

(2008) 09 SHI CK 0020
In the High Court Of Himachal Pradesh

National Insurance Company Limited	APPELLANT
Vs	
Kanta Devi and Others Ankush and Another	RESPONDENT

Date of Decision : 23-09-2008

Acts Referred:

Workmens Compensation Act, 1923 — Section 3(2)

Citation : (2009) 1 ShimLC 8

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Judgement

Rajiv Sharma, J.—These FAOs are directed against the order dated 6.4.2004 passed by the Commissioner, under Workmen's Compensation Act (SDM), Nalagarh, District Solan in case No. 17/2002. Since common questions of law and facts are involved in these appeals, these were heard together and are being decided by a common judgment.

FAO (WCA) No. 465/2004:

2. The brief facts necessary for the adjudication of this appeal are that the application was filed by respondents No. 1 to 3 before the Commissioner seeking compensation on account of death of Jeet Singh in accident on 10.10.2001. The case set out in the claim petition was that when the deceased was plying the truck bearing No. HP-51-2580 from Chandigarh to Nathpa in Kinnaur District and when it reached at Nathpa, the deceased felt tiredness due to long drive and became unconscious and he was taken to hospital at Bhabanagar, but unfortunately, he died. Sh. Jeet Singh was employed as a workman with respondent No. 4. He was being paid Rs. 3000/- per month plus Rs. 100/- as daily allowance. The age of the deceased at the time of death was 28 years. Respondent No. 4 in his reply has admitted the employment of deceased and also admitted that on fateful day i.e. 10.10.2001, deceased plied the vehicle from Chandigarh to Nathpa and died during the course of his employment. The appellant-insurance company also contested and resisted the claim petition. It

was primarily contended before the learned Commissioner that the driver was not having valid and effective driving licence and the vehicle was being driven in breach of the terms and conditions of the insurance company. The learned Commissioner on the basis of the evidence led by the parties, awarded a sum of Rs. 3,70,632/. The insurance company has filed the FAO (WCA) No. 465 of 2004 assailing the order dated 6.4.2004.

3. It will be apt at this stage to state that though the appeal was required to be admitted on substantial questions of law, but it appears that inadvertently the substantial questions of law framed by the appellant at page 7 were not taken into consideration. The appeal was admitted on 29.12.2004. It will not be in the interest of justice to dismiss the same on very hyper technical ground. The appeal is deemed to have been admitted on the substantial questions of law at page 7 of the paper book, which read thus:

1. Whether the impugned order is the result of non-consideration of Section 3(2) of the Workmen's Compensation Act, 1923?

2. Whether the impugned order is the result of complete misreading as well as misconstruction of post-mortem report Ex. PW-2/A?

3. Whether the learned Commissioner is right in not dismissing the petition u/s 4 of the Workmen's Compensation

Act especially when there was neither any pleading nor proof as required u/s 3 Sub-section (2) of the Workmen's Compensation Act, 1923?

4. Whether the learned Commissioner is right in not discussing the evidence of PW-1 to PW-4 in its right perspective especially when it has not been proved that the deceased has died due to any injury/occupational injury which had arisen during the course of his employment as required u/s 3 of the Workmen's Compensation Act, 1923?

5. Whether the learned Commissioner was right in awarding compensation especially when the Employer had not appeared as witness so as to support the factum of engagement of deceased Jeet Singh as Driver as well as with respect to the wages drawn by him or the period of his employment?

FAO (WCA) No. 72/2005:

4. So far as FAO No. 72/2005 is concerned, the claimants have filed the claim petition primarily on two grounds that neither the interest nor penalty u/s 4 of the Workmen's Compensation Act, 1923 has been awarded by the Commissioner.

5. Ms. Devyani Sharma has strenuously argued that the order dated 6.4.2004 is not sustainable in the eyes of law. She has primarily contended that the learned Commissioner has not taken into consideration the scope/ambit of Section 3(2) of the Workmen's Compensation Act, 1923 to ascertain whether the workman had died due to injury/occupational disease or not while awarding the compensation. Her further argument was that the deceased died natural death

and it was not relatable to his employment.

6. Mr. R.K. Gautam, Senior Advocate has supported the award and argued that the claimants are entitled to interest @ 12% alongwith penalty u/s 4 of the Workmen's Compensation Act, 1923.

7. I have heard the learned Counsel for the parties and perused the record.

8. The workman has died on 10.10.2001. His employment with respondent No. 4 is not in dispute. What has to be seen is whether deceased died due to any occupational disease/injury or died natural death. The cause of death as per post-mortem report Ex.PW-2/A is that he died as a result of ante-mortem aspiration of gastric fluid and blood which lead to asphyxia and death. The opinion of the doctor reads thus:

I am of the opinion that the deceased died as a result of ante-mortem aspiration of gastric fluid and blood which lead to asphyxia and death.

