(2014) 05 AHC CK 0057

Allahabad High Court

Case No: First Appeal From Order No. 336 of 2006

Oriental Insurance Company Ltd.	APPELLANT
Vs	
Poonam Devi	RESPONDENT

Date of Decision: May 9, 2014

Acts Referred:

- Workmens Compensation Act, 1923 - Section 3, 3(1), 30(1), 4A(3)(b)

Citation: (2014) 4 ACC 400 : (2016) ACJ 154 : (2015) 1 ADJ 529 : (2014) 5 ADJ 347 : (2014) 4 ALJ 708 : (2015) 2 AnWR 494 : (2014) 142 FLR 242 : (2014) 4 LLJ 522 : (2014) LLR 826

Hon'ble Judges: Manoj Misra, J

Bench: Single Bench

Advocate: Arun Kumar Shukla, Advocate for the Appellant; Rahul Mishra, Advocate for the Respondent

Final Decision: Allowed

Judgement

Manoj Misra, J.

The instant appeal has been filed u/s 30(1) of the Workmen Compensation Act, 1923 (hereinafter referred to as the Act) against the judgment and order dated 12.12.2005 passed by the Commissioner, Workmen''s Compensation Act/Assistant Labour Commissioner, U.P., Meerut in W.C.A. 294 of 2003 by which a compensation of Rs. 4,45,420/- was found payable to the claimant-respondents alongwith interest @ 12% from the date of the accident up to the date of deposit and a direction was given to the Oriental Insurance Company Ltd. (the appellant) to deposit the compensation amount within thirty days from the date of the order. In addition to above a penalty was imposed on the employer, u/s 4A(3)(b) of the Act, to deposit 50% of the said amount. The facts, in brief, are that the claimant-respondents filed a claim under the Act claiming, inter alia, that the husband of the claimant-respondent No. 1, namely, Suresh Kumar was in the employment of Smt. Rajbala, as a driver of

her TATA 407 truck No. U.P.-15-P-1689. On 11.6.2003 Suresh Kumar (the driver) and Kailash Chandra (the cleaner) were undertaking a journey in the said truck from Ambala to Meerut when, at about 12.30 hrs., near Fatehpur Bridge, P.S. Budia, district Yamuna Nagar, they stopped the vehicle to have a bath in the Yamuna canal and there, accidentally, they got drowned. It was alleged that the accident occurred during the course of employment and, therefore, the claimants were entitled to compensation under the Act. It was stated that the deceased Suresh Kumar had a monthly salary of Rs. 4000/- and, as such, a compensation of Rs. 4,51,920/- was payable to the claimants alongwith interest.

2. The owner of the truck admitted that the deceased was under her employment and that the accident occurred during the course of employment. The owner, however, claimed that the vehicle was duly insured and any liability that may be determined ought to be fastened on the insurance company, the appellant herein. The appellant (insurer) took the usual pleas. One of the pleas, which is the subject-matter of this appeal, was that the accident did not arise out of the employment and, therefore, the claim was not maintainable.

3. Before the Commissioner, copy of the First Information Report, lodged by the husband of the employer; the G.D. entry made at the concerned police station; and the post mortem report were produced, which suggested that the driver and the cleaner of the truck got drowned while bathing in the canal. Two witnesses were also examined. One was the deceased driver''s widow, who was not an eye witness to the incident. The other was a bystander near the canal who deposed that he witnessed the incident which so happened that after parking the truck two persons came out, one was carrying a container to fetch water from the canal. As he slipped and fell into the canal, the other person jumped into the canal to save him and as a result both of them got drowned in the water. This witness was cross-examined. In his cross-examination he admitted that he did not inform the police of the incident and that he watched the incident from a distance of about 15-20 meters.

4. The Commissioner found that the deceased was an employee of the employer and as the deceased died in an accident which occurred during the course of employment, therefore, the claim was maintainable. After determining the" monthly wages@ Rs. 4,000/- per month, which was commensurate to the minimum wages payable under the Minimum Wages Act, he assessed the compensation by taking the age of the deceased to be 21 yrs. In addition to the compensation awarded, he imposed penalty on the owner of the motor vehicle, u/s 4A(3)(b) of the Act, to the extent of 50% of the compensation. The compensation was, however, awarded against the Insurance Company after recording a finding that the vehicle was duly insured.

