SUPREME COURT OF INDIA

Oriental Insurance Company Ltd.

Vs

Sorumai Gogoi & Ors.

(S.B. Sinha and V.S. Sirpurkar)

Appeal (civil) 1269 of 2008[Arising out of SLP (C) No.6932 of 2007]

14/02/2008

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. Bipul Gogoi was appointed as a Driver of a vehicle bearing Registration No.AS-09/2289 by the third respondent. He reported to his duty at about 9.30 am on 9.10.1996. He was since then not heard by the members of his family or by his employer.

3. The Officer In-charge of the Bokajan Police Station registered a case against Bipul Gogoi. A charge-sheet was filed in connection with the said case before the Judicial Magistrate stating that the Driver has absconded with the vehicle on 23.7.1999.

4. First and second respondents herein, being the parents of the said Bipul Gogoi, filed an application under the Workmen Compensation Act, 1923 (the 1923 Act) for payment of compensation for a sum of Rs.4,48,000/- before the Commissioner of Workmen Compensation, Golaghat for death of their son in course of his employment. Notices were issued to the appellant. It denied and disputed the said claim, inter alia, contending that no compensation in terms of the Workmen Compensation Act was payable, only on a presumption that the said Bipul Gogoi had died. The owner of the vehicle being the third respondent, however, contended that some miscreants have taken away the vehicle with the driver which could not be searched out by the Police.

The vehicle was not traced. No dead body was found. Whether the said Bipul Gogoi had died or still alive is not certain.

The Commissioner, Workmen Compensation, in view of the reival contentions of the parties, framed two issues.

On issue No.1, it was held :

I have gone through the evidence on record. The DW-1 Sri Jayanta Madhab Dutta categorically stated that he investigated the incident. He enquired about the incident in the locality where the driver had lived. He disclosed the names of neighbourers of the claimant. All the persons are residing in front, left and right hand side of the claimants residence. All of them had spoken that they have not seen the driver since long back. From the above discussion, on the evidence of the Investigator it is proved that the driver never seen by the people of that locality from the date of incident. The driver is not traced since 8.10.1996 till date, i.e., more than seven years. Therefore, in view of Section 108 of evidence Act, it is presumed that the driver is dead. Therefore, the claimant is entitled to get compensation under the provisions of Workmens Compensation Act. Therefore, the issue No.1 is answered in favour of the claimant.

5. On issue No.2, the Commissioner, without there being any materials on record and only upon drawing a presumption on the basis of ection 108 of the Indian Evidence Act that the said Bipul Gogoi must have died, held:

It is proved that the deceased was a workman and he died as a result of injuries sustained in an incident/accident arising out of and in course of his employment. Therefore, the claimant is entitled to get compensation.

6. The Commissioner awarded a sum of Rs.2, 24,000/- against the appellant herein, opining :

It is admitted fact that Bipul Gogoi was the paid driver of vehicle No.AS-09/2289 (Maruti Van) employed by the opposite party No.1. It is also proved that the said driver and vehicle is untraceable from the date of incident (9.10.1996) till date. At the time of incident/accident he was on duty. Now the question came for decision that whether Bipul Gogoi is dead or alive? The learned counsel for the claimant argued that the driver is murdered by the miscreants at the time of taken away the said vehicle on the other hand, the learned counsel for the opposite party Insurance Company advanced his argument that proof of death is necessary.

7. An appeal was preferred thereagainst by the appellant before the High Court in terms of Section 30 of the 1923 Act.

8. By the impugned judgment, the High Court has dismissed the said appeal, opining:

The learned commissioner while deciding the issue No.1 has considered and approved the statement of the claimant as well as DW1 in favour of the appellant and on such assessment and appreciation, the learned commissioner has come to the finding that the driver has not been traced since 9.10.1996, till date i.e. more than seven years and presumption of the death of the driver. Under Section 108 of the Evidence Act, I am of the considered opinion the aforesaid finding of the learned Commissioner cannot be said to be unjust, unreasonable and unwarranted on facts.

Regarding the submission of Mr. Ahmed that the accident took during the course and out of employment of the driver also belies the facts of the statement made on the pleadings of the owner of the vehicle that apart the FIR that was registered in the Bokajan Police Station on which heavy reliance has been laid by the same also belies the contention.

9. The High Court in the impugned judgment took note of the fact that a first information report was lodged as against the said Bipul Gogoi under Sections 420 and 406 of the Indian Penal Code. It furthermore took notice of the fact that the police having found a prima facie case against him, submitted a charge sheet and there was no other evidence to show that he had expired and, if so, under what circumstances.

10. Dr. Meera Agarwal, learned counsel appearing on behalf of the appellant, submitted:

1. The contract of insurance in terms of the proviso appended to Section 27 of the Motor Vehicles Act being confined to a death or an injury suffered by a workman, the impugned award awarding a compensation for a sum of Rs.2, 24,000/- is unsustainable in law, occurrence of any accident in course of employment, has been proved.

