(2009) 06 GUJ CK 0032

Gujarat High Court

Case No: First Appeal No. 2355 of 2009, Civil Application No. 6352 of 2009 and Civil Application No. 6407 of 2009 in First Appeal No. 2355 of 2009

United India Insurance Co. Ltd.		APPELLANT
	Vs	
Lupin Agrochemcials (I) Ltd. and Others		RESPONDENT

Date of Decision: June 24, 2009

Acts Referred:
Employees State Insurance Act, 1948 â€" Section 2#Motor Vehicles Act, 1988 â€" Section 146, 196#Workmens Compensation Act, 1923 â€" Section 10, 10(2), 12, 14, 2(1)

Citation: (2009) 06 GUJ CK 0032

Hon'ble Judges: H.K. Rathod, J

Bench: Single Bench

Advocate: Vibhuti Nanavati, for the Appellant; Manoj Shrimali, for Defendant 3, for the Respondent

Judgement

H.K. Rathod, J.
Heard learned Advocate Mr. Vibhuti Nanavati for appellant United India Insurance Co. Ltd. and learned Advocate Mr.

Manoj B. Shrimali for respondent No. 3. Learned Advocate Mr. Manoj Shrimali has made a mention before this Court that learned Advocate Mr.

Hakim is appearing for learned Advocate MM Saiyad for heirs of employer Ashokbhai B.Mehta. Learned Advocate Mr. Nanavati for appellant

raised objection that he has not filed any appearance in these proceedings.

2. By filing this appeal, appellant has challenged order passed by Workmen''s Compensation Commissioner, Bharuch in WC (Fatal) Case No.

41/01 below Exh. 36 dated 21st August, 2008 wherein WC Commissioner has awarded compensation in favour of claimant while directing

respondent No. 1, 2 and 3 jointly and severally to pay Rs. 1,14,155. No order for interest and penalty has been passed by WC Commissioner.

3. Pursuant to orders passed by this court in an application for condonation of delay, while condoning delay, appellant insurance company has also

filed Civil Application No. 6407 of 2009 for bringing heirs of respondent No. 2 contractor on record who has expired during pendency of

proceedings before WC Commissioner with a prayer to condone delay in filing such an application.

4. Considering submissions made by learned Advocates for parties, and averments made in this application supported by affidavit, prayer made in

para 6 of this application is allowed. Cause title be amended accordingly by appellant application stands disposed of accordingly.

5. While challenging impugned order passed by WC Commissioner, learned Advocate Mr. Vibhuti Nanavati raised contention before this Court

that on 5.4.1996 when accident occurred, deceased was not in actual employment, meaning thereby, accident not occurred during course of

employment, therefore, insurance company is not liable to pay compensation to claimant. He also raised contention that respondent No. 2 Shri

Ashokbhai B. Mehta has expired during pendency of claim petition on 3.4.2002 and his heirs and legal representatives have not been brought on

record by claimant, therefore, directions issued by WC Commissioner against dead person respondent No. 2 is nullity. He also raised contention

before this Court that principle of notional extension is not applicable to facts of this case. He relied upon decision of apex court in case of

Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja and Others, , therefore, para 8 of said judgment of Hon''ble Supreme Court is quoted as

under:

8. It is unnecessary for the purposes of this appeal to refer to the various decisions in England and in India explaining the aforesaid theory because

even it on such a basis a workman may be regarded as being in the course of his employment at point B either while on his way to the salt works

or returning from it, the question for our decision is whether he has still in the course of his employment when he was on his journey between points

A and B of the map, Ext. 35. While the case was in the High Court attention of the learned judges was drawn to the failure of the Commissioner

for Workmen"s Compensation to examine witnesses to prove an alleged arrangement between the appellant and the Kharvas (ferry-walas) for the

carrying of the workmen of the appellant by boat across the creek to enable them to be ferried to and from the salt works. The learned Judges of

the High Court at first were included to order a remand for the recording of this evidence, but, having regard to the view which they took of the

recent decisions of the House of Lords in England, they thought it unnecessary to have such evidence recorded. In their opinion, on the material as

already on the record, it must be held that the accident arose out of and in the course of the employment of the deceased workmen. In this Court,

as already stated, we considered it necessary to have evidence taken in this connection and findings recorded thereon. The findings, on the

evidence so recorded, is quite clear that there was no arrangement between the appellant and the Kharvas to ferry to and from the salt works,

across the creek, any workman of the appellant. According to the evidence, workmen of the salt works are charged by the Kharvas when they

cross the creek in their boats. The only concession made by them on their own account is not to make such a charge in the case of any person who

is a Kharva - a fellow caste man. It is also clear from the evidence on the record, both before and after remand, that the boats ferried across the

creek are used by the public, every one of whom has to pay the charge for being ferried across the creek with the exception of a person of the

Kharva caste. To reach point A on the map a workman has to proceed in the town of Porbander via a public road. A workman then uses at point

A a boat, which is also used by the public, for which he has to pay the boatman''s dues, to go to point B. From point B to the salt works there is

an open sandy area 450 to 500 feet long and 200 to 250 feet wide. This sandy area is also open to the public. From this sandy area there is a

footpath going to the salt jetty, point C and a foot-track going to the salt works, point D. There is no question that the foot-track going to the salt

works is a public way. The footpath from the sandy area to the salt jetty, point C, may or may not be used by the public. For the purpose of this

case it may be assumed that a workman must necessarily use that footpath if he has to go to the salt jetty and from there to the various salt pans

and salt reservoirs within the area of the salt works. It is well settled that when a workman is on a public road or a public place or on a public

transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment

makes it necessary for him to be there. A workman is not in the course of his employment from the moment he leaves him home and is on his way

to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of

notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him. In the present case, even if it

be assumed that the theory of notional extension extends upon point D, the theory cannot be extended beyond it. The moment a workman left

point B in a boat or left point A but had not yet reached point B, he could not be said to be in the course of his employment and any accident

happening to him on the journey between these two points could not be said to have arisen out of and in the course of his employment. Both the

