(2003) 07 CAL CK 0043

Calcutta High Court

Case No: None

Smt. Quraisha Bibi		APPELLANT
	Vs	
Shipping Corporation of India Ltd.		RESPONDENT

Date of Decision: July 10, 2003

Acts Referred:

- Merchant Shipping Act, 1990 - Section 98

Citation: (2004) 1 ACC 215

Hon'ble Judges: Joytosh Banerjee, J; Dilip Kumar Seth, J

Bench: Division Bench

Judgement

Dilip Kumar Seth, J.
This appeal is directed against the judgment and order dated 2nd June, 1998 passed in Claim Case No. 122 of 1992 by the learned Judge, in the Court of the Commissioner of Workmen''s Compensation, West Bengal, Calcutta.

Facts:

2. The appellant had lodged a claim under the Workmen''s Compensation Act on account of her husband''s death. She alleged that his death was due to injury suffered by her husband while in his employment on board the vessel Chatrapati Shivaji belonging to the Shipping Corporation of India Limited. The injury, according to her, is related to the stress and strain suffered by her husband in the course of his employment. The husband had boarded the vessel, after he was found fit on medical examination in terms of Section 98 of the Merchants Shipping Act, on 29th March, 1990. On board, he was found ill and was signed off on 23rd August, 1990. Thereafter, his treatment was arranged by the respondent. The husband of the appellant died on 13th January, 1991. According to her, the death was the result of an injury, which is casually related to the employment. As such it is a case within the scope and ambit for grant of compensation under the Workmen''s Compensation

Act.

3. The respondent, on the other hand, had denied that the death was related to any injury in course of employment. According to them, the husband of the appellant died out of the ailment, which is wholly unconnected with employment. There is no exceptional circumstances to relate the death to any injury sustained during the course of employment. Relying on various documents, it was contended that it was a death out of a disease wholly unconnected with the employment and not as a result of any stress and strain.

Submission on behalf of the appellant:

4. Learned Counsel for the appellant points out that this question involves a substantial question of law, since the ascertainment of the relevance of the disease with the injuries sustained in course of employment is a question of inference which gives rise to substantial question of law and not a question of fact as such. He argued conversely that the learned Judge had omitted to consider certain material facts in order to relate the injury to employment. He had overlooked certain material facts available on record. He had come to an inference on the basis of such material facts, which, in law, could not have been arrived at. Such drawing of an inference is a question of law. In the present case, it is definitely be a substantial one. Therefore, the appeal is maintainable u/s 30 of the Workmen''s Compensation Act, as contemplated in Sub-section (3) thereof.

5. He further contends that in the present case, the husband of the appellant was found to be fit and only then he was signed in on 29th of March, 1990. He fell sick on board on 23rd August, 1990, namely, within five months during voyage, according to him, the reasonable presumption would be that when a person declared fit fell sick, it must be due stress and strain on voyage in course of employment. Therefore, the learned Judge had failed to appreciate the materials and draw proper inference from the facts disclosed. The report that the husband of the appellant died out of cancer as has been sought to be made out on behalf of the respondents, according to him, cannot be sustained in view of the fact that the Medical Officer or the Doctor, who had examined or issued the said certificate, was not examined. As such the said medical certificate cannot be said to have been proved. Therefore, it could not have been marked exhibit and could not have been relied upon. A document, which could not have been admitted into evidence, if relied upon results into perversity, which is again a substantial question of law.

6. He next contends that in a case under the Workmen''s Compensation Act when it is asserted that the injury related to employment, the onus or burden is discharged, particularly, when the witness could not have any occasion to be on board or voyage to ascertain the truth. In such a case, assertion by such witness would be sufficient discharge of the burden or onus to prove that the injury related to employment and casually connected therewith. In such circumstances, the burden or onus shifts who

is supposed to rebut such a presumption by leading adequate evidence. According to him, the employer has failed to discharge the onus or burden and has failed to being on record sufficient materials to rebut such presumption that the injury was sustained in employment. Therefore, the Judge had failed to pass an award, which he ought to have passed on the basis of the materials on record.

7. He then contends that the documents that have been produced, particularly, the Continuous Discharge Certificate (in short CDC) shows that the victim was physically and medically fit. The learned Judge ought to have drawn inference from the said CDC in favour of the claimant and ought not to have relied upon the report of the Medical Officer either on board or of the Nursing Home where the victim was admitted. Reliance on a document, which prevailed upon by CDC is also a cause, which brings the question within the scope and ambit of substantial question of law.

