embargo for this Court to arrive at a conclusion that the deceased was driving the lorry and due to that he had heart pain.

13. Learned Counsel for the appellant would place much reliance upon a decision

of the Hon''ble Supreme Court in Shakuntala Chandrakant Shreshti Vs. Prabhakar Maruti Garvali and Another, wherein their Lordships have discussed a case of Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another, , in which the cleaner of the lorry, goods carrying vehicle died due to heart attack and it was observed that even though he was considered to be under employment of the owner of the vehicle and his death occurred during the course of and out of employment, in the absence of the materials to show that he suffered heart attack which was outcome of strain obtained from his labour in the course of employment. In the said case there was no proof to show that the cleaner experienced strain or stress in the course of employment and their Lordships held that there was no nexus between the death and the employment and hence the legal heirs are not entitled for compensation. In said case, the following principles have been formulated:

(22) There are a large number of English and American decisions, some of which have been taken note of in Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another, , in regard to the essential ingredients for such finding and the tests attracting the provisions of Section 3 of the Act.

The principles are:

(1) There must be a causal connection between the injury 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 record establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of personal injury, it would be enough for the workman to succeed, but the same would depend upon the facts of each case.

(23) Injury suffered should be a physiological injury. Accident, ordinarily, would have to be understood as unforeseen or uncomprehended or could not be foreseen or comprehended. A finding of fact, thus, has to be arrived at, inter alia, having regard to the nature of the work and the situation in which the deceased was placed.

(24) There is a crucial link between the causal connections of employment with death. Such a link with evidence cannot be a matter of surmise or conjecture. If a finding is arrived at without pleading or legal evidence the statutory authority will commit a jurisdictional error while exercising jurisdiction.

(25) An accident may lead to death but that an accident had taken place must be proved. Only because a death has taken place in the course of employment will not amount to accident. In other words, death must arise out of accident. There is no presumption that an accident had occurred.

(26) In a case of this nature to prove that accident has taken place, factors

which would have to be established, inter alia, are:

- (1) stress and strain arising during the course of employment;
- (2) nature of employment; and
- (3) injury aggravated due to stress and strain.

14. It is to be noticed that the facts of the present case has fulfilled all the requirements contained in the principles. In the above said case their Lordships have also observed that deceased has admittedly suffered a massive heart attack and nothing has been brought on record to show that the heart attack was caused while doing any job and that even according to the employer, he at the relevant time was getting down from the vehicle. But the facts of the present case on hand are distinguishable. It is on record and admitted that Annadurai died in the course of employment and the F.I.R. shows that he was all along in the lorry right from 25.3.1998 up to the death and earlier to that he was driving the vehicle and hence this Court finds no embargo to conclude that the death occurred out of employment.

15. Learned Counsel for the appellant also garnered support from a decision of this Court in *United India Insurance Co. Ltd. v. M. Veluchamy* 2005 (1) TN MAC 87 wherein it is held that simply because the applicant was travelling as a cleaner in lorry along with the driver, it cannot be said that there was any strain or stress and in the absence of any accident coupled with any personal injury, he is not entitled for any claim of compensation. It is further observed that even assuming that there was some strain in the work, in order to attract Section 3(1) of the Act, there must be an accident coupled with the personal injury. But so far as the above case is concerned, it has come out in the evidence from PW 3 that the applicant was already suffering from heart ailment. In the case on hand even though there is a version in the F.I.R. as regards heart ailment of the deceased, since the informant/lorry driver was not brought before the court, his statements in the F.I.R. lose probative value.

16. Learned Counsel for the appellant also draws attention of this Court to another unreported judgment of this Court made in *National Insurance Co. Ltd. v. Chinnapillai C.M.A. (NPD) No. 1396 of 2001*; decided on 10.7.2007, wherein the learned Judge has held that in the absence of any evidence by a co-worker it cannot be said that there was stress and strain in the employment and that deceased was exposed to added duty or burden on the fateful day resulting in the death.

17. Learned Counsel for the respondents would contend that in order to controvert the materials available in the claimant's evidence, the appellant insurance company has not instituted any steps to produce either the driver or the owner of the lorry. In the absence of any contra evidence on the part of the appellant, it is his contention that the testimony adduced by the claimant has to be accepted. In support of his contention, he placed reliance on the decision of

the Supreme Court in Vidhyadhar Vs. Manikrao and Another, in which it is held that where a party to the suit does not appear into the witness-box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. Applying the dictum laid down in this judgment to the case on hand, in the absence of any contrary evidence to the claimant evidence, presumption can be drawn that the defence raised by the appellant could not be sustained. I hasten to add that this Court does not merely advert to this situation for the proof of claimant's case, but other attending circumstances also which have been narrated in the judgment in earlier paras.

18. Learned Counsel for the respondents also cited a judgment of this Court in Krishnaveni v. B. Muruganathan 2001 LW 222 in which learned single Judge has held that it is settled that the appreciation and analysis of the materials available on record by the Tribunal are totally different from the approach of the criminal courts and the civil courts. Coming to the facts of the present case, the proof of preponderance of probabilities as required in a civil case is very much available and it is observed that strict proof as needed for the criminal case is not necessary.

19. Learned Counsel for respondents would also place reliance on New India Assurance Co. Ltd. v. S. Vijayalakshmi 2007 (2) TN MAC 502 in which this Court has held that stress and strain resulting in sudden heart failure in a case of the present nature could not be presumed and no legal fiction can therefore be raised. It is also held that each case has to be considered in its own facts and no hard and fast rule can be laid down therefor.

20. In yet another decision of this Court in Oriental Insurance Co. Ltd. v. Nagaraj 2009 ACJ 2587 (Madras) the learned single Judge is of the opinion that suffice it to note that strain, even if it was a normal strain, connected with the employment was the reason for the death of workman and the provisions of Workmen's Compensation Act should be broadly and liberally construed in order to effectively apply the provisions of the Act.

21. Bearing in mind the above stated, I am of the considered view that the judicial pronouncements make this subject clear. Even an ordinary strain in given circumstances of the case would be enough to cause the injury or death which is found to be in the course of and out of employment, it has to be held that the claimant is entitled for the compensation. Claimant is expected in law to show that the workman suffered injury or death due to strain and stress drawn from the work which in particular circumstance was sufficient to cause injury or death and unlike in a criminal case it is enough to show the preponderance of probabilities which would form a premise that claimants version is probable. It is not necessary to prove that the injury or death was caused by the stress and strain beyond any doubt but it must be shown and the materials brought before the court shall be to the satisfaction of the court.

22. Even though there is no plausible medical evidence to portray that the proximate cause for the death was due to strain and stress, still the other circumstances found in this case show a causal connection between employment and death. There is nothing before this Court to infer that there was an error apparent on the face of records so as to lead the Commissioner to commit the jurisdictional error while exercising his powers and the provisions of the Act.

23. In view of the above said observations, this Court is of the considered opinion that the deceased died of heart ailment, due to strain and stress exerted on him by the nature of his employment which was proximate cause for his death. Hence this Court finds that the insurance company is bound to indemnify the employer, opposite party No. 2 to compensate the claimants and the finding of the authority below needs no interference of this Court. Even though the Commissioner has concluded that the deceased was a cleaner, this Court holds that he was "cleaner-cum-driver", on the basis of the documentary evidence on record. The substantial questions of law have been answered as indicated above. The appeal is devoid of merits which suffers dismissal.

24. In fine the appeal is dismissed confirming the award of the Commissioner for Workmen's Compensation, Salem dated 30.11.2000, made in W.C. No. 130 of 2000. No costs.