Commissioner for Workmen''s Compensation and the High Court were in error in supposing that the deceased workmen in this case were still in

the course of their employment when they were crossing the creek between points A and B. The accident which took place when the boat was

almost at point A resulting in the death of so many workmen was unfortunate, but for that accident the appellant cannot be made liable.

6. Except contentions recorded herein above, no other contention is raised by learned Advocate Mr. Nanavati before this Court and except

decision referred to above, no other decision is cited by learned Advocate Mr. Nanavati before this Court.

7. Learned Advocate Mr. Shrimali for respondent claimant submitted that WC Commissioner has rightly examined matter under WC Act and has

rightly awarded compensation in favour of claimant. For that, no error has been committed by WC Commissioner which would require

interference of this Court. He submitted that before WC Commissioner, initially, distribution application was filed by claimant - case No. 6/96 Exh.

7 with a prayer to disburse (distribute) amount in favour of claimant because respondent No. 2 employer has deposited amount of compensation

of Rs. 1,14,261. During pendency of said distribution application, objection was raised by respondent No. 2 that employer is not liable to pay

compensation to claimant and matter may be examined on merits, therefore, insurance company was joined as a party and matter was decided

thereafter by WC Commissioner on merits, therefore, he submitted that no interference of this Court is required in this matter.

8. I have considered submissions made by learned advocates. I perused award passed by WC Commissioner. Respondent No. 1 Lupin

Agrochemicals (I) Ltd. is principal employer and respondent No. 2 is contractor and respondent No. 3 is insurance company. At the time when

accident occurred, insurance policy was obtained by respondent No. 2 in respect of workmen those who are working under control of respondent

No. 2. These facts are not in dispute between parties. Now, only question is whether insurance company is liable to pay compensation to claimant

or not. Workman had joined service on 1st April, 1996 and on 5th April, 1996, while going to place of work, before he could reach at the place

of work, workman was having serious chest pain and, therefore, he died on 8.4.1996. In Distribution Application, reply was filed by insurance

company at Exh. 15. After considering facts stated by employer, WC Commissioner has decided to decide main application on merits, therefore,

notices were issued to respondents and after receiving notices, Exh. 10 reply was filed by employer-contractor. Exh. 35 reply was filed by

insurance company. Deceased was working with respondent No. 2 contractor. That fact was admitted by respondent No. 2 contractor. Insurance

Co. raised contention denying averments made in petition and also raised contention that considering Section 14, insurance company is not liable to

pay any amount of compensation to claimant. Further contention was also raised by insurance company that Section 10(2) notice was not served

being statutory notice and therefore, on that ground, application against insurance company is required to be dismissed. Certain documents have

been produced on record by claimant as referred to in para 3 and certain documents have been produced by respondent No. 2. Vide Exh. 17,

affidavit in the form of evidence was filed by applicant Shakuntalaben Hasmukhbhai Parmar. Vide Exh. 20, closing purshis was filed on behalf of

applicant. On behalf of opponent No. 1, vide Exh. 24, closing purshis was filed before WC Commissioner. Vide Exh. 22, deposition of

Harnishbhai, son of opponent No. 2 Ashokbhai B.Mehta was recorded before WC Commissioner. Exh. 29 is statement of calculation of salary of

deceased workman, husband of applicant, dated 22nd April, 1996. Insurance policy was also produced on record by respondent No. 2. It is

necessary to note that on behalf of appellant, no oral evidence was produced before WC Commissioner and no documentary evidence was

produced before WC Commissioner. WC Commissioner has considered evidence on record. Issues are framed vide Exh. 16. At the time when

accident occurred, deceased was 28 years and his salary was Rs. 1079.00. WC Commissioner considered evidence of applicant Shakuntalaben,

widow of deceased. Respondent No. 1 has cross examined widow. It is necessary to note that on behalf of respondent No. 2 means immediate

employer and respondent No. 3 insurance company, widow was not cross examined and, therefore, evidence of widow has remained

unchallenged and uncontroverted in so far as immediate employer and insurance company are concerned. WC Commissioner has considered

evidence of widow Exh. 17 and came to conclusion that widow is dependent within the meaning of Section 2(1)(d) of WC Act. WC

Commissioner also considered evidence of Mr. Harnish Ashokbhai Mehta, on behalf of respondent No. 2 at Exh. 22 wherein it was deposed by

him that his father was contractor of workmen of respondent No. 1. It was also deposed by said witness at Exh. 22 that at present, his father is not

surviving and he is looking after the work of contractor. He deposed that they have obtained policy for workmen from United India Insurance

Company Ltd., Ankleshwar Branch. He deposed that deceased was their workman, he died during course of employment. As stated earlier, on

behalf of respondent No. 1 and respondent No. 3, no oral and/or documentary evidence was produced. From respondent No. 3 insurance

company, policy was obtained for workmen and premium of said insurance policy was also paid in time. It was deposed by witness for respondent

