HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

MA No. 9/2009

Reserved on 30.01.2024.
Pronounced on 02.02.2024

National Insurance Co. Ltd Division office 2nd Canal Road Jammu through its Assistant Manager Sh. S.N.Koul son of Sh. K.N.Koul NIC DO 2nd Canal Road Jammu — appellant (s)

Through :- Mr. Rajesh Kumar Advocate.

V/s

1 Rakesh Kumar Sharma 2. Rajesh Kumar Sharma 3. Ajit Sharma 4. Soni Devi 5. Poli Devi 6. Sansaroo Devi, sons, daughters and wife of Sh.Suraj Parkash
7. Shamsher Singh son of Lal Chand resident of village Kala Tehsil R.S.Pura — .....Respondent(s)

Through :- Mr. M.S.Malik Advocate.

HIGH COURT
JAMMU & KASHMIR

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1 An award dated 24.10.2008 passed by the Commissioner under Workmen's Compensation Act (Assistant Labour Commissioner), Udhampur ['the Commissioner'] in file No.DWC/2006/10 titled '*Rakesh Kumar Sharma and others vs. Shamsher Singh and another*', is subject matter of challenge in this appeal filed under Section 30 of the Workmen Compensation Act, 1923 ['1923 Act'].

2 This appeal was admitted to hearing vide order dated 17.09.2021 on the following substantial questions of law:

(i) Whether the employer and the insurer are liable to compensate the petitioners/dependents of the deceased even if the deceased has not suffered any injury/died in an accident when admittedly the deceased was found murdered and had neither died because of any injury directly attributable to his employment; and,

(ii) Whether there was any nexus with the nature of employment and the murder and the cause of death, when there is no finding of the Commissioner under workmen's Compensation Act in this respect.

3 Before addressing the substantial questions of law framed in this appeal, an advertence, though brief, to the factual antecedents leading to the filing of this appeal would be beneficial to put the matter in proper perspective:

The deceased Suraj Parkash Sharma was employed by respondent No.7 herein as driver with vehicle No. JK02E/1581 ['the Truck']. The deceased driver had gone to Rajasthan carrying some vegetables in the Truck. While on his way, the deceased driver stated to have parked his Truck at village Jagatpura near Mittal Petrol Pump. It was on 1st of November, 2005, one Sh. Sham Lal, Sarpanch of village Badwala reported the matter to the police that a Truck bearing Registration No. JK02E/1581 was parked near Jagatpura Mittal Petrol Pump. On examination of the Truck from where a foul smell was emitting, it was found that there was a dead body lying on the back seat of the cabin. On the basis of this report, FIR No. 259/2005 dated 01.11.2005 under Sections 302/201 IPC was registered in the Police Station concerned. It has not come on record as to what happened in the investigation thereafter. On the allegation that respondent No.7 had hired the services of the deceased driver, who was killed during and in the course of employment of respondent No.7, a claim petition was preferred before the Commissioner by three sons, a daughter, a widow and mother of the deceased driver. It was submitted that the Truck was duly insured with the appellant-Insurance Company and that the deceased was earning monthly wages of Rs.6000/- on account of his employment and being a person of the age of 35 years at the time of his death, respondents No. 1 to 5 ['the claimants] were entitled to compensation, to be computed under the provisions of 1923 Act.

4 The claim petition was contested by the appellant-insurance company by filing written objections. Respondent No.7 also filed his written objections and virtually admitted the claim of respondent Nos. 1 to 5 ['claimants'].

HIGH COURT JAMMU & KASHMIR

5 On the basis of the pleadings of the parties, the Commissioner, *inter alia*, framed four issues. Issues No.1 & 4 which are relevant for the purpose read thus:

> "1. Whether the deceased was engaged as workman by the respondent No.1 for driving the vehicle and died during the course of his employment with respondent No.1 ? OPP
>
> 2. The cause of death attributed in the petition during the course of employment of insured whether falls under the provisions of terms and conditions of policy. If not, what is its effect ? OPR".

6 The claimants led evidence in support of their claim and examined one of the claimants, namely Poli Devi as her own witness. The claimants also examined Sh. Sanjay Kumar, Sh Charan Dass and Sh Ram Saran as their witnesses. In rebuttal, respondent No.7 produced one Balwinder Singh, his Attorney Holder, whereas the appellant-insurance company produced Sh. S.N.Koul Assistant Manager of the insurance company as its witness. The matter was considered by the Commissioner in light of the evidence on record and the case law relied upon by both the sides.

