

(1990) 05 OHC CK 0027

In the Orissa High Court

Case No : M.A. No"s. 252 and 253 of 1989

Satyabadi Nayak

APPELLANT

Vs

Damei Khilla and Others and Hontal Damuni and Others

RESPONDENT

Date of Decision : 18-05-1990

Acts Referred:

Workmens Compensation Act, 1923 — Section 3

Citation : (1991) 1 ACC 35 : (1991) ACJ 211 : (1990) 70 CLT 493 : (1999) 3 LLJ 367

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : A. Routray, for the Appellant; D.K. Mahant, Senior Standing Counsel, for the Respondent

Judgement

A. Pasayat, J.—These two appeals arise out of a common order passed by the Commissioner for Workmen's Compensation-cum-Asst. Labour Commissioner, Jeypore, Koraput (in short "the Commissioner") disposing of four claim applications.

2. The case of the applicants in all the four cases was identical in respect of cause of accident, and amount of claim, under the Workmen's Compensation Act, 1923 (for short "the Act"). It was stated that their respective husbands were working under one Sri Satyabadi Naik, the present appellant (hereinafter referred to as "the contractor") in the construction work at Jersey Breeding Firm, Sunabeda and were engaged in the work when they suffered personal injuries on account of falling of a big portion of the roof, leading to their death. The Assistant Engineer, Central Public Works Department, Sunabeda (for short "C.P.W.D.") and Executive Engineer, C. P. W. D., Bhubaneswar were also impleaded as the work was entrusted by the C. P. W. D. to the contractor to execute the construction of the building. The contractor filed written statement denying his liability to pay any compensation on the ground that the deceased persons were never his workmen, and therefore, the question of his paying any

compensation did not arise.

3. Four issues were framed by the Commissioner which read as follows:--

1. Whether the deceased was a workman within the meaning of W. C. Act ?
2. Whether the accident arose out of and in course of employment of the deceased ?
3. Whether the amount of compensation claimed is due or any part thereof ?
4. Whether the p. P. is liable to pay such compensation as is due ?

Answering issue No. 1, the Commissioner held that the deceased were engaged in the construction work on the date of accident i. e. June 14, 1977 and hence were workmen within the meaning of Section 2(1)(n) of the Act. Answering issue No. 2, it was held that the deceased had personal injuries caused due to the collapse of centering and not due to lightning in course and arising out of employment. The lightning aspect is very vital for adjudication of this case, and I shall deal with the same in greater detail subsequently. Answering issue No. 3, it was held that each of the claimants was entitled to Rs. 11,520/- as compensation. Answering issue No. 4, it was held that the Executive Engineer, C. P. W. D. being the principal employer was to deposit the entire amount, and to get the same indemnified u/s 12(2) of the Act, from the contractor. He treated the Assistant Engineer and the Executive Engineer to be the principal employers u/s 12 of the Act.

4. In appeal, several grounds of challenge have been pressed into service by the learned counsel for the appellant. They are primarily as follows: (i) No notice as required u/s 10 was given in respect of the alleged accident, and therefore, claim petitions were not entertainable; (ii) The F. I. R. lodged with the police authorities, and the medical evidence clearly established that the death of the so called workmen was on account of lightning, (iii) It was not the case of the claimants that deaths were occasioned on account of falling of a big portion of the roof. Even if such a plea was taken during trial, yet in view of the F.I.R. and medical evidence, the Commissioner should have discarded the new plea. The claimants have not adduced any plausible evidence to prove that the deceased were workmen under the contractor, and/or that they were dependents to be entitled to compensation; and (iv) It has not been proved that the accident has arisen out of and in course of alleged workmen's employment.

5. On behalf of respondent No. 1, it has been alleged that no notice is necessary because the accident took place in the premises of the employer-contractor; even if it is held that the death was occasioned due to the lightning, yet the contractor cannot escape the liability on evaluation of evidence, it has been held that the deceased were workmen under the contractor, and that the accident had arisen out of and in course of employment; findings in this regard are essentially conclusions on facts, and are not open to be interfered in appeal u/s 30 of the Act.

The functionaries under the Central Government were also represented through the learned Senior Standing Counsel (Central). Though the ultimate result did not affect these functionaries, yet because of important questions involved, learned Senior Standing Counsel also made his submissions. In view of the novel nature of controversies it is appropriate to deal with the contentions in detail.

6. Section 3 of the Act is a most important provision in the whole scheme relating to payment of compensation by an employer under the Act. When personal injury is caused to a workman as defined in Section 2(1)(n), compensation is payable. Four conditions are to be fulfilled before a claimant is entitled to compensation, and claimant has to prove the existence of all four conditions. These conditions are as follows :--

- (i) There must be personal injury to the workmen.
- (ii) Personal injury must have been occasioned by an accident.,
- (iii) Accident must have arisen out of and in course of employment; and
- (iv) Injury must have resulted either in the death of the workmen, or his total or partial disablement for a period exceeding three days.