No. 2 at Exh. 22 that therefore, insurance ocmpany is liable to pay compensation to claimant. Mark 11/1 is a letter of insurance company

produced by immediate employer and according to that letter, deceased was workman of respondent No. 2. Written arguments were submitted

by respondent No. 2 and according to written arguments of respondent No. 2, on 5.4.96, workman had received serious chest pain before joining

duty, therefore, he was admitted in Ankleshwar Primary Medical Center and thereafter, he was shifted at Baroda in Bhailalbhai Amin General

Hospital for further treatment where he died during course of treatment on 8.4.1996. Considering letter Mark 11/1 of contractor Shri Ashokbhai

B. Mehta, on 5.4.1996, at 7.00 a.m., while deceased was coming for duty, while he was on the way, near M/s. PCI Ltd., GIDC Panoli, he had

fallen sick all of a sudden, therefore, he was immediately shifted at Patel Surgical Hospital, Ankleshwar for treatment and as per advise of Dr.

Naresh Shah, MD, he was shifted and admitted in Bhailalbhai Amin General Hospital on 6.4.1996 at evening hours. As observed by WC

Commissioner, official intimation was also given by respondent No. 2 to respondent No. 3 insurance company. Considering such oral and

documentary evidence on record, and decision in case of Chairman, Cochin Dock Labour Board Vs. P.J. George and Another, as well as

decision of Karnataka High Court, The Assistant Executive Engineer, N.H. No. 13, Bijapur Vs. Shantavva and Others, and circumstances of

case, it was held by WC Commissioner that principle of Notional Extension is applicable to this case therefore, as per said principle and

circumstances of case, deceased Hasmukhbhai Ramjibhai Parmar has died during course of employment and, therefore, issue No. 2 was

accordingly answered in affirmative.

9. Thereafter, WC Commissioner considered age of deceased, 28 years as per Exh. 29 and thereafter, considered his daily wage of Rs. 41.50

and then considered total of Rs. 1079.00.Thereafter, considering date of incident 5.4.1996 and age of 28 years, applied relevant factor 211.79

and held that 50% of monthly salary would come to Rs. 539.00 and applying said amount of Rs. 539.00 with said factor 211.79, held that the

figure would come to Rs. 1,14,155.00 and applicants are entitled to recover said amount from jointly and/or severally. WC Commissioner has

considered evidence of respondent No. 2 as deceased was employee of respondent No. 2 and also considered written statement Exh. 33 and on

that basis, held that respondent No. 1 being principal employer and respondent No. 2 being immediate employer, considering Section 12 of WC

Act, respondent No. 1 is also liable to pay compensation to claimant. Insurance policy was obtained from appellant insurance company having

period from 17.11.95 to 15.11.96 which covers date of accident and accordingly information was given by respondent No. 2 to insurance

company, therefore, commissioner has come to conclusion that looking to age of deceased 28 years and salary of Rs. 1079.00 and factor of

211.79, held that 50% of monthly salary would come to Rs. 539.00 and applying said amount of Rs. 539.00 with said factor 211.79, held that the

figure would come to Rs. 1,14,155.00 as stated earlier. It is necessary to note that in reply filed by insurance company, only contention raised was

that of delay which has been considered by WC Commissioner and considering decision of Himachal Pradesh High Court reported in 1985 (I)

LLN 922 in case of Mangalchand v. Forest Department (Through Divisional Forest Officer, Kinnor) such argument of insurance company cannot

be accepted and, therefore, such contention about delay was rejected by WC Commissioner. On behalf of respondent No. 1, reliance was placed

before WC Commissioner on decision of apex court reported in AIR 2007 248 in case of Shakuntala Chandrakant Shresthi v. Prabhakar Maruti

Garvali and Ors. Considering said decision in light of facts of this case, it was held by WC Commissioner that opponent No. 1 company is an

establishment manufacturing poisonous agro chemicals and applicant has clearly stated at Exh. 17 that her deceased husband died in accident due

to chest pain in view of effect of such poisonous chemical against which no evidence has been produced by opponents before WC Commissioner.

In view of that, decision reported in AIR 2007 248 was not applicable according to WC Commissioner in this case. From perusal of order of WC

Commissioner, it appears that contentions which have been raised by learned Advocate Mr. Vibhuti Nanavati in this appeal before this Court have

not been raised by appellant before WC Commissioner. Not only that, except filing of reply, no documents were produced by appellant and no

oral evidence was led by company. Not only that, no oral arguments or written submissions were made before WC Commissioner by appellant

insurance company. Not only that, appellant Company has not cross examined claimant. Therefore, contentions raised by learned Advocate Mr.

Nanavati before this Court cannot be accepted as no such contention is finding place in order passed by WC Commissioner.

10. I have considered decision of apex court in case of Saurashtra Salt (supra) relied upon by learned Advocate Mr. Nanavati before this Court. I

have also considered para 8 thereof relied upon by him in particular. ''Employment injury'' is not defined under WC Act but it is defined u/s 2(i) of

ESI Act 1948 which contemplates that-

employment injury means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his

employment being an insurable employment, whether the accident occurs or the occupational disease is extended within or outside the territorial

limits of India.

11. Legislature has emphasized that in order to claim compensation by workman, he has to prove that injury has been caused to him by an

accident arising out of and during course of employment. These words are having a great importance in dealing with such claims of compensation.

In Western Railway Vs. Chandrabai and Another, employee was a loco attendant and he was going to attend his duty but he met with accident on

the way and died. The widow claimed compensation u/s 10 of WC Act, 1923. WC Commissioner allowed claim, applying theory of Notional

extension of time and place of injury and accident and following case of apex Court in case of Mackinnon Mackenzie and Co. (P) Ltd. Vs.