8. He has relied upon various decisions in support of his contention to which reference would be made at appropriate stage.

Submission on behalf of the respondent:

9. Mr. Jayanta Bhattacharyya, learned Counsel for the respondent, on the other hand, points out relying on Section 30 of the Workmen''s Compensation Act that unless the matter involves a substantial question of law, no appeal u/s 30 of the said Act could be maintained. According to him, no substantial question of law is involved in the present case. He points out that there was sufficient material produced by the employer. Some of those documents were marked exhibits without any objection. Once it is marked exhibit, it is not open to the appellant to question the validity of this document. As such, reliance thereon now cannot be questioned except the ground that reliance was placed on inadmissible evidence.

10. He then contends that in the present case, sufficient evidence was led on behalf of the employer and these are sufficient to rebut a presumption, if there be any. Therefore, the argument contrary thereto cannot be sustained. He also contends that the claimant has not been able to discharge the burden or onus lay upon her to prove the case that the injury related to employment. Unless there are sufficient materials, it cannot be said that the claimant has been able to discharge the onus or burden and that the case was proved so as to call upon the employer to rebut the same.

11. He then contends that in Schedule 3 of the Act, item 23 prescribes lung cancer as one of the disease as occupational disease. But in the present case, lung cancer is not the disease out of which the victim had died. From the medical certificate, it appears that the victim died of cancer. It cannot be said to be occupational disease. It is not a case of the claimant that the victim had been engaged in handling hazardous cargo on board so as to attract the said disease. Finding of fitness may not be able to detect sufferance from cancer and the cancer as it may be a disease, which cannot develop in five months and become so fatal to kill a person. He also

contends that the stress and strain of the employment cannot contribute to the aggravation of the disease. If it is cancer, it was undetected. There is nothing to show even on Medical Jurisprudence that the stress and strain of employment could result in to cancer or aggravates cancer.

12. He further contends that assuming but not admitting that the death was not due to cancer, even then on board, it was found that the victim suffered from anaemia and lump in stomach. Lump in stomach cannot develop out of stress and strain suffered through employment nor can anaemia be said to be so.

13. Therefore, according to him, the questions raised by the appellant are not shown to erode the credibility of the judgment and order appealed against. He has also relied on two decisions to which reference would be made at appropriate stage.

14. We have heard the learned Counsels for the respective parties at length.

The question:

15. The moot question that is to be decided is whether in the facts and circumstances of the case, the injury could be related to the employment as a cause of death and whether the case involves a substantial question of law in order to maintain the appeal.

Discharge of burden by claimant''s witness : Rebuttal

16. We may first deal with the question of real connection of the allied disease with the employment. Admittedly, the facts are more or less admitted. In the claim petition, the claimant had simply pointed out that the victim was on board Chatrapati Shivaji. Due to heavy strain of work, he fell sick in deep sea and was ultimately signed off on medical ground at Sikkalpo and then was admitted in May Flower Nursing Home at Calcutta. In her deposition, she had repeated the same thing without specifying as to how the stress and strain in course of employment could be casually connected with the alleged injury. She had only pointed out that her husband was engaged in the vessel Chatrapati Shivaji where no tell sick on 23rd August, 1990 and was repatriated to Calcutta. After undergoing treatment for three months, he died on 13th January, 1991. The sickness has been caused due to heavy strain and stress of work. In cross-examination, she had admitted that she had no knowledge what was the cause of sickness. She also pointed out that she was not informed about the nature of the disease her husband was suffering from. She had also stated that she was not aware of the contents of the claim petition.

17. From these materials on record, it cannot be said that the claimant was able to establish that the injury was casually connected with the employment so as to enable the Court to come to the conclusion that the claimant had been able to discharge the burden or onus lay upon her.

18. But at the same time, it can be contended that it was not for her to say about the facts of which it was not possible to acquire any knowledge directly. Therefore, in such a case, though such an assertion is made that the injury was related to employment, it may be presumed that onus or burden has been sufficiently discharged. The normal principle of Evidence Act could not be said to be attracted in such a case when the proceeding is under a special Statute conferring benefit on the claimants as such. Inasmuch as if strict principles of the Evidence Act are employed, in that event, no claimant would be able to succeed in a case, once the victim dies in deep sea or suffers any injury in voyage in deep sea. Therefore, the assertion that the injury was related to employment is sufficient to discharge the onus or burden.

