

(2012) 11 DEL CK 0038
In the Delhi High Court
Case No : FAO 109 of 2004

National Insurance Company Ltd.

APPELLANT

Vs

Chander Vir and Others

RESPONDENT

Date of Decision : 22-11-2012

Acts Referred:

Workmens Compensation Act, 1923 — Section 2(8), 3

Citation : (2013) 137 FLR 288 : (2013) 169 PLR 35

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : L.K. Tyagi, for the Appellant;

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—The Appellant National Insurance Company Limited takes exception to an order dated 09.02.2004 passed by the Commissioner under Workmen's Compensation Act, 1923 (the Act) awarding a compensation of Rs. 4,54,944/- in favour of the First Respondent for having suffered an employment injury viz., loss of one eye while he was driving bus No. DL-1 PA-288 near village Chutmal Pur, District Saharanpur, U.P. On the basis of the evidence adduced by the First Respondent it was established that on 24.03.2003, the First Respondent was employed as a driver on bus No. DL-1PA-288. On the fateful day when he reached village Chutmal Pur, District Saharanpur, U.P. a truck bearing No. UP-12D-3065 came from the opposite direction and stopped in front of the bus. The truck driver got down and started hurling abuses on the First Respondent. The truck driver was accompanied by other persons. All of them were armed with lathis and rods. They started hitting the First Respondent on account of which he suffered injuries on his left eye. The First Respondent lodged an FIR No. 49/2003 at Police Station Fatehpur, District Saharanpur. The First Respondent's testimony with regard to the manner of the accident and the insurance of the bus covering the risk for the driver/employee under the Act was not disputed by the Appellant Insurance Company.

2. On appreciation of evidence, the Commissioner found that the First Respondent suffered injuries out of and during the course of employment. On the basis of the evidence adduced the Commissioner found that the First Respondent was totally incapacitated to work as a driver on account of loss of one eye although as per the Disability Certificate dated 09.05.2003 there was disability to the extent of 30% only. The Commissioner, thus awarded a compensation of Rs. 4,54,944/-.

3. The following contentions are raised on behalf of the Appellant Insurance Company:-

(i) The First Respondent suffered injuries on account of the felonious act of the truck driver. This was not an employment injury. The First Respondent was not entitled to compensation under the Act.

(ii) As per Schedule I Part II, item 25 on account of loss of one eye there is loss of earning capacity to the extent of only 40%. The Commissioner, erred in awarding compensation on account of total incapacity.

EMPLOYMENT INJURY

4. In Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmmed Issak, , the Supreme Court had the occasion to deal with the term "arising out of and in the course of employment." The Supreme Court held that the words "in the course of employment" meant in the course of work which the workman is employed to do and which is incidental to it and the words "arising out of employment" are understood to mean during the course of employment, injury has resulted from some risk incidental to the duties of the service. Para 5 of the report is extracted hereunder:-

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. In Lancashire and Yorkshire Railway Co. v. Highley [(1917) AC 352] Lord Sumner laid down the following test for determining

whether an accident "arose out of the employment:

There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment. If nay, it did not, because, what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of the workman was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment, that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury.

5. In *Oriental Insurance Company Limited v. Abdul Salim*, 2009 ACJ 1395, a Division Bench of Kerala High Court considered the scope of employment injury. The workman who was employed as a driver on a motor vehicle (i.e. a truck) and was reversing the same after loading of the truck. Some people inimical to him pulled him out of the vehicle and trounced him with sticks whereby he sustained serious injuries. Relying on the Supreme Court judgment in *Mackinnon Mackenzie* (supra) and *Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another*, ; the Division Bench of Kerala High Court held that the injuries sustained by the driver was an employment injury.