Ibrahim Mahmmed Issak, wherein it has been accepted that employee while going on duty and coming back to home after work would be treated

as an employee on duty and entitled to compensation, if he meets with accident during that period of time. Appeal preferred by employers was

dismissed by High Court and confirmed award of lower Court. See: Jayanti Shipping Co. Ltd. v. Berha Dil Parera 1976 (33) FLR 262; (2)

Establishment Comleat Vehicles of Research and Ors. v. Dy. Commissioner of Labour 1995 (71) FLR Mad ; (3) Steel Authority of India Ltd.,

Rourkela Steel Plant Vs. Assistant Labour Commissioner (Central) and Controlling Authority and Others,

12. Learned Advocate Mr. Vibhuti Nanavati is relying upon decision of apex court in case of Saurashtra Salt (supra), para 8 thereof in particular

but observations made by apex court in para 7 of said decision are also relevant and important in light of facts of this case where apex court has

kept it open that there may be some reasonable extension in both time and place and a workman may be regarded as in the course of his

employment even though he had not reached or had left his employer''s premises. It has also been held facts and circumstances of each case will

have to be examined very carefully in order to determine whether accident arose out of and in the course of employment of a workman, keeping in

view at all times this theory of notional extension. Therefore, observations made by apex court in para 7 of said decision in Saurashtra Salt (supra)

are reproduced as under:

7. As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has

left the place of employment, the journey to and from the place of employment being excluded. It is now well-settled, however, that this is subject

to the theory of notional extension of the employer''s premises so as to include an area which the workman passes and repasses in going to and in

leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the

course of his employment even though he had not reached or had left his employer''s premises. The facts and circumstances of each case will have

to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping

in view at all times this theory of notional extension.

13. Considering facts of present case as admitted by immediate employer respondent, accident had occurred during course of employment

because workman had left residence for joining duties at work place. Therefore, in view of observations made by apex court in para 7 of same

decision in Saurashtra Salt (supra) , and also in view of facts of case before hand, contention raised by learned Advocate MR. Nanavati cannot be

accepted when accident occurred during course of employment while applying theory of notional extension.

14. This Court had an occasion to consider same question of Principle of Notional Extension will apply or not in First Appeal No. 5157 of 2008

on 27.11.2008 in case of National Insurance Co. Ltd. v. Raijibhai Vaghjibhai Patel (Baria) and 3 Ors. In para 8 of said decision of apex court in

Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja and Others, was considered. Para 7 thereof was considered. In para 9 of said decision,

apex court decision in case of General Manager, B.E.S.T. Undertaking, Bombay Vs. Mrs. Agnes, The relevant observation made by Apex Court

in Para 14 of said decision were also considered by this court. In para 10 of said decision, this court considered decision in case of Rajanna Vs.

Union of India, and then, this court considered decision of MP High Court in case of Vidyaram Kanauha v. Punabi and Ors. 1999 III LLJ (Supp.)

410, para 16. Therefore, para 8 to 11 of decision of this Court in First Appeal No. 5157 of 2008 dated 27.11.2008 are reproduced as under:

8. The Apex Court has also considered the same in case of Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja and Others, The relevant

observation made by Apex Court in Para 7 which is quoted as under:

7. As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has

left the place of employment, the journey to and from the place of employment being excluded. It is now well-settled, however, that this is subject

to the theory of notional extension of the employer''s premises so as to include an area which the workman passes and re-passes in going to and in

leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the

course of his employment even though he had not reached or had left his employer''s premises. The facts and circumstances of each case will have

to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping

in view at all times this theory of notional extension.

9. The Apex Court has also considered the same in case of General Manager, B.E.S.T. Undertaking, Bombay Vs. Mrs. Agnes, . The relevant

observation made by Apex Court in Para 14 which is quoted as under:

14. Bombay is a City of distances. The transport service practically covers the entire area of Greater Bombay. Without the said right, it would be

very difficult for a driver to sign on and sign off at the depots at the schedule timings, for he has to traverse a long distance. But for this right, not

only punctuality and timings cannot be maintained, but his efficiency will also suffer. D.W. 1, a Traffic Inspectors of B. E. S. T. Undertaking, says

that instructions are given to all the drivers and conductors that they can travel in other buses. This supports the practice of the drivers using the

buses for their travel from home to the depot and vice versa. Having regard to the class of employees it would be futile to suggest that they could

as well go by local suburban trains or by walking. The former, they could not afford, and the later, having regard to the long distances involved

would not be practicable. As the free transport is provided in the interest of service, having regard to the long distance a driver has to traverse to

go to the depot from his house and vice versa, the user of the said buses is a proved necessity giving rise to an implied obligation on his part to

travel in the said buses as a part of his duty. He is not exercising the right as a member of the public, but only as one belonging to a service. The

entire Greater Bombay is the field or area of the service and every bus is an integrated part of the service. The decisions relating to accidents

occurring to an employee in a factory or in premises belonging to the employer providing ingress or egress to the factory are not of much relevance

to a case where an employee has to operate over a larger area in a bus which is in itself an integrated part of a fleet of buses operating in the entire

area. Though the doctrine of reasonable or notional extension of employment developed in the context of specific workshop factories or harbours,

equally applies to such a bus service, the doctrine necessarily will have to be adopted to meet its peculiar requirements. While in a case of a

