

(2012) 08 SHI CK 0074

In the High Court Of Himachal Pradesh

Case No : First Appeal From Order No. 324 of 2006

Oriental Insurance Company Ltd. Shimla

APPELLANT

Vs

Shankar and Others

RESPONDENT

Date of Decision : 27-08-2012

Acts Referred:

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

Citation : (2013) 136 FLR 923 : (2012) 3 ShimLC 1746

Hon'ble Judges : Dev Darshan Sood, J

Bench : Single Bench

Advocate : Lalit K. Sharma, for the Appellant; N.K. Sharma, Advocate, for the Respondents Nos. 1 to 3 and Mr. B.K. Malhotra, Advocate, for the Respondent No. 4, for the Respondent

Judgement

Dev Darshan Sud, J.—The Insurance Company has appealed against the judgment of the Workmen Compensation Commissioner under the Workmen's Compensation Act (hereinafter Commissioner) allowing the claim of the appellants claiming compensation for the death of Raj Kumar. The Commissioner awarded a sum of Rs. 3,32,055/- along with interest @ 12% per annum to be paid from 27.9.2002 to 29.3.2005 by the employer. The claim petition avers that late Raj Kumar was the son of the first two applicants, namely, Shankar and Berfi and brother of Ravi, who is the third claimant. He was employed by Hakam Singh as a driver who, on 26.9.2002 sent him alongwith passengers in Jeep No. DL-7 CA-8979 to Jaipur in Rajasthan. He received grievous injuries in the accident arising out of and in the course of the employment which resulted in his death. It was pleaded that Raj Kumar had died when he met with an accident in the Jeep which he was employed to drive. His monthly wages were pleaded to be Rs. 4,000/- and his age as 22 years. A claim of Rs. 5,00,000/- in all was instituted. These pleadings were denied by the employer Sh. Hakam Singh, who pleaded that the deceased died because he was murdered and not during the course of his employment as pleaded. It was stated that some "miscreants" committed this murder when Jeep No. DL-7 CA-8979 was stolen and F.I.R. No. 453 dated

27.9.2002 was lodged by the respondent owner. The relationship of employer and employee is admitted. It was denied that the deceased had been sent to Rajasthan by his employer with some passengers. There was no accident as pleaded. The vehicle in question was the personal vehicle of the 1st respondent which was never used for any commercial purpose whatsoever. It was pleaded that the deceased used to spend the night at Vasundhara taxi-stand since he did not have any accommodation to live in. On the night of 25th September, 2002 when the deceased was sleeping there, some "miscreants" contacted him and engaged him to drop them at Jaipur where he was supposed to remain for three days. No permission etc. was granted by the respondent to carry any passengers. The Insurance Company took the usual pleas of denying its liability in toto.

2. The Commissioner, on consideration of the entire evidence, allowed the claim holding that the deceased was a workman within the meaning of the Act. The second settled issue was as to whether the deceased was authorized or asked by the employer to use the vehicle in the manner as pleaded. No permission was sought for to ply the vehicle in the manner as pleaded and it was an act committed by the deceased of his own volition and without the consent of the employer. The Commissioner relying upon the judgment of the High Court of United India Insurance Co. Ltd. Vs. Philo and Others, held that the killing of a workman during the course of the employment by an unknown person can be considered as death and proceeded to award the compensation. Insurance Company is now in appeal.

3. Learned Counsel appearing for the Company relies upon the decision of the Supreme Court in Shakuntala Chandrakant Shreshti Vs. Prabhakar Maruti Garvali and Another, to urge that the death was not the result of the normal consequence of employment and in these circumstances, no claim could be allowed. In particular, he relies upon the decision of the Supreme Court holding:

22. 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.

23. Injury suffered should be a physiological injury. Accident, ordinarily, would have to be understood as unforeseen or un-comprehended 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 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
3. injury aggravated due to stress and strain

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

28. 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....

36. 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.

37. 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.

38. 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.

