

(2017) 10 RAJ CK 0042
In the Rajasthan High Court
Case No : 2443 of 2004

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Mohd. Hameed S/o Shri Siraj Rehman

RESPONDENT

Date of Decision : 30-10-2017

Acts Referred:

[Workmens Compensation Act, 1923](#), [Section 3](#), [Section 30\(a\)\(aa\)](#) - Employers liability for compensation - Appeals
[Evidence Act, 1872](#), [Section 108](#), [Section 108](#)

Citation : (2017) 10 RAJ CK 0042

Hon'ble Judges : Dinesh Chandra Somani

Bench : SINGLE BENCH

Advocate : Pritam Bijlani, Liyakat Ali

Final Decision : Allowed

Judgement

1. The instant appeal has been preferred by the non-claimant No.2/appellant under Section 30 (a) (aa) of the Workmen's Compensation Act, 1923 (hereinafter referred to as the "Act") against the order dated 6.9.2004 passed by the Commissioner, Workmen Compensation, Jaipur City, Jaipur (hereinafter referred to as the "Commissioner") in Case No.WCC(F) 10/1999 titled as Mohd. Hameed & Anr. Vs. Munna & Anr., whereby the learned Commissioner has ordered the non-claimant No.2/appellant and non-claimant No.1/respondent No.3 to pay a sum of Rs.3,22,920/- as compensation alongwith interest @ 9% per annum from 29.6.2003 till one month after the date of the award (i.e. till

6.10.2004) and in case the amount of award is not paid within one month from the date of the award, further interest @ 12% per annum from 6.10.2004 till payment, to the claimants No.1 & 2 (respondents No.1 & 2) and non-claimants No.1 & 2 have been made liable for the said award amount severally and jointly. An amount of Rs.32,292/- has also been imposed as penalty and the employer i.e. non-claimant No.1 has been made liable for the same.

2. Skeletal material facts necessary for disposal of the appeal are that a claim petition was filed by the claimants/respondents No.1 & 2 on 11.2.1999 before the learned Commissioner mentioning therein that on 29.5.1996, the deceased-Mohd. Nafees Miyan was employed by the non-claimant No.1/respondent No.3 as driver of his car bearing Registration No.RJ-14/C-545 and on that day three person namely; Devendra, Raju and Bharat Verma came and asked him to go to Alwar with them with the car. It was also averred that the deceased first of all did not agree to it, but when they told him that the owner of the car Munna had instructed them to take the car to Alwar, he agreed to go with them. The deceased proceeded with them in the car and thereafter he has not been heard of by anybody. It was further averred that the deceased was getting Rs.3000/- as salary and at that time he was 25 years old. The claimants are the parents of the deceased and they claimed a sum of Rs.2,16,910/- as compensation alongwith interest and penalty from both the non-claimants as the vehicle was insured with the appellant/Insurance Company.

3. After service of summons upon the non-claimants, the non-claimant No.1 did not appear and has been proceeded ex-parte. Non-claimant No.2/appellant appeared before the learned

Commissioner and filed written statement in which averments of the claim petition were denied and it was mentioned that it is not proved that the said driver has died, since his dead body was not found till today. It was also averred that the driver of the vehicle was not having valid driving license and that the vehicle was insured as a private vehicle while the same was being used as a taxi at that time and as such the insurance company is not liable to pay the compensation and prayed to dismiss the claim petition.

4. On basis of pleadings of the parties, eight issues were framed. The claimants produced as many as two witnesses and the non-claimant/appellant produced one witness.

5. After hearing learned counsel for the parties, the learned Commissioner decided all the issues in favour of the claimants and awarded compensation as mentioned hereinabove vide impugned judgment and award dated 6.9.2004. Being dissatisfied with the impugned award passed by the learned Commissioner, the non-claimant No.2/appellant has preferred this appeal before this Court.

6. Learned counsel for the appellant/Insurance Company submitted that the learned trial Court has not considered material aspect of the matter that the deceased was not heard alive after the date of incident i.e. 29.5.1996 and the claim petition was filed in the year 1999, as such no presumption of the death of the deceased could have been drawn on the date when the claim petition was filed since seven years had not completed by then.

7. Learned counsel also submitted that the learned Commissioner has given the finding that the deceased is presumed to have died after seven years from the date he was found missing i.e. 29.5.2003, as laid down under Section 107 & 108 of the Indian Evidence Act. In view of the said finding of the

learned Commissioner, it cannot be said that the deceased died in the present incident on 29.5.1996. Learned counsel also submits that a presumption of death may be drawn under Section 107 & 108 of the Indian Evidence Act when someone is not heard alive within a period of seven years by those who normally should have heard about him, but no presumption can be drawn regarding the time and cause of death of the deceased. Thus, any presumption under Section 107 & 108 of the Indian Evidence Act was not sufficient to prove that the deceased died during the course of his employment on 29.5.1996.