factory, the premises of the employer which gives ingress or egress to the factory is a limited one, in the case of a city transport service, by

analogy, the entire fleet of buses forming the service would be the ""premises"". An illustration may make our point clear. Suppose, in view of the

long distances to be covered by the employees, the Corporation, as a condition of service, provides a bus for collecting all the drivers from their

houses so that they may reach their depots in time and to take them back after the day''s work so that after the heavy work till about 7 p.m. they

may reach their homes without further strain on their health. Can it be said that the said facility is not one given in the course of employment? It can

even be said that it is the duty of the employees in the interest of the service to utilize the said bus both for coming to the depot and going back to

their homes. If that be so, what difference would it make if the employer, instead of providing a separate bus, throws open his entire fleet of buses

for giving the employees the said facility? They are given that facility not as members of the public but as employees; not as a grace but as of right

because efficiency of the service demands it. We would, therefore, hold that when a driver when going home from the depot or coming to the

depot uses the bus, any accident that happens to him is an accident in the course of his employment.

10. The Apex Court has also examined the same in case of Rajanna Vs. Union of India, which are relevant, therefore, the same are quoted as

under:

10. ...In the facts of that case the employer was held not liable only because the accident occurred when the workman was travelling in a boat not

provided by the employer but a public transport in which any other member of the public could travel and it was not incumbent on the workman to

adopt that mode of travel. Applying the test in the present case, it is clear that since the appellant was travelling in the official SPG vehicle he was

required to travel from the staff quarters to the South Block, that vehicle not being available to anyone other than the SPG personnel, the appellant

was at a place or a point or an area which came within the theory of notional extension of the official premises for performance of ""actual VIP

security duty."" In other words, that official SPG vehicle was a notional extension of the official premises and, therefore, the appellant was deemed

to be on actual VIP security duty, while travelling in it from the staff quarters to the South Block in these circumstances.

12. In Halsbury''s Laws of England, Volume 33, Fourth Edition, the summary is stated thus:

490. Accident Travelling to and from Work.- The course of employment normally begins when the employee reaches his place of work. To extend

it to the journey to and from work it must be shown that in travelling by the particular method and route and at the particular time, the employee

was fulfilling an express or implied term of his contract of service. One way of doing this is to establish that the home is the employee''s base from

which it is his duty to work and that he was travelling by direct route from his home to a place where he was required to work, but that is only one

way of showing this; the real question at issue is whether on the particular journey he was travelling in the performance of a duty, or whether the

journey was incidental to the performance of that duty and not merely preparatory to the performance of it. If the place where the accident occurs

is a private road or on the employer''s property, the accident is in the course of the employment because he is then at the scene of the accident by

reason only of his employment and he has reached the sphere of his employment. The test is whether the employee was exposed to the particular

risk by reason of his employment or whether he took the same risks as those incurred by any member of the public using the highway.

496. Accidents Travelling to or from Work in Employer''s Transport.- An accident happening while an employed earner is, with the express or

implied permission of his employer, travelling as a passenger to or from his place of work in any vehicle which is being operated by or on behalf of

his employer, or which is provided by some other person in pursuance of arrangements made with his employer, must be deemed to arise out of

and in the course of his employment, even though the employed earner is not obliged to travel by that vehicle, if it would have been deemed so to

have arisen if he had been under an obligation to travel by it provided that the vehicle is not operated in the ordinary course of a public transport

service.

11. The Madhya Pradesh High Court has also considered the same in case of Vidyaram Kanauha v. Punabi and Ors. reported in 1999 III LLJ

(Supp.) 410. The relevant observation made by Madhya Pradesh High Court in Para 16 which is quoted as under:

16. The only surviving question is if the mere fact that at the particular point of time, when the accident occurred, deceased Jagdish, responding to

Daru''s call to take quilt for him, would be such an act on his part as would be outside the course of his employment. Daru being Vidyaram''s

servant, and being in-charge of working operations relating to the irrigation of fields, would be evidently enjoying the status of a supervisor and he

would be exercising on behalf of the employer Vidyaram control over other persons working at the site. It has been held in Dharangadhara

Chemical Works Ltd. Vs. State of Saurashtra, , that the test of contract of service is existence of right in the master to supervise and control not

only by directing what work may be done, but also directing as to how and the manner in which work has to be done. The incident took place in

the month of January and the night being cold, at the end of the day after hard work, Daru wanted to comfort himself by slipping inside the quilt

and he called, therefore, Jagdish who was under his control to bring the quilt. The act of deceased Jagdish of carrying the quilt to Daru would be

related to his employment because it advanced the interest of his employer. The expression ''course of employment'' is to be infused with such

meaning as will reflect the nature of the employment, the environment in which the work is done and the surrounding circumstances, characteristic

of human nature. The small boy earning bread for his family, opting out of the company of his younger brothers and sister to land at night at a place

of hazardous undertaking, had little option except to respond dutifully and obediently to Daru''s cal. Daru''s status naturally overawed him even if

Daru himself was not frightened and apprehensive of the prospects of the demand he had made on the young boy. I would, therefore, hold that in

carrying the quilt, deceased Jagdish acted under Daru''s control and he was advancing the interest of his employer non-applicant/appellant in doing

so: his act fell within the mischief of the expression ''course of employment''.

15. Therefore, in light of facts of this case and law as considered by this court in aforesaid first appeal decided by this Court on 27.11.2008, WC

Commissioner has rightly applied theory of Noational Extension of time and place of injury and accident and, therefore, contentions raised by

learned Advocate Mr. Nanavati in that regard cannot be accepted and same are, therefore, rejected.