9. The occupational diseases have been mentioned in Part A, B and C of Schedule-III (under Section 3). The specific stand of the appellant-insurance company in the reply filed to the claim petition was that neither any injury/occupational injury was ever sustained by the deceased in the course of alleged employment with respondent No. 4.

10. PW-3 Kanta Devi has deposed that her husband had driven the truck from Chandigarh to Bhawanagar and he died during the course of his duty. In her cross-examination, she has admitted that she did not know the cause of the death except that he was on duty. PW-4 is Anil Kumar. He has only stated that when he reached Bhawanagar at 5/6 p.m., he found him dead in the truck. This fact is disclosed to him by the conductor. Ex.R-1/B is the insurance policy valid with effect from 9.1.2001 to 8.1.2002 and RW-2/A is the verification of the driving licence and as per this verification the driving licence was valid with effect from 7.9.1998 to 6.9.2003. What is essential for attracting Section 3 of the Workmen's Compensation Act, 1923 is that (i) there must be a causal connection between the injury and the accident and (ii) the accident and the work done in the course of employment. It is now well settled that only because a death has taken place during the course of employment will not amount to accident. The death must arise out of accident. The claimants have not proved by leading any cogent evidence that Sh. Jeet Ram died while doing any job. In the present case he has been found dead in the truck. The claimants have not led any evidence to establish that deceased Jeet Ram suffered stress and strain arising during the course of employment and it was relatable to his nature of employment and the same stood aggravated by stress and strain. It was for the claimants to prove that it was the work oriented-strains, which contacted or aggravated the injury/disease. The cause of death cannot be left to be ascertained by way of conjectures and surmises. There should be cogent evidence required to be led by the parties to establish that the death has been caused during the course of employment due to stress and strain and there is

connection of employment with death. It is required to be proved by pleading and leading legal evidence. The claimants have not explained how Jeet Ram has died. PW-3 could not state the cause of death of her husband. PW-4 has also not disclosed how Jeet Ram has died. The factum of death of deceased was told to him by the conductor. Strangely the Commissioner has not given finding the manner in which Jeet Ram has died. It was necessary for him to discuss the evidence at length to decide whether the death of Jeet Ram was relatable to his nature of work and stress or stress has aggravated the same. Since the claimants have failed to prove that the death of Jeet Ram was caused because of stress and strains of work, the Commissioner could not grant damages. There has to be proximity in cases between cause of death and employment.

11. Their Lordships of the Hon^{ble} Supreme Court in *Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Carvali and Anr.* 2007 11 SCC 668, have succinctly explained the nature of injury to be covered u/s 3 of the Workmen's Compensation Act, 1923. Their Lordships have held as under:

This Court in *E.S.I. Corporation (supra)* referred to with approval the decision of Lord Wright in *Dover Navigation Co. Ltd. v. Isabella Craig* 1940 AC 190, wherein it was held:

Nothing could be simpler than the words "arising out of and in the course of employment". It is clear that there two conditions to be fulfilled. What arises "in the course of the employment is to be distinguished from what arises out of the employment". The former words relate to time conditioned by reference to the man's service, the latter to casualty. Not every accident which occurs to a man during the time when he is on his employment that is, directly or indirectly engaged on what he is employed to do gives a claim to compensation, unless it also arises out of the employment. Hence the Section imports a distinction which it does not define. The language is simple and unqualified.

We are not oblivious that an accident may cause an internal injury as was held in *Fenton (Pauper) v. J. Thorley & Co. Ltd.* 1903 AC 443, by the Court of Appeal:

I come, therefore, to the conclusion 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.

Lord Lindley opined:

The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but

for legal purposes it is often important to distinguish careless from other unintended and unexpected events.

There are a large number of English and American decisions, some of which have been taken note of in ESI Corporation (*supra*), in regard to 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 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.

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.

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.

An accident may lead to death but that an accident had taken place must be proved. Only because a death has taken place in 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.

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.
3. injury aggravated due to stress and strain.

The deceased was traveling in a vehicle. The same by itself can not give rise to an inference that the job was strenuous.

Only because a person dies of heart attack, the same does not give rise to automatic presumption that the same was by way of accident. A person may be suffering from a heart disease although he may not be aware of the same.

Medical opinion will be of relevance providing guidance to Court in this behalf.