8. Learned counsel further submitted that learned Commissioner has committed illegality in taking into consideration the income of the deceased to be Rs.3000/- per month for the purpose of calculating the compensation as against the maximum of Rs.2000/- fixed under the law and thus, illegally awarded Rs.1,07,640/- in excess. Learned counsel prayed to allow the appeal and to quash and set aside the impugned judgment and award. In support of his submissions, learned counsel placed reliance on the judgments of Hon''ble Supreme Court in the case of LIC of India Vs. Anuradha reported in 2004 DNJ (SC) 360 and Oriental Insurance Company Ltd. Vs. Sorumai Gogoi & Ors. reported in 2008 ACJ 1143.

9. Per contra, learned counsel for the claimants/respondents No.1 & 2 submitted that when a person is reported to be missing and the persons, who should have ordinarily heard about him, have not heard about him for a period of seven years, then it will be presumed that the person is dead. This is provided under Section 107-108 of the Indian Evidence Act. Learned counsel also submitted that under the provisions of the Evidence Act, the death is presumed after the lapse of seven years if the whereabouts of

that person is not known or it is not proved that the person had died within the period. Indian Evidence Act does not require that in such a contingency, declaration has to be sought about death of person concerned. When the law provides a presumption to be drawn then no declaration is necessary from a competent Court.

10. Learned counsel also submitted that as per the provisions of Section 107 & 108 of the Indian Evidence Act, the date of death of the deceased Nafees is presumed to be 29.5.2003, as such the learned Commissioner has rightly passed the award on 6.9.2004.

11. In order to appreciate the contentions raised by learned counsel for the parties, it will be convenient to set out Sections 107 & 108 of the Indian Evidence Act :

"107. Burden of proving death of person known to have been alive within thirty years - When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for seven years.

Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

12. Section 3 of the Workmen's Compensation Act, 1923 provides for employer's liability for compensation. Sub-section (1) of Section 3 provides that if a 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 Chapter II of the Act.

13. Hon'ble Apex Court in Para 9, 11 and 12 of it's judgment rendered in LIC of India versus Anuradha (supra) held and observed as under :-

"9. We may with advantage quote the statement of law as contained in Manual

of The Law of Evidence by Phipson and Elliott (Eleventh Edition, at pp.83-84). The learned authors after stating the presumption, further state:- "It must be noted that the presumption is only as to the fact of death, not as to the time of death, so that if it has to be established that A was alive or dead on a particular day during the seven-year period, that fact will have to be proved by evidence, aided by any presumption of fact which the jury may see fit to act on. The presumption of death does not oblige the Court to presume that death occurred at any time during the seven years, nor is there any presumption of Law that life continued for any part of the seven-year period. Strictly, according to the leading case on the subject *Re: Phene's Trusts*, (1870) L.R. 5 Ch. App. 139-the presumption only operates to establish that if at the date of an action in which the death is called in question, seven years or more have elapsed without news, A is dead at that date, i.e. the date of the action. Accordingly, it is impossible to use this presumption to prove that A was dead in, say 1950, even if he has not been heard of since 1943. This inconvenience has caused the strict rule to be departed from in some cases to allow presumption of death at any given date if seven "years" absence before that is shown."

11. Peter Murphy states in "A practical approach to Evidence" (Second Edition pp 460-461)-"The presumption is only that the subject died at some time during the period; Ms death on any particular day will not be presumed, and must be proved by evidence if in issue". The learned author having set out in brief the facts of the cases in *Re Phene's Trusts* (1870) 5 Ch App 139 and *Chipchase v. Chipchase* (1939) P 391 and having noticed the law laid down therein proceeds to state-"The period of seven years is, however, strictly insisted upon, and it is often pointed out that, though the rule is to some extent illogical, a period of six years and 364 days is not enough. Nor is there any presumption that the subject died from any particular cause, died childless or died celibate, though these matters may be capable of inference on the evidence, as a question of fact. It should be remembered that it is always open to the court to infer death (or that someone is alive) as a matter of fact, as it is to make any other proper inferences from the evidence. No question of the presumption arises in such a case; it is a matter of circumstantial evidence. What is sometimes called the "presumption of continuance"-an instance of which is that if a person is shown to be alive at a certain time, his continuing life may be inferred-is no more than an example of such an inference, and will yield to the presumption of death where the latter applies".

12. Neither Section 108 of Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years absence and being unheard of having elapsed before that time. The presumption stands un-rebutted for failure of the contesting party to prove that such man was alive either on the date on

which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.

14. Hon"ble Apex Court in Para 14 of it's judgment (supra) also held that the presumption raised under Section 108 of the Evidence Act is limited presumption which is confined only to presuming the factum of death of the person whose life or death is in issue. Though, it will be presumed that the person is dead but there is no presumption as to date or time of the death. It is also held that there is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an Authority who is called upon to decide as to whether a person is alive or dead. It is also held that so long as the dispute is not raised before any forum and in any legal proceedings, the occasion for raising the presumption does not arise.