16. As regards contention raised by learned Advocate Mr. Nanavati that because respondent No. 2 Ashok B. Mehta expired on 3rd April, 2002,

therefore, direction issued by WC Commissioner against respondent No. 2 is nullity, therefore, insurance company cannot be held responsible,

question is that on basis of insurance policy, whether insurance company is liable or not, that has been rightly examined and according to contract

between respondent No. 2 and insurance company, it is liability of insurance company to indemnify owner covering period because of relevant

agreement for payment of compensation as per premium received by insurance company. That contention has not been specifically raised before

WC Commissioner and it has no much effect because ultimate result is that insurance company has to pay compensation to claimant and, therefore,

contention raised by learned Advocate Mr. Nanavati before this Court cannot be accepted while considering conduct of insurance company which

is a statutory authority, has remained silent before WC Commissioner after filing reply and no documentary and/or oral evidence was produced nor

such contention was raised either expressly or impliedly before WC Commissioner. Therefore, argument made by learned advocate Mr. Nanavati

before this court raising such technical contention for avoiding liability arising from order of WC Commissioner after pocketing premium from

employer, cannot be accepted. Such approach seems to have been adopted only with a view to avoid statutory liability as well as contractual

obligations for making payment of compensation to claimant by statutory authority and, therefore, such approach and conduct on part of appellant

insurance company has been deprecated by this Court. Normally this court is not entertaining such type of conduct of a party which is raising

contentions which have not been raised by it before court below. Therefore, this court has noted such type of contentions raised by insurance

company before this court without raising same before WC Commissioner. Insurance company is entitled to file appeal for challenging orders

passed by Court below but insurance company is having responsibility to raise such contention which is available to it on basis of record. In case

before hand, contentions raised by appellant in this appeal are not finding place in record of case before W.C. and, therefore, according to my

opinion, WC Commissioner has rightly examined matter by applying principle of notional extension and WC Commissioner has rightly considered

evidence of widow Exh. 17 against which there was no other evidence available from record and further, widow was not cross examined by

advocate for insurance company before WC Commissioner and, therefore, oral evidence of widow had remained uncontroverted and

unchallenged in so far as insurance company is concerned. Recently, Apex Court has observed in respect of conduct of Insurance Company in

case of Dharmendra Goel v. Oriental Insurance Co. Ltd. reported in 2008 (3) GLH 315. Para 6 of apex court decision is quoted as under:

6. We have heard the learned Counsels for the parties and have gone through the record very carefully. The facts as narrated above remain

uncontroverted. Admittedly, the accident had happened on 10th September, 2002 during the validity of the Insurance Policy taken on 13th

February, 2002 insuring the vehicle for Rs. 3,54,000/- on a premium of Rs. 8498/- It is also the admitted position that the vehicle had been

declared to be a total loss by the surveyor appointed by the company though the value of the vehicle on total loss basis had been assessed at Rs.

1,80,000/- We are, in the circumstances, of the opinion that as the company itself had accepted the value of the vehicle at Rs. 3,54,000/- on 13th

February, 2002, it could not claim that the value of the vehicle on total loss basis on 10th September, 2002 i.e., on the date of the accident was

only Rs. 1,80,000/-. It bears reiteration that the cost of the new vehicle was Rs. 4,30,000/- and it was insured in that amount on 19th January,

2000 and on the expiry of this policy on 18th January, 2001, was again renewed on 19th January, 2001 on a value of Rs. 3,59,000/- and on the

further renewal of the policy on 13th February, 2002 the value was reduced by only Rs. 5,000/- to Rs. 3,54,000/-. We are, therefore, unable to

accept the company''s contention that within a span of seven months from 13th February 2002 to the date of the accident, the value of the vehicle

had depreciated fromRs.3,54,000/- to Rs. 1,80,000/-. It must be borne in mind that Section 146 of the Motors Vehicles Act, 1988 casts an

obligation on the owner of a vehicle to take out an insurance policy as provided under Chapter 11 of the Act and any vehicle driven without taking

such a policy invites a punishment u/s 196 thereof. It is therefore, obvious that in the light of this stringent provision and being in a dominant position

the insurance companies often act in an unreasonable manner and after having accepted the value of a particular insured good disown that very

figure on one pretext or the other when they are called upon to pay compensation. This ''take it or leave it'' attitude is clearly unwarranted not only

as being bad in law but ethically indefensible. We are also unable to accept the submission that it was for the appellant to produce evidence to

prove that the surveyor''s report was on the lower side in the light of the fact that a price had already been put on the vehicle by the company itself

at the time of renewal of the policy. We accordingly hold that in these circumstances, the company was bound by the value put on the vehicle while

renewing the policy on 13th February, 2002.

17. In Madras State Electricity Board Vs. Ambazhathingal Ithachutti Umma, Madras High Court considered Section 3 of WC Act, accident

arising out of and in the course of his employment, Relevant observations made by Madras High Court in said decision are reproduced as under:

The majority of their Lordships held that there was evidence to support the finding, and that it was a case of personal injury by accident arising out

of and in the course of employment. But according to the dissenting opinion of Lord Atkinson, the death of the deceased in that case was no more

an accident than if had he been a butler, he had died walking slowly up the stairs of the house in which he served or, had he been a coachman he

had died while slowly mounting to his box. And according to another dissenting Lord (Lord Shaw of Dunfermline), the workman did not die owing

to injury by accident but died of heart disease, and that the death was caused not by any injury by accident but simply by disease under which he

unhappily suffered.