Circumstances must exist to establish that death was caused by reason of failure of heart was because of stress and strain of work. Stress and strain resulting in a sudden heart failure in a case of the present nature would not be presumed. No legal fiction therefore can be raised. As a person suffering from a heart disease may not be aware thereof, medical opinion therefore would be of relevance. Each case, therefore, has to be considered on its own fact and no hard and fast rule can be laid down therefor.

In Saurashtra Salt Manufacturing Company (supra), this Court held:

It is well settled that when a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. A workman is not in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him. In the present case, even if it be assumed that the theory of notional extension extends upto point D, the theory cannot be extended beyond it. The moment a workman left point B in a boat or left point A but had not yet reached point B, he could not be said to be in the course of his employment and any accident happening to him on the journey between these two points could not be said to have arisen out of and in the course of his employment. Both the Commissioner for Workmen's Compensation and the High Court were in error in supposing that the deceased workmen in this case were still in the course of their employment when they were crossing the creek between points A and B. The accident which took place when the boat was almost at point A resulting in the death of so many workmen was unfortunate, but for that accident the appellant cannot be made liable.

In General Manager, B.E.S.T. Undertaking, Bombay Vs. Mrs. Agnes, , referring to the decision of Court of Appeal in Jenkins v. Elder Dempster Lines Ltd. (1953) 2 All ER 1133, this Court opined therein that a wider test, namely, that there should be a nexus between accident and employment was laid down. It also followed the decision of this Court in Saurashtra Salt Manufacturing Company (supra).

This Court in ESI Corporation (supra) was dealing with a case where the Respondent met with an accident while he was on his way to his employment. The accident occurred at a place which was about 1 K.M. away from the factory.

In Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmmed Issak, , this Court held:

5. To come within the Act the injury by accident must arise both out of and in the

course of employment. The words in the course of the employment mean in the course of the work which the workman is employed to do and which is incidental to it. The words arising out of employment are understood to mean that during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered. In other words there must be a causal relationship between the accident and the employment. The expression arising out of employment is again not confined to the mere nature of the employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises out of employment. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act.

The question recently has been considered by a Bench of this Court in *Jyothi Ademma Vs. Plant Engineer, Nellore and Another*, wherein it was opined:

The expression "accident" means an untoward mishap which is not expected or designed. "Injury" means physiological injury. In *Fenton v. Thorley & Co. Ltd.* (1903) AC 448, 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* (1914) A.C. 676, as follows:

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

Larned Counsel appearing on behalf of Appellant seeks to distinguish this decision stating that therein the job of the workman was merely to switch on and switch off and thus there has been no scope of stress and strain in his duties and that the workman had been suffering from a heart disease. But in this case also job of a cleaner was not strenuous and in any event far less that of driver of the vehicle.

Only because the cause of death was due to heart attack, the same by itself may not be a ground to arrive at a conclusion that an accident had occurred resulting in injury.

The nature of duty of the deceased was that of a helper. Per se that the duties would not be such which could cause stress or strain. If an additional duty were required to be performed by him, the same was required to be clearly stated.

Unless evidence is brought on record to elaborate that the death by way of cardiac arrest has occurred because of stress or strain, the Commissioner would not have jurisdiction to grant damages. In other words, the claimant was bound

to prove jurisdictional fact before the Commissioner. Unless such jurisdictional facts are found, the Commissioner will have no jurisdiction to pass an order. It is now well-settled that for arriving at a finding of a jurisdictional fact, reference to any precedent would not be helpful as a little deviation from the fact of a decided case or an additional fact may make a lot of difference by arriving at a correct conclusion. For the said purpose, the statutory authority is required to pose unto himself the right question.

12. The Court has also considered Part A, B and C of Schedule-III to ascertain whether the disease mentioned in the medical certificate is covered under any items. The cause of death of the workman is not due to any of the diseases mentioned in Schedule-III. Since the Commissioner has not given any finding whether the death of Jeet Ram has close proximity with his employment or not and the nature of injury/disease, it is a fit case where the matter is required to be remanded back to the Commissioner to decide the same afresh in view of the observations made hereinabove.

13. Consequently, in view of the aforesaid reasons, the FAO (WCA) No. 465/2004 is allowed. The order dated 6.4.2004 is set aside. The Commissioner is directed to decide the claim petition afresh in view of the observations made hereinabove, more particularly, in view of the parameters laid down by their Lordships of the Hon"ble Supreme Court in *Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali and Anr.* In view of the judgment rendered in FAO (WCA) No. 465/2004, the FAO (WCA) No. 72/2005 has rendered infructuous. The question raised in this appeal are to be decided by the Commissioner while adjudicating the entire matter afresh. There shall be no order as to costs.