15. Hon"ble Apex Court in Para 16, 17, 18, 19 and 20 of it's judgment rendered in Oriental Insurance Company Limited versus Sorumai Gogoi & Ors. (supra) has held and observed as under:-

"16. The sine qua non for invoking the proviso appended to Section 147 is that the employee must be engaged in driving the vehicle. Death or bodily injury must occur arising out of or in the course of his employment. The 1923 Act or the 1988 Act, therefore, would be applicable only if the conditions precedent laid down thereunder are satisfied. 17. The employer lodged a first information report against Bipul Gogoi. A charge sheet was also filed. There is nothing on

record to show that the death had occurred to Bipul Gogoi in an accident arising out of or in course of employment. If some miscreants have taken away the driver along with the vehicle or has murdered him, it is an offence. It, except in certain situations, does not give rise to a presumption that the death had occurred arising out or in the course of an employment. Some evidence should have been adduced in that behalf. If the version brought on records by the police was correct, namely, he had himself ran away with the vehicle and had not been heard for a period of seven years, particularly, when he had been declared a proclaimed offender by a Court of law, presumption under Section 108 of the Evidence Act could have been invoked by the criminal court for dropping the criminal case that he is dead. In our opinion, in a case of this nature, the said provisions could not have been invoked for the purpose of grant of compensation under the 1923 Act without any other evidence having been brought on records. Sections 108 and 109 of the Evidence Act are founded on the presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until contrary is established by evidence either direct or circumstantial. The said provision can be invoked in a legal proceeding by the death of a person may be an issue.

The Section does not say that presumption would be applicable in all situations. It shall not apply in respect of a person who absconds from justice nor evade a trial or is otherwise charged for commission of a grave offence as he in that situation may not communicate with his relations. Furthermore in a case of this nature, it is also difficult to rely upon a self serving statements made by the claimants that they had not heard of their son for a period of seven years. The Commissioner of Workmen Compensation or the High Court did not assign any reason as to why the fact disclosed in the charge sheet which was filed upon investigation that Bipul Gogoi himself had run away with the vehicle would not be a relevant fact, particularly, when cognizance had been taken by a competent court of law on the basis thereof. Section 3 of the 1923 Act would be attracted only when the conditions precedent therefor are fulfilled and not otherwise.

18. The view which we have taken find support from a judgment of this Court In Mackinnon Machenzie & Co. Pvt. Ltd. V. Ibrahim Hameed Issak [(1969) 2 SCC 607], holding :

"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." 19. In *Jyothi Ademma v. Plant Engineer, Nellore Thermal Station*, [(2006) 5 SCC 513] also this Court held :

"6. Under Section 3 (1) it has to be established that there was some causal connection between the death of the workman and his employment. If the workman dies as 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. 7. The expression accident means an untoward mishap which is not expected or designed. Injury means physiological injury. In *Fenton v. Thorley & Co. Ltd.* 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* as follows: "I think that the context shows that in using the word "designed" Lord Macnaghten was referring to designed by the sufferer". 20. Furthermore, the rights of the parties were required to be determined as on the date of the incident, namely, 9.10.1996. It is, therefore, difficult to hold that a subsequent event and that too by raising a presumption in terms of Section 108 of the Evidence Act can give rise to fructification of claim, save and except in very exceptional cases."

16. The contention of learned counsel for the respondent that in such contingencies the death can be presumed and declaration about death of the person concerned is not necessary, is acceptable. Learned Commissioner gave a finding that the deceased is presumed to have died after seven years from the date he was found missing i.e. 29.5.2003 under Sections 107 & 108 of the Evidence Act. But it cannot be said that the deceased died in the present incident on 29.5.1996. The claim petition has been filed in the year 1999 and no presumption of the death of the deceased could have been drawn on the date of filing of the claim petition since seven years had not completed by then. As no

cause of action arose to the claimants to file the claim petition in the year 1999, the claim petition cannot be held to be maintainable.

17. There is nothing on record to show that the death of the deceased had occurred in an accident arising out of or in the course of the employment. It is pertinent to note that presumption of death can be drawn under Sections 107 & 108 of the Evidence Act, but no presumption can be drawn regarding the time, date and cause of death of the deceased. In my opinion, provisions of Workmen's Compensation Act, 1923 cannot be invoked for grant of compensation, because Section 3 of the Act can be attracted only when the conditions precedent therefore are fulfilled and not otherwise. Casual connection between the death of the deceased and the employment is not established in this case.

18. In view of the discussions made above, the impugned judgment passed by the Commissioner is not sustainable and the appeal deserves acceptance.

19. Consequently, the appeal is allowed and impugned judgment is set aside and the claim petition filed by the claimants/respondents No.1 & 2 is dismissed. No order as to costs.