Exceptions have been provided to the general rule which keep the employer out of the net liability. We are not concerned with those in this case. Significantly, "accident" is not defined in the Act. Therefore, it has to be construed in its proper sense. Generally, it means, "an unlocked for mishap or untoward event which is not expected or designed". It involves idea of something fortuitous and unexpected. Accident alone does not give rise to a cause of action for payment of Compensation. Accident must not only occur during actual employment, but must arise out of it. In Section 3 words "out of and "in the course of employment" are used conjunctively and not disjunctively. The words "out of" point to the origin or cause of accident, while words "in the course of to the time, place and circumstance under which accident took place. It has also to be established by the claimant that the accident arose "out of and in the course of employment". The expression "arising out of employment" means that during course of employment injury has resulted from some risk incidental to the duties of service, which, unless engaged in the duty owing to the master; it is reasonable to believe that the workman would not otherwise have suffered. The expression "in course of employment" means in course of work which workman is employed to do and which is incidental to it. An accident arises out of employment if it is due to a danger to which the workman is exposed by reason of nature, conditions, obligations or incidents of employment. This is the view indicated in HALSBURY'S LAWS OF ENGLAND. Second Edition, Vol-XXXIV at page 832. The expression "arising out of the employment" was explained by LORD SHAW in the leading English case of *Thom or Simmeon v. Singlair*, in 1917 A.C.127. It was observed :

" In short, my view of the Statute is that the expression "arising out of the

employment" is not confined to the mere nature of the employment. The expression in my opinion, applies to the employment, as such to its nature, its conditions, its obligations, and its incidents.

If by reason of any of these workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the Statute "arising out of the employment" apply."

In 1931 A.C. 351 *Bimoson v. London Midland and Scottish Railway Company*, it was observed as follows:--

".....the principle to be applied in such cases is that if the accident is shown to have happened while the deceased was in the course of his employment and at a place where he was discharging the duties of his employment, and the accident is capable of being attributed to a risk which is ordinarily inherent in the discharge of such duties, the arbitrator is entitled to infer that accident arose out of employment."

The further question that arises is when the cause of death is lightning, can it be termed as an accident attracting liability under the provisions of the Act ? It would be appropriate to refer to HALSBURY'S LAWS OF ENGLAND in this context. (In Volume XXXIV at page 837).

"Injuries directly due to the operation of natural forces, for example, stroke of lightning do not arise out of the employment unless by reason of his employment the workman was specially exposed to such risks. Where, however, the injury is directly due to street or locality risk, the fact that the risk itself arose from the operation of a natural force is immaterial, and it is not necessary to prove special exposure to such risks."

The Privy Council had also occasion to deal with similar questions and Lord Atkin discussed the matter in great detail. Some of learned Judge's observations are quoted below for reference :--

"The principle which emerges seems to be clear. The accident must be connected with the employment : must arise "out of it. If a workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself has no kind of connection with employment, he cannot, recover unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon him, or he slips upon the premises there is no need to make further enquiry as to why the accident happened."

(See AIR 1933 225 (Privy Council)). The respondent No. 1 relied on a decision of Calcutta High Court in support of the contention that even where personal injury

is resulted from lightning the workman is entitled to compensation. 42 CWN 1093 The Manager, Gouri Sankar Jute Mills v. Sm. Khantamoni Dasi). The facts of that case were somewhat peculiar. The deceased, a Foundry mistry died due to lightning while he was at work running molten metal from the furnace to the bottom of the metal chimney. Therefore, considering the nature of the work, it was said that the deceased was exposed to an extra risk by nature of occupation, and met his death by accident in course of his employment. The case had certain peculiar features and it cannot be said to be a general proposition in law that in all cases of lightning death, employer is liable to pay compensation. It would depend upon facts of each case. Unfortunately, in the present case, the Commissioner has committed faux pes by holding that death was not occasioned due to lightning and was on account of collapse of a portion of the roof. Without any demur, it can be said that the conclusions are perverse because the F.I.R. clearly indicated that the accident was caused on account of lightning. Doctor's evidence was also to the same effect. There was no material placed before the Commissioner to come to any contrary conclusion. Therefore, his order is vitiated on that score. It also appears that evidence so far as question of engagement of the deceased under the contractor is concerned, is full of contradictions. The claimants did not lead any acceptable evidence to show that in reality they were dependents of the deceased and therefore, were entitled to compensation. "Dependent" is defined in Section 2(1)(d) of the Act. Claimants have not led any evidence to show that they belong to the classification of dependent as defined in Section 2(1)(d) of the Act and/or were related to the deceased. The evidence led was not of acceptable nature. Therefore, the Commissioner was not justified in answering the issues in that regard as indicated above.

Therefore, I am left with no alternative than to remit the matter back to the Commissioner to record specific findings on the question of entitlement of the claimants, cause of death and the basic question whether the deceased were the Workmen under the contractor. I am conscious that the accident took place thirteen years back and further evidence may not be forthcoming. But at the same time it would be improper to fasten liability of a huge sum on the contractor, when the claimants failed to substantiate their claim ; the onus for which lay on them. The Commissioner would do well to permit the parties to adduce fresh evidence and dispose of the matter as early as possible but in any event not later than the end of 1990.

The appeals are accordingly disposed of, but in the circumstances, there shall be no order as to costs.