4. He submits that causal relation between the death or injury must be established. In *Ram Dev Puri Vs. Trishla Devi and Others*, , this Court after considering the entire case law on the point and following the decision of the Supreme Court in *Jyothi Ademma Vs. Plant Engineer, Nellore and Another*, and *Shakuntla Chandrakant Shreshti's* case (supra), held:

16. A similar view has been taken in *Malikarjuna G. Hiremath Vs. The Branch Manager, The Oriental Insurance Co. Ltd. and Another*, In that case, the driver of a truck died in a drowning accident. The Apex Court held that it had not been proved that drowning of the workman had any causal connection with his work as driver. Following the similar principle as laid down in the earlier judgments, the Apex Court rejected the claim of the workman.

17. In the present case, even if the case of the claimants as set up by them is accepted as absolutely true then also all that is proved is that the deceased workman was employed as a driver on the truck. He reached the U P border where he alongwith conductor Manjit Singh ate food and spent the night there. In the morning, when the deceased returned after answering the call of nature, he complained of stomach ache. The conductor went to look for a doctor but could not find any and by the time he returned Sukhchain Singh had died. There is neither any averments in the petition nor any evidence to show that the death of the deceased had any connection what-so-ever with his employer. He may have died during the course of employment but there is nothing to show that accident arose out of the employment or had any causal connection with the employment.

18. Applying the principles laid down above, it is apparent that the claimants have not led any evidence to show that the death was caused by the stress and strain arising during the course of employment or had any connection with the employment. The Apex Court in no uncertain terms has held that the onus is upon the claimants to show that it was the work and resulting strain which contributed to or aggravated the injury. This having not been done, the Commissioner Workmen's Compensation lacked jurisdiction to pass an award. Therefore, it is held that the claim petition under the Workmen's Compensation Act was totally misconceived and the Tribunal gravely erred in deciding the claim petition in favour of the claimants.

5. Dr. Lalit Sharma, learned Counsel appearing for the appellant fortified his submissions with the decision of the Supreme Court in *Malikarjuna G. Hiremath Vs. The Branch Manager, The Oriental Insurance Co. Ltd. and Another*, holding that u/s 3(1) of the Workmen's Compensation Act it has to be established that there was some causal connection between the death and his employment. In fact, the Supreme Court holds:

12. 5. Section 3(1) of the Act which is relevant for the purpose of this case reads

as follows:--

3. EMPLOYER'S LIABILITY for COMPENSATION.--(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 :

Provided that the employer shall not be so liable -

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;

(b) in respect of any injury, not resulting in death or permanent total disablement, caused by an accident which is directly attributable to-

(i) the workman having been at the time thereof under the influence of drink or drugs, or

(ii) the willful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii) the willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen...

6. u/s 3(1) it has to be established that there was some casual connection between the death of the workman and his employment. If the workman dies a natural death because 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 & Company 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.

The above position was highlighted by this Court in *Jyothi Ademma Vs. Plant Engineer, Nellore and Another*,

14. It is the specific case of the claimants that on 30.11.2000 the deceased who was driving the vehicle on the direction of the insured had gone to Gurugunta

from Siraguppa. There he had gone to a temple and was sitting on the steps of the pond in the temple and he slipped and fell into the water and died due to drowning. This according to us is not sufficient in view of the legal principles delineated above to fasten liability on either the insurer or the insured. The High Court was not justified in holding that the present appellant was liable to pay compensation.

6. Having considered the evidence on record, what I notice is that there is no clear evidence as to how the deceased lost his life. There is a serious contest between the parties as to whether the deceased was carrying out the duties as assigned by the first respondent or was acting on his own volition and two F.I. Rs. on the record did not lead to any direct conclusions. But the most crucial aspect would be as to whether the deceased was actually transporting some unknown person (s) or acting on the instruction of respondent No. 1, which was crucial to the entire case. If it is established as a fact that the deceased was, in fact, working on the directions of the first respondent there can be no manner of doubt that he would be discharging his duties during the course of his employment. The evidence being deficient, the case is remanded to the Commissioner with the direction that he shall re-admit the case on its record and to proceed with trial after granting an opportunity to both the parties to place their respective evidence on the record. Parties to appear before the Commissioner on 29th October, 2012. Records be sent back immediately.