(1969) 08 SC CK 0025

Supreme Court of India

Case No: Civil Appeal No. 850 of 1966

Mackinnon Mackenzie & Co. Pvt. Ltd.		APPELLANT
	Vs	
Ibrahim Mahmmed Issak		RESPONDENT

Date of Decision: Aug. 14, 1969

Acts Referred:

- Workmens Compensation Act, 1923 - Section 3

Citation: (1969) ACJ 422 : AIR 1970 SC 1906 : (1971) 73 BOMLR 131 : (1969) 19 FLR 281 : (1970) LabIC 1413 : (1970) 1 LLJ 16 : (1971) MhLj 395 : (1969) 2 SCC 607 : (1970) 1 SCR 869

Hon'ble Judges: J. C. Shah, Acting C.J.; V. Ramaswami, J; A. N. Grover, J

Bench: Full Bench

Advocate: S. Sorabji and Bhuvanesh Kumari, for the Appellant;

Final Decision: Allowed

Judgement

V. Ramaswami, J.
This appeal is brought by special leave from the Judgment of the Bombay High Court dated 5 March 1965 in Appeal No. 416 of 1963.

2. Shaikh Hassan Ibrahim (hereinafter referred to as the missing seaman) was employed as a deck band, a seaman of category II on the ship S.S. "Dwarka "which is owned by the British India Steam Navigation Company, Ltd., of which the appellant is the agent. The medical log-book of the ship shows that on 13 December 1961 the missing seaman complained of pain in the cheat and was, therefore, examined, but nothing abnormal was detected clinically. The medical officer on board the ship prescribed some tablets for the missing seaman and he reported fit for work on the next day. On 15 December 1981, however, he complained of insomnia and pain in the chest for which the medical officer prescribed sedative tablets. The official log-book of the ship shows that on 16 December 1961 when the ship was in the Persian Gulf the missing seaman was seen near the

bridge of the ship at about 2-30 a.m. He was sent back but at 8 a.m. he was seen on the Tween Deek when he told a seaman on duty that he was going to bed. At 6-15 a.m. he was found missing and a search was undertaken. At 7-35 a.m. a radio message was sent by the master of the ship saying:

One seaman missing between Khorem-(sic) and Ashar Stop May be in river Stop All ships please keep look-out.

The ship arrived alongside Ashar Jetty at 8 a.m. when a representative of Gray, Mackenzie & Co., Ltd., who are the agents for the British India Steam Navigation Company, Ltd., In the Persian Gulf was informed that the said seaman was missing. The representatives in turn passed on the Information to the local police and the port authorities. The last entry in that log-book shows that at 4 p.m. an enquiry was held on board the ship by the local police and the British counsel General. On a suggestion made by the latter, the personal effects of the missing seaman were checked and sealed by the Consulate authorities for being deposited with the Shipping Master, Bombay. On 20 February, 1962, the respondent filed an application u/s 3 of the Workmen''s Compensation Act (Central Act 8 of 1923) (hereinafter referred to as the Act) claiming compensation of Rs. 4.000 for the death of his son, the missing seaman, which, according to him, occurred on account of a personal injury caused by an accident arising out of and in the course of his employment. The appellant, put in a written statement on 23 April 1962 and disputed the respondent''s claim on the ground that there was nothing to show that the seaman was in fact dead, that the death, if any was not caused in the course of the employment, that in any event the death could not be said to have been caused by an accident which arose out of employment and that the probabilities were more consistent with a suicidal death than with an accidental death.

3. But the appellant did not lead oral evidence at the trial of the claim. The Additional Commissioner, however, inspected the ship on 23 January 1963. By his judgment dated 6 February 1963, he held that there was no evidence to show that the seaman was dead and there wan in any event no evidence to Justify the inference that the death of the missing seaman was caused by an accident which arose out of employment. In the course of his judgment the Additional Commissioner observed as follows:

Now In the present case what is the evidence before me? It is argued on behalf of applicant that I must presume that the man fell down accidentally. From which place did he fall down ? How did he fall down ? At what time he fell down? Why was he at the time at the place from which he fell down ? All these questions It is Impossible to answer. Am I to decide them in favour of the applicant simply because his ''missing'' occurs in the course of his employment ? In my opinion, there is absolutely no material before me to come to a conclusion and connect the man''s disappearance with an accident. There are too many missing links. Evidence does not show that it was a stormy night. I had visited the ship seen the position of the bridge and dock and there was a bulwark more than 31/2 foot. The man was not on duty. Nobody saw him at the so-called place of accident. In

these circumstances I am unable to draw any presumption or conclusion that the man is dead or that his death was due to an accident arising out of his employment, Such a conclusion, presumption or Inference would be only speculative and unwarranted by any principle of judicial assessment or evidence of permissible presumptions.