19. In such a case, it is the employer who was to rebut such presumption by leading adequate evidence. In the present case, the employer had produced a log book and various other documents and adduced the same into evidence and those were marked exhibits. Whether on those materials the presumption said to have been rebutted or not, we will examine later. But at the moment, we may deal with the admissibility of the document so produced. In the present case, the log book was produced and was marked exhibit and there is nothing to indicate that any objection to it was taken. At the same time, medical certificate was also proved without objection and were marked exhibit. Similarly, the CDC produced by the claimant also marked exhibit. Once a document is marked exhibit, unless it is shown that it was objected to or that it was not properly admitted into evidence or that such document is otherwise inadmissible, it cannot be said to be inadmissible in evidence. In the present case, we do not find any material to support the contention of the learned Counsel for the appellant to conclude that the evidence admitted in the proceedings were inadmissible.

20. Therefore, the reliance on such evidence be said to be an infraction of law and substantial question of law.

Drawing of inference--Question of Law:

21. Admittedly, an inference drawn on the basis of a material on record is a question of law. It may become substantial question of law when the Court draws some inference, which, in law, cannot be drawn. But it has to be examined on the basis of the materials on record that might be available before the Court. In the present case, the inference that was to be drawn is as to whether the injury related to employment or is casually connected with it. In fact, such an inference is definitely a question of law. Therefore, we cannot agree with the contention of Mr. Bhattacharyya to the extent that this appeal does not relate to a substantial question of law. We find the appeal maintainable.

Injury related to employment:

22. In order to determine the question, in case of death or injury to a disease, whether the disease related to employment, the Court has to examine the following

factors: (1) Whether the disease is contacted in course of employment; (2) whether the injury is related to the occupational hazard undertaken in course of employment; (3) whether the stress and strain of the job undertaken in course of employment was the reason for development of the disease; (4) whether the reason for development of the disease is connected with the nature of employment; (5) whether the stress and strain has aggravated the disease, though not connected or developed due to the nature of the employment; (6) whether the disease is so peculiarly or exceptionally coupled with the employment that any one undertaking such job would be exposed to such disease; (7) whether the disease and the resultant death was casually connected with the employment; (8) whether the employment is a contributory cause or has accelerated the death; (9) whether the death was due not only to the disease but the disease coupled with the employment; (10) in respect of a pre-existing disease, whether it can be said that the disease was aggravated or accelerated by reason of the employment or its stress and strain; (11) whether the disease was the result or any added peril to which the workman by his conduct exposed himself and which peril was not involved in the normal performance of the duties of his employment; (12) whether the disease is common to mankind and could be contacted by person unconnected with the kind or nature of the employment; (13) if the death is due to a disease the workman was suffering from, as a result the wear and tear of the employment, then no liability can be fixed on the employer. However, each case has to be examined and assessed on the basis of peculiarity of the facts of each case.

23. Now, we may examine as to whether the injury could be related to employment. Admittedly, the victim was found fit when he was signed in on 29th March, 1990. But such declaration or fitness normally does not carry out any test to detect if a person suffers from cancer. Therefore, the Medical Certificate in terms of Section 98 of the Merchants Shipping Act in declaring the victim medically fit at the time of signing in would not lead us to hold that the cancer had developed due to stress and strain on board after he had signed in and the victim was not suffering from cancer before he was signed in on 29th March, 1990.

24. It has been contended that the disease might have been aggravated due to stress and strain but there cannot be any question of aggravation of cancer other than occupational disease due to stress and strain in order to give rise to a lump in stomach within five months. Thus, it is very difficult to relate cancer unless it comes within item 33 of Schedule 3 of those groups of occupational disease resulting from the hazards of employment. Admittedly, in the present case, there is nothing nor any allegation has ever been made to contend that the victim did undertake to handle any hazardous cargo which could result into the development of the disease.

