

(1989) 09 BOM CK 0001
In the Bombay High Court

Zubeda Bano and Others

APPELLANT

Vs

Maharashtra Stateroad Transport Corporation and Others

RESPONDENT

Date of Decision : 25-09-1989

Acts Referred:

Workmens Compensation Act, 1923 — Section 30

Citation : (1990) 2 ACC 20

Hon'ble Judges : V.A. Mohta, J;D.J. Moharir, J

Bench : Division Bench

Judgement

V.A. Mohta, J.—This is an appeal u/s 30 of the Workmen's Compensation Act, 1923 (the Act) by the legal heirs of the deceased Abdul Aziz Qureshi, whose claim for compensation u/s 22 of the Act has been dismissed by the Commissioner.

2. Abdul Aziz, aged 51, was a bus driver in the serve of the Maharashtra State Road Transport Corporation (MSRTC). On 7.11.1983, in the regular course of his employment, he drove a passenger bus from Umred to Nagpur. The bus reached Nagpur about two hours late at 6.30 p.m. The second part of the journey was to commence for destination Girad at 9-30 p.m. The bus was stationed at the bus-stand platform, all passengers got down and the conductor Iqbal Shaikh proceeded to issue tickets. When the first two passengers to Girad - Ramchandra and Mohd. Hussain - entered the bus, they found Abdul Aziz lying unconscious on the bonnet and the steering wheel. They reported the matter to the conductor who along with mechanic Mohd. Akrem entered the bus, lifted the body of Abdul Aziz, put it in the lying condition and straightway they took the bus to the Government Medical College Hospital, there Abdul Aziz was declared dead by the attending doctor at about 9 a.m. The death was attributed to heart failure due to sudden heart-attack.

3. The case of the legal heirs-widow Zubeda Bano, Sons and daughters-has been and is that Abdul Aziz met with an accidental death as a result of fall while attempting to change the destination board of the bus from inside the cabin and

it was a case of personal injury caused by the accident, "arising out of and in the course of his employment" as contemplated u/s 3 of the Act. The MSRTC denied the liability and resisted the claim taking a stand that it was a case of natural death which in no way was connected with the employment. The legal heirs examined Zubeda Bano and Dr. More, who had performed the post-mortem examination on the dead body of Abdul Aziz. They also filed several documents such as departmental reports, spot statements of two passengers, the conductor and the mechanic, Zubeda Bano had naturally no personal knowledge of the incident and her version was hearsay. MSRTC examined no witness. The Commissioner held that Since there was no direct evidence about how the incident actually took place and the deceased was not a heart patient, the legal heirs had failed to discharge the burden of proving the ingredients of charging Section 3 of the Act.

4. Having heard the parties and perused the record it seemed to us that the entire approach of the Commissioner was hyper technical and this appeal deserves to be allowed.

It is true that there is no direct evidence of the incident. It is equally true that very scanty material is available on record about the circumstances in which the incident took place. But the absence of ample evidence should not relieve the court of its duty to arrive at a conclusion on the vital issues on the basis of available material. The Evidence Act as such does not apply to the proceedings under the Act, as has been held in *Union of India (UOI) Vs. T.R. Varma*, and *Birhwal Sugar Mills Ltd v. Renjan* 1982 Lab. L.J., 84. The Act is a beneficial legislation intended to give some security to the workmen in certain types of employment. Indeed it contains a sort of mini-insurance scheme. The liability of the employer under the Act is conceptually quite different from the liability under tort. All these facts, therefore, call for a broad and liberal construction of the Act, lest its evident object is defeated. When evidence is balanced"" observes Gujarat High Court in the case of *Dai Shakri v. Meanekechowk Mills Ltd*. 1961 (i) LLJ 885, "if the evidence shows greater possibility which satisfied a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workmen to succeed".

5. Section 3 is the soul of the Act and it specifies the circumstances under which the employer is liable for workmen's compensation. Section 3(1) reads thus:

3.(1) If personal injury is caused to a workmen 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 workmen for a period exceeding three days;

(b) In respect of any injury not resulting in death, caused by an accident which is

directly attributable to--

- (i) The workmen having been at the time thereof under the influence of drink or drugs, or
- (ii) The willful disobedience of the workmen to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or
- (iii) The wilful removal or disregard by the workmen of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen.