The Additional Commissioner, however, negatived the contention of the appellant that the death, if any, was caused by the seaman''s voluntary act. The respondent preferred an appeal on 17 April 1983, to the High Court from the judgment of the Additional Commissioner dated 6 February 1963. Aw the hearing of the appeal it was agreed that the appellant would pay to the respondent a sum of Rs. 2,000 as and by way of compensation in any event and irrespective of the result of the appeal. The respondent agreed to accept the sum of Rs. 2,000. But in view of the serious and important nature of the issues the High Court proceeded to decide the question of law arising in the appeal. By his Judgment, dated 5 March 1965, Chandrachud, J., allowed the appeal and reversed the judgment of the Additional Commissioner and granted the application for compensation. The view taken by Chandrachud, J., was that the death of the seaman in this case must be held to have occurred on account of an accident which arose out of his employment.

4. The principal Question that arises in this appeal is whether the accident arose is the course of employment and whether it arose out of employment within the meaning of Section 3 of the, Act which states:

(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this chapter:

Provided that the employer shall not be so liable-

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

(b) in respect of any Injury, not resulting in death, caused by an accident which is directly attributable to--

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

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

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

* * *

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, when, 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 or 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 Lancashire and Yorkshire Railway Company v. Highley 1917 A.O. 362 Lord Sumner laid down the following: test for determining whether an accident "arose out of the employment":

There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this : Was it part of the Injured person"s employment to hazard, to suffer, or to do that which caused his Injury ? If yes, the accident arose out of his employment. If ray, it did not, because, what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident of the workman was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment, that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained Injury.

6. In the case of death caused by accident the burden of proof rests upon the workman to prove that the accident arose out of employment as well au in the course of employment. But this does not moan that a workman who comes to Court for rollof must necessarily prove it by direct evidence. Although the onus of proving that the injury by accident arose both out of and in the course of employment rests upon the applicant these essentials may be inferred when the facts proved justify the inference. On the one hand the Commissioner must not surmise, conjecture or gueas; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate Inference. It is of course Impossible to lay down any role as to the degree of proof which is sufficient to justify an Inference being drawn, but the evidence mast be such as would Induce a reasonable man to draw it. Lord Birkenhead, L.O., in Lancaster v. Blackwell Colliery Company, Ltd.

1918 W.C. Rep.345 observed:

If the facts which are proved give rise to conflicting inferences of equal degrees; of probability so that the choice between them is a mere matter of conjecture, then of course, the applicant falls to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balanoing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends then the arbitrator is justified in drawing an inference in his favour.

7. In cases of the unexplained drowning of seaman, the question has often arisen as to whether or not there was evidence to justify the Inference drawn by the arbitrator that the seaman met his death through accident arising out of and in the coarse of his employment. The question was considered by the House of Lords in Kerr or Lendrum v. Ayr Steam Shipping Company, Ltd. 1915 A.C. 217 in which the steward of a ship, which was in harbour, was lying in his bunk, when he was told by the captain to prepare tea for the crew. He was shortly afterwards missing, and the next day his dead body, dressed in his underclothes only, was found in the sea near the ship. The bulwarks wore 3 feet 6 inches above the deck, The steward was a sober man, but was subject to nausea. Murder and suicide were negatived by the arbitrator, who drew the Inference that the deceased left his buck, went on deck, and accidentally fell overboard and was drowned. He accordingly held that the accident arose out of and in the course of his employment as steward. The Court of Sessions reversed his decision on the ground that there was no evidence to support It. The House of Lords (Earl Lorsburn, Lord Shaw of Dunfermline and Lord Parmoor, Lord Donedin and Lord Atkinson--dissenting), however, upheld the decision of the arbitrator on the ground that, although UPOL the evidence it was open to him to have taken a different view, his conclusion was each as a reasonable man could reach.

I should state my main proposition thus, said Lord Shaw of Dunfermline, "that we in this House are not considering whether we would have come to the same conclusion upon the facts seated as that at which the learned arbitrator has arrived. Our duty is a very different, a strikingly different one. It is to consider whether the arbitrator appointed to be the judge of the facts, and having the advantage of hearing and assessing the witnesses, has come to a conclusion which could not have been reached by a reasonable man.Lord Parmoor said:I wish to express no opinion either way on the reasonableness of the finding in itself as long as it is a possible finding for a reasonable man.Whilst Earl Lorsburn observed:that they should regard these awards in a very broad way and constantly remember that they were not the tribunal to decide.