Section 3 of the Workmen''s Compensation Act provides that, 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. The expression ''out of and in the course of his employment'' has been

the subject of interpretation in numerous cases. There is also expression ''accident'' in the section. The basic and indispensable ingredient of

''accident'' is unexpectedness, Accident has been defined in Fenton v. Thorely & Co. Ltd. 903 AC 443, as

...an unlooked for mishap or an untoward event which is not expected or designed.

A second ingredient, however, has been added in most judicial decisions. The injury must in most judicial decisions. The injury must be traceable

within reasonable limits, to a definite time, place and occasion or cause. Larson in his Workmen''s Compensaiton Law, Vol. I, while dealing with

heart cases, observes at p. 548:

In the heart cases, the issue almost from the start has centred about the question whether there was anything unusual about the exertion producing

the attack or the circumstances surrounding it.

Tracing the course of the decisions, Larson cited the decision in Massee v. James H. Robinson Co. 301 NY 34, where the following statement has

been made (p.551):

A heard injury such as coronary occlusion or thrombosts when brought on by over exertion or strain in the course of daily work is compensable,

though a pre-existing pathology may have been a contributing factor.

Larson concluded thus, again quoting from a judgment (pp. 552 and 553):

...However, whether an event is to be found an industrial accident is not to be determined by legal definition but by commonsense view point of the

average man.... Hence the issue almost invariably falls within the realm of fact, and if the facts and circumstances sustain, upon any reasonable

hypotheses, the conclusion that an average man would view the event as accident, then, the determination of the board is final.... Application of this

principle, though often not expressed, are inherent in many decisions.

The principle in heart cases seems to be that, if death or disability is due to heart attach which resulted from the exertion of the employee in the

performance of the duties of his employment, compensation should be awarded. If death of an employee is brought about by an injury due to some

mishap, or accident, happening during the course of his employment, the fact that deceased had a chronic ailment which rendered him

moresusceptible to such injury than an ordinary person would be, will not defeat the right to compensation. The fact that the injury and the pre

existing disease combined to produce the disability does not prevent the injury being compensable in the injury accelerated or aggrevated the

disease or that the accident complained of was a contributory cause to the injury. If the accidental injury suffered in the course of his employment is

the proximate cause of the employee''s death, the previous physical condition is unimportant. Bearing these principles in mind, I have to decide in

the instant case whether the deceased died of heart attack arising out of and in the course of his employment.

It is true that, when the deceased was admited in the hospital, he was brought with the history of acute pain in the chest and giddiness. He was

already suffering from heart disease before the accident happened in the course of his employment. On the fateful day, while he was doing the

work of loading and unloading heavy stones, he suddenly felt some pain in the chest. He had complained of similar pain in the chest on previous

occasions while working on the spot. That day, he was removed to the hospital where he died two days later. In Laxmibai Atmaram Vs. Chairman

and Trustees, Bombay Port Trust, the deceased was a watchman employed by the port trust. The hours of his duty were 7 p.m. to 7 a.m. on 21

August 1951, the deceased complained of pain in his chest and was asked to lie down. His condition deteriorated and he died in the morning. The

medical evidence showed that the deceased was suffering from heart disease and that the death was brought about by the strain caused by the

deceased being on his legs for a certain period of time. It was contended that death did not arise in the course of employment. The learned Judge

observed [at pp 616 617]:

The question, therefore, that we have to consider is whether there was any casual connexion between the death of this workman and his

employment.... But it is equally clearly established that if the employment is a contributory cause, or if the employment has accelerated the death, or

if it could be said that the death was due not only to the disease but the disease coupled with the employment, then, the employer would be liable

and it could be s aid that the death arose out of the employment of the deceased.

xxxxx

(1) There must be a casual connection between the injury and the accident and the accident and the work done in the course of employment.

(2) The cause is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

(3) It is not necessary that the workman must be actually working at the time of his death or that d eath must occur while he is working or had just

ceased work.

(4) Where the evidence is balanced, if the evidence shows 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.

Xxxxx

On a review of the entire case law on the subject I am of the opinion that it is desirable and in accordance with the general Rule that the

Workmen''s Compensation Act should be broadly and liberally construed, in order to effectuate their evidence intent and purpose, in the

application of the provisions which govern the nature and determination of the injuries for which compensation may be had. Courts should favour

adoption of liberal construction of the words ""by accident arising out of and in the course of his employment"".

In The Oriental Insurance Company Ltd. Vs. Nagaraj, Balamurugan, Maniammal [Minors rep. by father and guardian Nagaraj] and The

Management, Bombay Burmah Trading Corporation Ltd., Madras High Court considered Section 3, 10 and 30 of WC Act and observed as

under in para 19 to 22 of judgment as under:

19. I do not propose to go into the factual details of these cases suffice to note that strain even normal strain, connected with the employment was

the reason for the death of workman. In the circumstances of the case and nature of work, normal strain contributed to the death. It falls within the

purview of ''arising out of and in the course of employment'' contained in Section 3 of the Act. The provisions of Workmen''s Compensation Act

should be broadly and liberally construed in order to effectively apply the provisions of the Act.

20. The learned Counsel for the respondent claimant has drawn the attention of the Court to the Statement of Objects and Reasons articulated at

the time of moving Appeal for Workmen''s Compensation Act which ultimately resulted in passing of the Ac t. The objects and reasons of the Act

are stated as follows:

The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workman, along with the

comparative poverty of the workmen themselves, renders it advisable that they should be protected, as far as possible from hardship arising from

accident.