6. In *Gajanan Bhau Magar v. Employee's State Insurance Corporation* (1973) 27 FLR 277 (Bom.) the Appellant was employed as an Assistant Electrical Foreman. While on duty in the mill, he reprimanded a coolie working under him. After being relieved by the reliever the Appellant left for home. The coolie who was reprimanded by the Appellant assaulted him at a short distance from the mill resulting in loss of an eye. The Division Bench of Bombay High Court held the injury to be an employment injury on the ground that the journey taken by the employee was for the purpose of his duties. Relevant Paras of the report are extracted hereunder:-

9. The course of employment normally beings when the employee reaches his place of work. To extend it to the journey to and from work it must be shown that, in travelling by the particular method and route and at the particular time, the employee was fulfilling an express or implied term of his contract of service. One way of doing this is to establish that the home is the employee's base from which it is his duty to work and that he was travelling by direct route from his home to a place where he was required to work, but that is only one way of showing this; the real question at issue is whether on the particular journey he was travelling in the performance of a duty, or whether the journey was incidental to the performance of that duty and not merely preparatory to the performance of it. The test is whether the employee was exposed to the

particular risk by reason of his employment or whether he took the same risks as those incurred by any member of the public using the highway. (See. Halsbury's Laws of England. Vol. 27. 3rd Edition, Articles 1418 and 1419.)

x x x

15. In our opinion, having regard to the findings of Gatne, J., on questions of fact the conclusion is that the personal injury caused to the appellant by the accident, arose out of and in the course of his employment being an insurable employment and injury is an employment injury within the meaning of S. 2(8) of the Act...

7. The instant case stands on a much better footing in as much as in Abdul Salim the persons who had pulled the driver out of the vehicle were inimical to him whereas in the instant case the attackers were not even previously known to the First Respondent. Applying Mackinnon Mackenzie there is no manner of doubt that the injury suffered by the First Respondent was an employment injury within the meaning of Section 3 of the Act.

QUANTUM OF COMPENSATION

8. The Commissioner while holding that the First Respondent was incapacitated to work as a driver on account of loss of one eye held him to be entitled to total loss of earning capacity under the Act. The Commissioner referred to a judgment of the Supreme Court in Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, where a workman was engaged to work as a carpenter. On account of loss of his left hand due to amputation of the hand above elbow, the Supreme Court held that the compensation is to be awarded not with reference to the loss of physical capacity but with reference to loss of earning capacity which is to be examined with reference to the nature of the job the workman was doing.

9. In Samir U. Parikh Vs. Sikander Zahiruddin, , the Bombay High Court held that the Commissioner is competent to award the loss of earning capacity more than what is prescribed in Part II of Schedule I of the Act. Relevant Para of the report is extracted hereunder:-

...The proper way to construe the relevant provisions of the Workmen's Compensation Act, 1923 is to hold that the percentage of the loss of earning capacity mentioned in Schedule I thereof is the minimum that has to be presumed in every case. Rules 6 and 7 and Forms A" and "B" of the Maharashtra Workmen's Compensation (Occupational Diseases) Rules, 1962, read together leave no doubt that the assessment of disability by the medical practitioner and the Medical Board has to be in terms of the working or earning capacity. The percentage of the loss of earning capacity stated against the injuries in part II of Schedule I of the Workmen's Compensation Act is only the minimum to be presumed in each case and the applicant is entitled to prove that the loss of earning capacity was more than the minimum so prescribed. The Commissioner is, therefore, empowered to come to his own conclusion with regard to the loss of earning capacity in each case on the basis of the evidence led before him.

Hence the contention that the percentage loss of earning capacity mentioned against the injuries in the Schedule is the maximum that the Commissioner can presume in every case and that he has no power to assess the loss over and above it, is not correct...

10. In this view of matter, the award of compensation on 100% loss of earning capacity awarded by the Commissioner cannot be faulted.

11. The Appeal is devoid of any merit; the same is accordingly dismissed.

12. Statutory deposit of Rs. 25,000/- shall be refunded to the Appellant Insurance Company.

13. Pending Applications stands disposed of. Copy of the judgment be transmitted to the Claims Tribunal for information.