Three expressions used therein are material (i) personal injury (ii) accident and (iii) arising out of and in the course of employment. That death is a personal injury is beyond doubt. That death by heart-attack is an accident is now well established by series of judicial pronouncements made from time to time. That death in the instant case has taken place in the course of employment is obvious and fairly not disputed either before the Commissioner or before us. The controversy thus centres would the question as to what the expression "arising out of" connotes.

6. The leading case of *Laxmibai Atmaram Vs. Chairman and Trustees, Bombay Port Trust*, related to a heart patient watchmen of the port Trust, who in the midst of his duty hours in the midnight complained of a pain in the chest and who dies in the morning even though he was made to lie down after the pain. The Commissioner had rejected the claim holding that it was a case of natural death. The High Court in appeal set aside the order taking a view that heart injury was accelerated by strain of work and it was a case of death by disease as well as the employment and not by disease simpliciter, there was a causal connection between the death and employment and that connection was sufficient to attract the liability of the employer u/s 3.

7. The case of *Messrs, Mackinnon Mackenzie & Co. Pvt. Ltd. v. Ritta Fernandes* 1969 A.C.J. 419 before the Supreme Court was of an heart patient employee on board a ship who was admitted to the hospital while on duty and died there after 7 days. He was a general servant who had to perform his duties standing up. Considering all the circumstances and after drawing adverse inference against the employer for non-production of material within his special knowledge, the employer was held liable to compensate the legal heirs of the deceased. While discussing the scope of expression "arising out of" in Section 3, it was observed:

It is well established that under this section there must be some casual connection between the death of the workmen and his employment. If the workmen die as natural result of the disease from which he was suffering or while suffering from a particular disease, he dies of that disease as a result of wear and tear of his 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 the disease coupled with the employment

then it could be said that the death arose out of the employment and the employer would be liable.

8. The case of Amubibi Vs. Nagri Mills Co. Ltd., was of a death by heart attack of a deceased workmen, who had started his work at about 3-30 p.m. and who was found lying unconscious near his wearing loom of the mills round 5 p.m. When he was removed to the dining shed he was found dead. The medical officer gave a report that the death was due to heart failure by heart attack. The Commissioner rejected the claim of the legal heirs on the ground that it was a case of natural death and the causal connection between the death and work done in the employment was not established by the claimants by direct evidence. Gujrat High Court considering the entire circumstances including the fact that the workmen was working on a loom in an artificial atmosphere of humidity, came to the conclusion that greater possibility was that heart failure had been accelerated due to the strain of work and, therefore, held the injury compensable.

9. Legal position thus seems to have been settled down to this: Heart injury when brought about by a strain due to the work in the employment (and not by natural wear and tear of employment) is compensable though pre-existing condition may have been the contributory element and this is irrespective of the percentage of the part played by either of them viz. The work and the condition.

10. What about a case of accidental death by heart failure due to heart attack where contributory factor of existence of pre-condition of heart ailment does not exist? The answer given by a Full Bench of the Assam High Court in the case of Assam Railways and Trading Co. Ltd. v. Saraswati Devi (Accidents Claims Journal 1958-65 page 394) can best be summarised in its own words :

Even in cases where a person has been suffering from heart disease, if the nature of the work has contributed to the deterioration of the heart and his death, the personal injury can be said to arise out of his employment. The case where the deceased was not suffering from any previous heart disease is to my mind a stronger case and in such circumstances if he suddenly gets a heart attack while proceeding to perform his duty, the accident can be nothing but arising out of his employment.

11. Keeping in view the aforesaid principles we proceed to scan the evidence on record.

The MSRTC has been tactful but not fair. It owed a duty to produce the material to show how much driving the deceased had under taken on that date. The legal heirs who are helpless widow and children had no access to that material which was within the special knowledge of the MSRTC. The MSRTC had immediately recorded statements of as many as 4 persons who had witnessed the physical condition of the deceased and the placement of his body in the cabin immediately after the accident. Two of them, namely the conductor and the mechanic were its regular employees on whom it had complete control and thus their production in the witness box was very easy. Out of the two, the conductor

was post important. None has been examined. Non-production of record and non-examination of any witness must lead to drawing adverse inference against MSRTC.