21. The aforesaid extract from the Statement of Objects and Reasons for passing of the Act clearly indicates that;

The general principles of workmen''s compensation command almost universal acceptance, and India is now nearly alone amongst civilized

countries in being without legalization embodying these principles. For a number of years the more generous employers have been in the habit of

giving compensation voluntarily, but this practice is, by no means, general. The growing complexity of industry in this country, with the increasing

use of machinery and consequent danger to workman, along with the comparative poverty of the workmen thsemselves renders it advisable that

they should be protected, as far as possible, from hardship arising from accident.

22. Liberal construction of the provisions should be adopted for the provisions which govern the nature and determination of the injuries for which

compensation may be had. There is no reason for taking a narrow view.

In Malikarjuna G. Hiremath Vs. The Branch Manager, The Oriental Insurance Co. Ltd. and Another,

9. 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.

10. The expression ""accident"" means an untoward mishap which is not expected or designed. ""Injury"" means physiological injury. In Fenton v.

Thorley & Co. 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.

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

12. This Court in Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another, referred to, with approval, the decision of

Lord Wright in Dover Navigation Co. Ltd. v. Isabella Craig 1940 AC 190 wherein it was held: (All ER p. 563)

Nothing could be simpler than the words ''arising out of and in the course of the employment''. It is clear that there are two conditions to be

fulfilled. What arises ''in the course'' of the employment is to be distinguished from what arises ''out of the employment''. The former words relate to

time conditioned by reference to the man''s service, the latter to causality. Not every accident which occurs to a man during the time when he is on

his employment--that is, directly or indirectly engaged on what he is employed to do--gives a claim to compensation, unless it also arises out of the

employment. Hence the Section imports a distinction which it does not define. The language is simple and unqualified.

13. We are not oblivious that an accident may cause an internal injury as was held in Fenton (Pauper) v. J. Thorley & Co. Ltd. 1903 AC 443 by

the Court of Appeal:

I come, therefore, to the conclusion 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.

Lord Lindley opined:

The word ''accident'' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an

accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and

unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word

''accident'' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of

what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish careless from other unintended

and unexpected events.

18. In Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmed Issak, this Court held:

5. 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''. To put it differently 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.

In The Assistant Executive Engineer, N.H. No. 13, Bijapur Vs. Shantavva and Others, , Karnataka High Court at Bangalore considered Section

3, notional extension and observed as under in para 4 and 8 of judgment:

4. The learned Counsel appearing for the respondent Nos. 1 and 2 (respondent No. 3 having been served with notice had remained absent before

court), Mr. Nagaraj, argued at the outset that the appellant having filed the objection statement before the WCC did not challenge the evidence

adduced by the claimants and furthermore he did not adduce his side of the evidence to oppose the claim. To counter the argument of the learned

Additional Government Advocate that the accident that had taken place during the course of employment, Mr. Nagaraj had placed reliance on the

reported decision of the High Court of Judicature, Andhra Pradesh, in the case of Shree Krishna Rice & Flour Mills, Samalkot v. Challapalli

Chittemma 196 FI LLJ 260. He had also pointed out that in the said decision, it was held that the expression ''employment'' as defined in Section 3

of the Workmen''s Compenstaion Act is wider than the actual place of work or duty where the workman had to discharge. In the said decision, the

High Court of AP had held that even when the worker was to proceed from the place of employment to his residence and that if the accident was

to take place, then, the same had to be construed in law that the accident had taken place arising out of and during the course of employment.

5 to 7.xx

8. My answer to the above point is in the affirmative, for the courts have time and again held that, even if any injury or death were to take place

during the course of journey from the residence to the place of employment and so also from the place of his employment to his place of residence,

it has to be construed in law as the accident has taken place during the course of employment. That the courts had consistently held so by applying

the principle of notional extension of time of employment As I see, it may be by applying that theory, the Andhra Pradesh High Court in the

decision relied upon by learned Counsel for the respondent held as follows, no matter it had not been stated so in so many words:

...The expression ''employment'' in Section 3 of the Workmen''s Compensation Act is wider than the actual work or duty which the workman had

to do it is enough, if at the time of the accident the workman was in actual employment although he might not be actually turning out the work which

it was his duty to carry out. It is for this reason that even when a workman is resting, or having his food, or taking his tea or coffee (in the factory

premises) or proceeding from the place of employment to his residence and an accident occurs, the accident is regarded as arising out of and in the

course of the employment.

18. Therefore, in light of facts of this case as discussed above and law in subject as considered above, as per Exh. 17 evidence of claimant, that

her husband died in accident due to chest pain in view of such poisonous agro chemical against which no evidence was produced by appellant and

principal employer and both original opponents No. 1 and 3 not cross examined claimant at all, means, evidence of claimant is not disputed by

them, therefore, according to my opinion, WC Commissioner has rightly examined matter and has rightly applied Principle of Notional Extension

and has rightly passed order in question and matter does not require any interference of this Court, therefore, there is no substance in this appeal

and same is required to be dismissed. Therefore, this appeal is dismissed.

19. In view of orders passed by this Court in first appeal today, civil application for stay is not surviving. Same is, therefore, disposed of

accordingly. Amount deposited by insurance company before WC Concerned in this case is directed to be paid by WC Commissioner to

applicant Shakuntalaben Hasmukhbhai Parmar, widow of deceased, by way of an account payee cheque on proper verification.