8. In the case of unexplained drowning of seaman, the English Court of Appeal have drawn some very fine distinctions. In Bender v. Owners of S.S. "Zent" (1909) 2 K.B.41 the chief cook on board a steamship fell overboard and was drowned while the ship was on

the high seas. He was seen at 5-25 a.m. looking over the side; 5-30 a.m. was his usual time for turning out; and he was last seen at 5-35 a.m. going f.t. The wheather was fine at the time, It was daylight, the ship was steady and there was no suggestion that the duties of the deceased would lead him into any danger. There was a 4 feet rail and bulwark all round the ship and there was no evidence to show how the deceased had fallen overboard. The County Court Judge drew the inference that his death was caused by an accident arising oat of and in the course of his employment, but the Court of Appeal held that there was no evidence to warrant such inference, Cozens-Hardy, M.R., pointing out that, although it was conceivable that he might have been engaged on some chip"s work, it was equally conceivable that he had been larking or had committed suicide. Bender case (1909) 2 K.B.41 (vide supra) was followed in "Marshall v. Owners of S.S. "Wild Rose" (1909) 2 K.B. 46 where an engineer came on board his vessel which was lying in a harbour basin, Shortly after 10 p.m. steam had to be got up by midnight. He went below and took off his clothes, except his trousers, shirt and socks. It was a very hot night, and he subsequently came out of his berth, saying that he was going on deols for a breath of fresh air. Next morning his dead body was found at the aide of the vessel, just under the place where the men usually sat. It was hold by the Court of Appeal, reversing the County Court Judge, that there was no legitimate ground for drawing the Inference that the engineer died from an accident arising out of his employment. Farwell, L.J., said:

If an ordinary sailor is a member of the watch and in on duty during the night and disappears, the Inference might fairly be drawn that he died from an accident arising out of his employment. But, if, on the other hand, ho was not a member of the watch, and was down below and came up on deok when he was not required for the purpose of any duty to be performed on deck, and disappeared without our knowing anything else, it seems to me that there is absolutely nothing from which any Court could draw the inference that he died from an accident arising out of his employment.

This decision was upheld by the House of Lords by a majority of one (Lord Loreburn, L.O., and Lord James of Hereford--dissenting), Lord Shaw of Dunfermline Saying:

The facts in every case may leave here and there a hiatus which only inference can All. But in the present case, my Lords, the name of Inference may be apt to be given to what is pure conjecture. What did the sailor Marshall do when he left his berth and went on deck ? Nobody knows. All is conjecture, Did he Jump overboard, walk overboard, or fall overboard ? One can Infer nothing; all is conjecture. Was there an accident at all, or how and why did the deceased unhappily meet his fate ?

... There can be, in my view, nothing dignified with the name of an inference on this subject, but again only conjecture.

But In Rice v. Owners of ship "Swansea Vale" 1912 I.O. 238 where the deceased was a "seaman" in the strict sense of the term that is to say, one whose duty it was to work on deck--and not a ship"s cook, as in Bender Case (1909) 2 KB. 41 (vide supra), nor an

engineer, as in Marshall case (1900) 2 K.B. 46 a different conclusion was arrived at. In that case the chief officer of a vessel, who was on duty on deck, disappeared from the ship broad daylight. No one saw him fall overboard, but there was evidence that not long before he had complained of headache and giddiness. It was held (Buckloy, L.J., dissenting) that there was evidence from Which the Court might infer that he fell overboard from an accident arising out of and in the course of his employment. The cause of Bender (1909) 2 K.B.41 (vide supra) and Marshall (1009) 2 K.B. 40 (vide supra) were distinguished, as in those cases the men''s duties were below deck and at the time they lost their lives they had certainly no duties which called the in on the deck. In the House of Lords, Lord Loreburn, L.O., having discussed the various things that might have happened, said:

The other alternatives were suicide or murder. If you weigh the probabilities one way or the other, the probabilities are definitely greater that this man perished through an accident arising out of and in the course of his employment.