5. I have heard Sri Arun Kumar Shukla for the appellant and Sri Rahul Mishra for the claimant-respondents and perused the record.

6. While admitting the appeal for hearing, a Division Bench of this Court framed the following substantial question of law for hearing: "whether drowning of deceased-driver in canal while taking a bath can be treated as a death caused out of and during the course of employment?" Subsequently, matters up to a valuation of Rs. 5,00,000/- were made cognizable by a Bench presided over by a Single Judge therefore the appeal has been listed before this Bench.

7. Sri Arun Kumar Shukla, learned counsel for the appellant, submitted that for a claim to succeed u/s 3(1) of the Workmen''s Compensation Act, 1923, it has to be proved by the employee that: (i) there was an accident; (ii) the accident had a causal connection with the employment; and (iii) the accident must have been occurred during the course of employment. It was submitted that the accident had no causal connection with the employment. The act of taking a bath in a canal did not have any causal connection with the employment of the deceased as the driver of a truck. No doubt, taking a bath was incidental to the employment but taking a bath in a canal was not at all incidental to the employment and it was an added peril to which the workman voluntarily exposed himself when it was not at all required by the scope of the employment. It was thus submitted that the Commissioner committed manifest error in law by determining that compensation was payable to the claimant-respondents by the appellant under the Act. In support of his submission, the learned counsel for the appellant placed reliance on decisions of the Apex Court in Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmed Issak, and Malikarjuna G. Hiremath Vs. The Branch Manager, The Oriental Insurance Co. Ltd. and Another, and on a decision of the Madras High Court in the case of IL Rathinam and others v. Apollo Enterprises and others, 2003 (3) TAC 672.

8. Sri Rahul Mishra, who appeared on behalf of the claimant-respondents, submitted that from the frets and the evidence on record it was dearly established that the deceased was a driver employed for driving the truck, which was moving under the terms of employment from Ambala to Meerut during which, on account of extreme hot conditions, the driver as well as the cleaner went to the canal to fetch water where, in an accident, they got drowned. As the accident occurred during the course of the employment, therefore, the Compensation Commissioner was legally justified in determining the compensation and directing the Insurance Company to deposit the same upon finding that the vehicle was duly insured and the driver also held a valid driving licence.

9. Sri Rahul Mishra further submitted that, although, it may not have come on record that the driver and the cleaner had gone to fetch water for the vehicle but, considering the extreme hot conditions of the month of June, it could be assumed that they went to the canal to fetch water for cooling the vehicle and, as such, the accident occurred because of the reasons incidental to the employment and, therefore, it could be safely held that the accident not only occurred during the course of employment, but it also arose out of the employment. It was submitted

that although in the claim petition the case taken was to the effect that the deceased-driver and the cleaner were taking a bath in the canal when they got drowned, but from the statement of P.W. 2, it appears to be a case that they had gone to fetch water and when one of them fell in the canal the other person jumped, into the canal to save him and, as a result, both of them got drowned. It was thus submitted that from the facts and circumstances proven on record, it appears; to be a case where the driver and the cleaner had gone to fetch water from the canal and in the process they slipped and drowned.

10. Having considered the rival submissions, the question that arises for adjudication in this appeal is whether in the proven facts and circumstances of the case can it be said that the death of the husband off the claimant-respondent No. 1 occurred on account of an accident arising out of and during the course of employment.

11. In the case of Mackinnon Mackenzie and Company Pvt. Ltd. Vs. Ritta Farnandes, the Apex Court observed that to maintain a claim u/s 3 of the Act, it must be established that there is some causal connection between the death of the workman and his employment likewise, in the case of Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmed Issak, it was observed that 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". There must be a causal relationship between the accident and the employment. 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.