HIGH COURT JAMMU & KASHMIR

7 The Commissioner concluded that the deceased, who was engaged as workman by respondent No.7 [' the employer'] for driving his vehicle, died during the course of his employment and, therefore, having regard to the proved fact that the deceased was 40 years old at the time of his death and was getting Rs.4000/- per month as monthly wages, awarded an amount of Rs.3,68,340/- in favour of the claimants. Since the vehicle, which was being driven by the deceased, was insured with the appellant-insurance company, as such, the appellant- insurance company was called upon to indemnify the employer by depositing the awarded amount in the Court. This was done by the Commissioner vide impugned award dated 24.10.2008.

8 The impugned award is assailed by the appellant-insurance company on multiple grounds. However, the argument that is emphasized by Mr. Rajesh Kumar, learned counsel appearing for the appellant-insurance is that there is no causal connection of death of the deceased with his employment viz. the use of Truck and, therefore, the death of the deceased cannot be said to be on account of accident arising out of and in the course of his employment with the employer. Learned counsel argues that there is not even an iota of evidence on record to show that the deceased, who was found murdered in the Truck, was killed by an accident in respect of use of the vehicle which, at the relevant time, was under his control as its driver. He placed strong reliance upon a three-Judge Bench decision of the Supreme Court in **Mackinnon Mackenzie and Co. (P) Ltd. vs. Ibrahim Mohd Issak (1969) 2 SCC 607**. He also drew my attention to the judgments of the Supreme Court in the cases of **Malikarjun G. Hiremath vs. The Branch Manager OIC, (2009) 13 SCC 405** and **Shakuntala Chandrakant Shreshti vs. Prabhakar Maruti Garvali, (2007) 11 SCC 668** and a couple of other judgments passed by the different High Courts of the country to buttress his submissions made at Bar.

HIGH COURT JAMMU & KASHMIR

9 *Per contra*, Mr M.S.Malik learned counsel appearing for the claimants placed reliance upon the judgments of the Delhi High Court, Madhya Pradesh High Court, Allahabad High Court and the Rajasthan High Court in the cases of **United India Insurance Company vs. Kanshi Ram, 2004 (2) AD 655, Laxmi vs. Jai Karan Prasad Shukla, (2007) 3 MPHT 421, Ambalika Singh and others vs. United India Insurance Co. Ltd. (2018) 3 AWC 3151 and New India Assurance Company Ltd vs. Tara Kanwar, (2015) Leghal Eagle (Raj) 33.**

10 Having heard learned counsel for the parties and perused the material on record, I am of the considered opinion that the claimants have miserably failed to prove by leading any evidence that the death of their predecessor, the deceased driver was on account of an accidental murder which occurred out of and during the course of his employment.

11 Indisputably, the deceased was a driver engaged by the employer to drive a Truck bearing Registration No. JK02E-1581 owned by the employer. This Truck was also insured with the appellant-insurance company for indemnifying any loss on account of death or bodily injury to the driver. It has also come on record that said Truck used to carry vegetables from one place to another. On the fateful day, the said Truck driven by the deceased driver was carrying vegetables and had gone to Rajasthan. On the night intervening 23.10.2005 and 24.10.2005, the Truck was found parked at village Jagatpura near Mittal Petrol Pump. It was only on 01.11.2005, Sarpanch of village Badwala noticed a foul smell coming out from the said Truck and on examination found the dead body of the deceased lying on the back seat of the cabin. There is evidence on record to show that an FIR of the incident was registered, but what was the outcome of the investigation, if any, launched by the police has not been brought on record. The cause of death of the deceased is unknown. However, looking to entirety of the circumstances and the manner in which the dead body was found, one could presume that the driver did not die a natural death, but was murdered. Whether the murder of the driver was an accidental murder or an intended murder is, however, not coming forth from the evidence on record. Interestingly, neither the copy of the FIR has been produced before the Commissioner, nor any effort has been made by the claimants to summon a report from the concerned Police Station. In these

HIGH COURT JAMMU & KASHMIR

circumstances, it is very difficult for this Court to concur with the conclusion of the Commissioner that death of the driver had occurred out of and during the course of his employment. As a matter of fact, the Commissioner has not made any effort to find out as to whether there is any causal connection between the death and the employment of the workman.