2. Death or bodily injury suffered by the workman was a sine qua non for entertaining a claim petition under the Workmen Compensation Act and, thus, in absence of proof of death of the said Bipul Gogoi, the impugned judgments are wholly unsustainable.

11. The 1923 Act was enacted to provide for payment of certain classes of employers to their workmen compensation for injury caused by accident. The said Act does not provide for a mandatory insurance policy to be taken by an employer.

A dependent has been defined by Section 2(d) to mean the relative(s) of a deceased workman specified therein including a widow mother.

12. Section 3 of the Act provides for the employers liability for compensation; sub-section (1) whereof reads as under :Section 3.Employer's liability for compensation.(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.

13. Proviso appended thereto provides for exclusion of the liability of the employer as specified therein.

14. Section 4 of the 1923 Act provides for payment of the amount of compensation.

15. Section 147 of the Motor Vehicles Act, 1988, however, mandatorily provides for obtaining insurance cover by the owner of a vehicle. Proviso appended thereto reads as under :

Provided that a policy shall not be required

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee

(a) Engaged in driving the vehicle, or

(b) If it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) If it is a goods carriage, being carried in the vehicle, or

(ii) To cover any contractual liability.

16. The sine qua non for invoking the proviso appended to Section 147 is that the employee must be engaged in driving the vehicle. Death or bodily injury must occur arising out of or in the course of his employment. The 1923 Act or the 1988 Act, therefore, would be applicable only if the conditions precedent laid down thereunder is satisfied.

18. The employer lodged a first information report against Bipul Gogoi.A charge sheet was also filed. There is nothing on record to show that the death had occurred to Bipul Gogoi in an accident arising out of or in course of employment. If some miscreants have taken away the driver along with the vehicle or has murdered him, it is an offence. It, except in certain situations, does not give rise to a presumption that the death had occurred arising out or in the course of an employment. Some evidence should have been adduced in that behalf. If the version brought on records by the police was correct, namely, he had himself ran away with the vehicle and had not been heard for a period of seven years, particularly, when he had been declared a proclaimed offender by a Court of law, presumption under Section 108 of the Evidence Act could have been invoked by the criminal court for dropping the criminal case that he is dead. In our opinion, in a case of this nature, the said provisions could not have been invoked for the purpose of grant of compensation under the 1923 Act without any other evidence having been brought on records.

Sections 108 and 109 of the Evidence Act are founded on the presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until contrary is established by evidence either direct or circumstantial. The said provision can be invoked in a legal

proceeding by the death of a person may be an issue. The Section does not say that presumption would be applicable in all situations. It shall not apply in respect of a person who absconds from justice nor evade a trial or is otherwise charged for commission of a grave offence as he in that situation may not communicate with his relations. Furthermore in a case of this nature, it is also difficult to rely upon a self serving statements made by the claimantsthat they had not heard of their son for a period of seven years. The Commissioner of Workmen Compensation or the High Court did not assign any reason as to why the fact disclosed in the charge sheet which was filed upon investigation that Bipul Gogoi himself had run away with the vehicle would not be a relevant fact, particularly, when cognizance had been taken by a competent court of law on the basis thereof.

Section 3 of the 1923 Act would be attracted only when the conditions precedent therefor are fulfilled and not otherwise.

19. The view which we have taken find support from a judgment of this Court in Mackinnon Machenzie & Co. (P) Ltd. v. Ibrahim Hameed Issak [(1969) 2 SCC 607], holding :

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.

20. In Jyothi Ademma v. Plant Engineer, Nellore & Anr. [(2006) 5 SCC 513] also this Court held :

6. Under Section 3(1) it has to be established that there was some causal connection between the death of the workman and his employment. If the workman dies as a natural result 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.

7. The expression accident means an untoward mishap which is not expected or designed. Injury means physiological injury. In Fenton v. Thorley & Co. Ltd. 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 as follows:

I think that the context shows that in using the word designed Lord Macnaghten was referring to designed by the sufferer.

21. Furthermore, the rights of the parties were required to be determined as on the date of the incident, namely, 9.10.1996. It is, therefore, difficult to hold that a subsequent event and that too by raising a presumption in terms of Section 108 of the Evidence Act can give rise to fructification of claim, save and except in very exceptional cases.

22. In Kerala State Electricity Board & Anr. v. Valsaka K. & Anr. [(1999) 8 SCC 254], this Court held:

Thus, the relevant date for determination of the rate of compensation is the date of the accident and not the date of adjudication of the claim.

{[See also Oriental Insurance Co. Ltd. v. Khajuni Devi & Ors. [(2002) 10 SCC 567]}.

23. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. However, as nobody has appeared on behalf of the respondent, there shall be no order as to costs.