12. Spot statements of persons have been placed on record by the legal here. It is not disputed before us that the body was lying on the bonnet and the steering wheel. The bus had completed one schedule of its journey - Umred to Nagpur. The second schedule was Nagpur to Gired. It is a matter of common knowledge that every passenger bus has a board of destination which has to be changed immediately in case the bus has to undertake a fresh journey soon. In the instant case the bus was to depart for Girad within half an hour. It was running late. The conductor had got down on the platform for issuing tickets. It is not his case in the statement that he changed the board. The two passengers had entered when the deceased was lying unconscious in the cabin. It is reasonable inference to draw from these circumstances that the driver must have attempted to change the destination board hurriedly during the short period of few minutes because the board had to be changed before passengers arrive. It is not known as to whose official duty it is to change the board, but many times the driver and conductor exchanges duties by way of mutual adjustment. The deceased was not lying on his seat in front of the steering wheel as wrongly held by the Commissioner. His body was lying on the bonnet and the steering wheel. All these circumstances are more in consonance with the theory of the deceased meeting with the accident while attempting to change the board than with the theory of natural death by sudden heart failure. To an extent, the principle of *res ipsa loquitur* can also be pressed into service.

13. Thus in our view, the burden on the legal heirs of proving causal connection between the accident and the work done in the course of employment stood discharged by the above speaking circumstances on record and there was grave error on the part of the Commissioner in totally ignoring them. The approach of the learned Commissioner, which in our view was quite erroneous, was this, the deceased had only driven the bus for a distance of about 30 miles from Umred to Nagpur, he was an experienced driver and therefore, there could not be any strain of driving on him, he had not suffered heart-attack before, he had suffered heart attack while he was sitting at the steering wheel and since there was no direct evidence of the accident, the claimants must fail.

14. The learned Counsel for the MSRTC brought to our notice a single Bench decision of Gujarat High Court in the Divisional Controller- Gujarat State Road Transport Corporation. *Rajkot v. Bai Jiviben Arjan and Anr.* 1981 L I.C. 86 wherein under the following circumstances - which are entirely different from the circumstances of the instant case - it was held that causal connection between the death and the work done was not established.

The deceased was an Assistant Traffic Inspector with the Corporation. While performing his duty of inspection, he got heart-attack and he succumbed to the same after a lapse of about 11 days.

15. The Commissioner has referred to the case of Kamlabai Chintaman Vs. Divisional Superintendent, Central Railway, Nagpur, . That was a case of death of a railway engine driver due to sudden heart attack while he was having a talk with the Guard. Against that entirely different factual back ground it was held that no connection between the work and death was established. Thus reliance on that authority was wrongly placed by the Commissioner.

16. Under the circumstances, disagreeing with the view taken by the Commissioner, we held that the death of deceased Abdul Aziz arose "out of and during the course of his "employment" is contemplated u/s 3 of the Act and hence the death was compensable by the employer - MSRTC.

17. This takes us to the question of extent of the liability, which is statutorily fixed. u/s 4 of the Act, the liability arises as soon as the accident takes place, which in this case means 7-11-1983. The legal heirs have claimed compensation as per Schedule IV as amended by the Amending Act 22 of 1984, which has been made applicable from 1-7-1984. For this, we see no legal justification. The compensation will have to be calculated on the basis of rates mentioned in the Schedule in force on the date of the accident.

18. The basis for calculation of the compensation is monthly "wages" as defined u/s 2(m) of the Act which excludes the travelling allowance and the amount paid to cover special expenses entailed on the workmen by the nature of his employment, So calculated, the "wages" of the deceased at the material time was Rs. 948/- P.M. The Compensation thus works out at Rs. 30, 000/-.

19. Section 4A permits grant of simple interest at 6% P.A. on the amount due and so also imposition of penalty to the extent of 50% of the compensation, for wilful default. The legal heirs have pressed for both, but case for the grant of the later relief seems to exist

20. To conclude, the appeal is allowed. The respondents are directed to pay the sum of Rs. 30,000/- together with interest at 6% P.A. from 7-11-1983 with costs throughout