9. In Catton v. Limerick Steamship Co. (1910) 2 I.R. 561 a night watchman on board a vessel, whose hours of duty were from 7 p.m. to 7 a.m. when he awoke the brew, was last seen on board at 6 a.m. but on that morning ho did not awake the crew. His cap was found on the deck, and his body was found in the harbour some months afterwards. The County Judge held that It was not proved that the accident arose "out of" his employment and the Court of Appeal on the ground that this was a finding of fact with evidence to support it, refused to interfere. Holmes, L.J., however, stated that the County Court Judge might have arrived at a different conclusion of fact, whilst Cherry, L.J., said that, If he had been the arbitrator, he would have found that the deceased had met with his death by accident arising oat of and in the course of his employment. In another similar case, Rourke v. Hold & Co. (1917) 2 IRR 318 a seaman disappeared daring his spell of duty at the wheel in the wheel house in the center of the flying deok and was not after wards seen. The night was rough, the sea choppy but the vessel was steady. The flying deck was protected by a rail. There was no evidence as to how the man met his death and in spite of the presumption against suicide the County Court Judge was unable to draw the Inference that the death was due to accident. It was held by the Court of Appeal that in the circumstances the conclusion of the County Court Judge was right. At p. 321 of the report, O''Brien, L.O., said:

In this case we cannot Interfere with the finding of the County Court Judge. The post of duty of the deceased was at the wheel and to steer a certain course until ordered to change It, but nobody knows how the man disappeared, or how he came to leave his post, it is conceivable that he may have fallen overboard in such circumstances as to entitle his widow to claim compensation on the ground that his death was due to on accident arising out of and in the course of the employment; but the onus of proof is on the applicant. That onus is not discharged by asserting that we must assume that the deceased was at his allotted employment when he fell overboard, although the natural inference would be that he was not, and that we should then draw the conclusion that the

accident arose out of and in the course of the employment.

10. In Simpson v. L.M. & Railway Company 1931 A.C. 351 Lord Tomlin reviewed all the previous authorities and stated the principle as follows:

...from these passages to which I have referred I think this rule may be deduced for application to that class of case which may be called unexplained accident cases--namely, that where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of the employment; but the inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the workman outside the scope of the employment.

Such a rule, so stated, seems to me to be consistent with all the previous decisions of your Lordships House including Marshall v. Owners of S.S. "Wild Rose" (1900) 2 K.B. 46 (vide supra) where there was some evidence from which it could be inferred that the seaman who foil overboard had by action of his own outside his employment added a peril to his position.

11. In the same case Lord Thankerton expressed the principle in similar language. Lord Thankerton said at p. 371 of the report:

...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, in the absence of any evidence tending to an opposite conclusion that the accident arose out of the employment.

12. In a later case in the House of Lords, Rosen v. S.S. "Quercus" (Owners), Lord Buck-master explained that in the passage in Lord Thankerton''s speech in Simpson case 1931 A.O. 351 (vide supra) the place referred to was not the exact spot at which the accident may have occurred, but meant, in that case the train on which the workman was travelling and in the later case in the House of Lords the ship on which the workman was employed. The same principle applies in Indian law, as the language of Section 3 of the Indian Act is Identical with Section 1 of the English Workmen''s Compensation Act of 1925.

13. What are the facts found in the present case? Shaikh Hassan Ibrahim was employed as a deck-hand, a seaman of category II on the ship. The medical log-book of the ship showed that on 13 December 1961 Shaikh Hassan complained of pain in the cheat and was therefore, examined, but nothing abnormal was detected clinically. The medical

officer on board the ship prescribed some tablets for Shaikh Hassan and he reported fit for work on the next, day. On the 16th instant however, he complained of insomnia and pain in the cheat for which the medical officer prescribed sedative tablets. The official log-book of the ship shows that on the 16th instant when the ship was in the Persian Gulf, Shaikh Hassan was seen near the bridge of the ship at about 2-30 a.m. He was sent back but at 3 a.m. he was seen on the Tween Dock when he told a seaman on duly that he was going to bed. At 6-15 a.m. he was found missing and a search was undertaken. The dead body, however, was not found either on that day or later on. The evidence does not show that it was a stormy night. The Commissioner made a local inspection of the ship and saw the position of the bridge and deck and found that there was a bulwark more than 3i feet. Nobody saw the missing seaman at the so-called place of accident. The Additional Commissioner hold that there was no material for holding that the death of the seaman took place on account of an accident which arose out of his employment. In our opinion, the Additional Commissioner did not commit any error of law in reaching his finding and the High Court was not Justified in reversing It. For these reasons we hold that this appeal must be allowed and the judgment of the Bombay High Court dated 5 March 1965 mast be sot aside.