12. Applying the test laid down by the Apex Court in Mackinnon Mackenzie & Co. Pvt. Ltd. v. Ibrahim. Mohd. Issak case (supra), in the case of Mallikarjun G. Hiremath (supra), the Apex Court set aside the order of the Compensation Commissioner providing compensation to the dependents of a deceased-driver, who had taken a vehicle to a Temple under the terms of the employment but while sitting on steps of a pond in the Temple, he slipped and fell into the water and died due to drowning. Likewise, the Madras High Court in the case of K. Rathinam and others v. Apollo Enterprises and others (supra) had denied the benefit of compensation to the dependents of a person who had voluntarily broken the security cordon and jumped into a Well to save another person and in the process died by drowning. While denying compensation, the Madras High Court observed that the deceased out of his own volition went and attended to the rescuing work in the seepage well which

he was not called upon by the employer and with which kind of work the deceased was not at all concerned and as the deceased out of his own volition voluntarily attended to do the rescuing work in the seepage well it is a case of added peril and, therefore, the employer cannot be held liable to pay compensation.

13. Coming to the facts of the instant case, the evidence reveals that the deceased-driver and the cleaner had gone to the canal where they got drowned. In the First Information Report; the GD entry; and in the claim petition, the case is to the effect that they had gone there to have a bath and in the process they got drowned. In the testimony of P.W. 2, who is just a chance witness, it has come that one of them had gone to fetch water in a bucket and when he slipped, the other person jumped into the canal to save him and as a result both of them drowned. In either situation, the driver and the cleaner had taken an added peril, on their own volition, either of fetching water from a canal which they were not at all required to take under the terms of their employment or of taking a bath in a canal. An act of fetching water from an open canal or of bathing in a free flowing canal, which by itself is fraught with danger, cannot be said to be an ordinary incidence of their employment as driver and cleaner of a truck. Whether they had gone to fetch water for use in the truck or they had gone to fetch water for their own personal consumption would not make much difference because in any case it is not the case of the claimants that there was no other convenient water source available in the village or anywhere in the vicinity, which necessitated taking an added risk of fetching water from a flowing canal. It is also not the case of the claimant that the truck had got over-heated and, therefore, to cool down the truck they had no option but to hurriedly fetch water from the nearest source as they could not have waited for a more convenient source.

14. Considering the over all facts and circumstances, this Court is of the view that, although, it is established that the accident occurred during the course of the employment but it is not proved on record and certainly not from the claimant''s case, as taken in the claim petition, that the accident arose out of the employment. To sustain a claim, u/s 3 of the Act, the claimant must not only prove that the accident occurred during the course of the employment but also that it arose out of the employment. Meaning thereby that the accident has some causal connection with the employment. According to P. Ramanatha Aiyar''s "Advanced Law Lexicon (4th Edition), no general principle can be evolved to explain and define the phrase "arising out of employment". One test, however which is always applicable is this: Was it part of the injured person''s employment to hazard, to suffer or to do which caused his injury? If yes, the accident arose out of his employment, if no, it did not. The word "employment" again is not to be defined in a narrow manner by reference only to the duties of the workman; but the character, conditions, incidents and special risks involved in the employment, would have to be taken into consideration in order to find out whether the accident arose out of and in course of the workman''s employment. In the instant case, the act of fetching water from a

flowing canal or of bathing in the canal, cannot be said to be an act which was incidental to the employment. No doubt, there may be a case where the workman is injured as a result of natural force such as lightening though in itself has no connection with employment, but the claim can be sustained by showing that such employment exposed the person to such injury, as has been held by the Apex Court in the case of State of Rajasthan v. Ram Prasad and another, 2001 (9) SCC 395. But here, it cannot be said that deceased''s employment as a driver would expose him to fetching water or taking bath in a flowing canal, particularly, when it is not shown that there was no other source of water available in the vicinity than the canal itself. Fetching water from a canal or taking a bath in the canal is nothing but an added peril to which the driver and the cleaner had exposed themselves to, even though it was not incidental to their employment..

15. For the reasons discussed above, this Court is of the view that the accident on which the claim was maintained did not arise out of the employment and, therefore, the Compensation Commissioner was not legally justified in determining the compensation and directing the appellant to deposit the same. The appeal is therefore allowed. The judgment and order dated 12.12.2005 passed by the Commissioner, Workmen''s Compensation Act/Assistant Labour Commissioner, U.P., Meerut in W.C.A. 294 of 2003, is hereby set aside. The claim petition of the claimant-respondents stands dismissed. The appellant would be entitled to recover the amount, if any, paid or deposited pursuant to the impugned order. There shall be no order as to costs.