25. The question that the medical certificates are incorrect cannot be gone into by this Court, once these were admitted in evidence without any objection. On board after having been found ill, the victim was medically examined. The report

submitted pointed out that a lump in stomach and anaemia. He was treated in Nursing Home where he was recorded to have died of cancer, it is virtually conceded by the learned Counsel for the appellant that the cancer cannot be related to stress and strain undergone through employment. But stress and strain has resulted in death of the husband of the claimant. Therefore, it can be connected with the employment and as such, it is casually connected.

26. Mr. Bhattacharyya, learned Counsel for the respondent, had preferred to the decision in National Insurance Co. Ltd. v. Susanta Das reported in (1999) 2 C. H.N. 226. In the said decision, this Court refused to interfere on the ground that the Judge had relied on the uncontroverted evidence adduced on behalf of the employer and, therefore, it was a finding of fact based on evidence for which there is no scope for interference in an appeal u/s 30 of the Workmen''s Compensation Act. This decision applies only in case where the Court comes to finding that it does not involve any substantial question of law and that it involves only question of fact. How far this decision would be applicable in the present case may be examined. As discussed above, in the present case, we have found that the appeal involves question of law and as such this proposition of law does not help us having regard to the facts and circumstances of this case.

27. Mr. Bhattacharyya had also relied on the decision of Parle Products. Limited v. Subir Mukherjee reported in (2000) 2 C. H.N. 766. In the said decision, the test for determination as to whether the accident could be held to have arisen out of employment is that the workman is, in fact, employed or performing the duties of his employment at the time of accident. Another test would be that the accident occurred at or about the place where the performance of his duties required him to be present. It is a case where the accident involved the reason common to all humanity and did not involve any peculiarity or exceptional damage resulting from the nature of employment or where the accident was the result of an added peril to which the workman, by his own conduct, exposed himself and which peril was not involved in the normal performance of the duties of his employment. This decision had relied on the decisions in the case of Armstrong Withworth & Co. v. Redford reported in 1920 A.C. 757 ; Mcculhum v. North Umbrain Shipping Co. reported in (1932) 147 L.T. 361, and Cardillo v. Liberty Mutua Insurance Co. reported in 330 U.S. 469. In order to arrive at the above conclusion, it had also relied on a Full Bench decision of the Assam High Court in Assam Railway and Trading Co. Ltd. v. Saraswati Devi reported in AIR 1963 Gau 127 , and Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, .

28. If we analyse the said decision, we find that it had pointed out some ingredients on the basis of which the question is to be tested. Here the alleged injury has been alleged to have taken place in the vessel which test is satisfied, but whether the injury was the result of a peculiar or exceptional damage resulting from the nature of employment or whether it was the peril involved in the normal performance of

duties of his employment. As it appears that the death having occurred on account of cancer, it is a reason common to all humanity. Therefore, it cannot be said to be a peculiar or exceptional damage resulting from the nature of employment as discussed above. It is neither an added peril involved in the normal performance of the duties. On the other hand, it was quite natural to contact disease outside the scope and nature of employment and if accident occurs due to such disease, it cannot come within the purview of the Workmen''s Compensation Act.

29. Learned Counsel for the appellant, on the other hand, relied on the decision in Mackinnon Mackenzie and Company Pvt. Ltd. Vs. Ritta Farnandes, . In the said decision while dealing with Section 3 of the Workmen''s Compensation Act, 1923, the Apex Court had held as follows:

It is well established that under this section there must be some casual connection between the death of the workman and his employment. If the workman dies as a natural result of the disease from which he was suffering or while suffering from a particular disease, he dies of that disease as a result of wear and tear of his employment, no liability would be fixed upon the employer. But if the employment is a contributory cause or has accelerated the death or if the death was due not only to the disease but the disease coupled with the employment then it could be said that the death arose out of the employment and the employer would be liable.

4. Even if a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under the circumstances which can be said to be accidental, his death results from injury by accident. This was clearly laid down by the House of Lords in Clover Clayton & Co. v. Huges, where the deceased, whilst tightening a nut with a spanner, fell back on his hand and died. A post-mortern examination showed that there was a large aneurism of the arota, and that death was caused by a rupture of the arota. The aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion or strain would have been sufficient to bring about a rupture. The Company Court Judge found that the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal, and held upon the authorities that this was an accident within the meaning of the Act. His decision was upheld both by the Court of Appeal and the House of Lords:

''No doubt the ordinary accident,'' said lord Loreburn, L.C. ''is associated with something external: the bursting of a boiler or an explosion in a mine, for example. But it may be merely from the man''s own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. In think it may also be something going wrong within the human frame itself, such as straining of muscle or the breaking of a blood vessel. If that occurred when he was lifting a weight, it would properly be described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident.''

With regard to Lord Macnaughten''s definition of an accident being ''an unlooked for mishap or untoward event which is not expected or designed'' it was said that an event was unexpected if it was not expected by the man who suffered it, even though, every man of common sense who knew the circumstances would think it certain to happen.''

30. A plain reading of the said decision shows that if the disease is the result of wear and tear of his employment, no liability can be fixed on the employer if the employment contributes to the cause or acceleration of death and that the death is due not only to the disease but the disease coupled with the employment, then it could be said that death arose out of the employment. However, if we apply the test, in this case, we cannot say that the disease was coupled with the employment nor that it could have been accelerated.

31. Learned Counsel for the appellant had relied on the decision in Assam Railways and Trading Co. Ltd. v. Saraswati Debi reported in 1958 65 A.C.J. 394. In the said case, it was held that a person having died of heart attack, but having regard to the nature of the work it could not be related to the disease though heart attack preceded the fall. Therefore, this decision does not help us in the present case where the death can be remotely connected with the employment when the death occurs due to cancer, which is a disease about which nothing can be predicted. Learned Counsel for the appellant had also relied on the decision in United India Insurance Co. Ltd. v. C.S. Gopalakrishnan reported in I (1989) ACC 524 (DB) : United India Insurance Co. Vs. C.S. Gopalakrishnan and Another, This judgment has dealt with the question at length relying on various decisions, hi the said decision, it was held that the stress and strains due to the work is contributory to the death and as such is casually connected with the employment. This principle is not in dispute. But the question is as to how the principle can be attracted in given facts and circumstances of the case. Applying the said test, we are unable to satisfy ourselves that in the present case, the injury could be connected to employment and that it had happened due to stress and strains undertaken by the husband of the appellant in course of his employment.

32. In the case of Zubeda Bano and others Vs. Maharashtra State Road Transport Corp. and others, , it was held that in the absence of any direct evidence about happening of the incident and that since the employer failed to examine any witness or produce any record to substantiate its plea that the employer is not responsible, an adverse inference ought to have been drawn against the Corporation and in such circumstances, it was held that the death of the deceased arose out of and in course of employment. But this decision is distinguishable in the facts and circumstances of this case. Inasmuch as here the employer had adduced evidence and put material documents and as such no adverse inference can be drawn.

33. Learned Counsel for the appellant had also relied on the case of United India Insurance Co. Ltd. v. Yasodhara Amma reported in I (1999) A.C.C. 484 (D.B.). In the

said case, Kerala High Court held that a person having become actually ill in course of employment though such illness was not a serious injury to the heart, yet it could be related to since stringently driving of the vehicle from one place to another accelerated his illness and resulted into death. Thus, there was direct evidence to come to the conclusion that the stress and strains related to the employment had resulted into an accident. Such ingredients are absent in the present case. On the other hand, as we have already found that stress and strains cannot result into cancer, therefore, this decision does not help us. He had relied on the decision in Tejubai and Others Vs. General Manager, Western Railway and Others, . This case also concerns a Driver driving in the Railways. While such driving, he felt pain at one station and he took rest. Then the train proceeded to another station and again he felt pain and then he was taken to Hospital. However, he was discharged from the Hospital but subsequently he developed pain and died at the Railway quarter. In this case, it was held that it was connected with the employment. As discussed above, the facts are distinguishable where we cannot connect injury with the employment.

Conclusion:

34. As discussed above, in the present case, applying the test enumerated, the disease could not be casually connected with the employment on the basis of the material available on record. Neither it would be established that the death was due to the acceleration or aggravation of the disease on account of employment. Nor the disease could be coupled with the nature of hazard of the employment nor was it a result of a peril to which the employee was exposed.

ORDER

35. For all these reasons, we are unable to persuade ourselves to agree with the contention of the learned Counsel for the appellant. The appeal, therefore, fails and is accordingly dismissed.

36. There will be no order as to costs.

37. Let Lower Court records, if arrived, be sent down forthwith.

Banerjee, J.

38. I agree.