12 Before we proceed further, it is relevant to set out Section 3(1) of the 1923 Act. It reads thus:

> *3. **Employer's liability for compensation**.-*
>
> *(1) If personal injury is caused to a employee 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 employee for a period exceeding three days;*
>
> *(b) in respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to:*
>
> *(i) the employee having been at the time thereof under the influence of drink or drugs, or*
>
> *(ii) the wilful disobedience of the employee to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employees, or*
>
> *(iii) the wilful removal or disregard by the employee of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of employee.,*

HIGH COURT
JAMMU & KASHMIR

13 From a plain reading of Section 3, it clearly transpires that the employer shall be liable to pay compensation in accordance with the 1923 Act only if personal injury caused to a workman resulting into total or partial

disablement or death is caused by an accident arising out of and in the course of his employment. The expression "accident" is not defined in the 1923 Act. However, the dictionary meaning of the accident is 'an untoward mishap which is not expected or designed'.

14 The Supreme Court in **Union of India and others vs. Sunil Kumar Ghosh, (1984) 4 SCC 246** defined the term "accident" in the following manner:

> "*An accident is an occurrence or an event which is unforeseen and startles one when it takes place but does not startle one when it does not take place. It is the happening of the unexpected, not the happening of the expected, which is called an accident……………..... But the happening of something which is not inherent in the normal course of events, and which is not ordinarily expected to happen or occur, is called a mishap or an accident".*

HIGH COURT
JAMMU & KASHMIR

15 Whether, in the given facts and circumstances, a 'murder' is an accidental murder or an intended murder has been explained beautifully by the Supreme Court in **Rita Devi and others vs. New India Assurance Company Ltd, (2000) 5 SCC 113.** In the aforesaid case, a driver of an auto-riksha was murdered by his fare-paying passengers. The passengers intended to steal the auto-rikshaw and to do so, they had to eliminate the driver. In the said case, the Supreme Court held that murder of the driver was not an intended murder, but happened accidentally in the process of committing theft of the auto-rikshaw. It is in these circumstances, the Supreme Court held that murder of the deceased-auto-rikshaw driver was due to an accident arising out of use of the motor vehicle and the claimants were held entitled to claim compensation under the 1923 Act. The Supreme Court, thus, drew clear distinction between a murder which is not an accident and a murder which is an accident. The Supreme

Court laid down the test that if the dominant intention of the act of felony is to kill any particular person, then such killing is not an accidental murder, but is a murder simpliciter. However, if the murder was not originally intended, but occurred to accomplish any other felonious act then such murder is an accidental murder. What was stated by the Supreme Court in paragraph 10 of the judgment is noteworthy and is set out below:

> *"10. The question, therefore, is can a murder be an accident in any given case? There is no doubt that murder, as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts . The difference between a murder which is not an accident and a murder which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominent intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder".*

HIGH COURT JAMMU & KASHMIR

16 To be eligible to claim compensation under Section 3 of 1923 Act in case of death of a workman, his legal representatives, the claimants, are required to be prove before the Commissioner that the death by accident has arisen both out of and in the course of employment. The word "and" used between the expression "arising out of" and "in the course of employment" is conjunctive and, therefore, it is incumbent upon the claimants to prove by leading cogent evidence that death of their predecessor-in -interest occurred both, 'out of' and 'in the course of employment'. The expression "in the course of employment" would mean during the period of work which the workman is employed to do or which is incidental to it. The words "arising out of employment" would mean that injury or death has resulted from some risk

associated or incidental to the duties of service. In other words, there must be causal connection between accident and employment. In such cases, the burden of proof rests upon the claimants to prove that accident arose out of employment as well as in the course of employment.

17 The Supreme Court in the case of **Mackinnon Mackensie and Co. (P) Ltd vs. Ibrahim Mohd Issak (1969) 2 SCC 607** has, in paragraphs 5 and 6 has dealt with the issue elaborately leaving no scope for any further debate. Para 5 and 6 for facility of reference are set out below:

> 5.*To come within the Act the injury by accident must arise both out of and in the cours. 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 these factors the workman is brought within the scene 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 Lancashire and Yorkshire Railway Co. v. Highley(1) 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 yea, the accident arose out of his employment. If nay, 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 was within the*

HIGH COURT JAMMU & KASHMIR

> *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 as in the course of employment. But this does not mean that a workman who comes to court for relief 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 guess; 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 rule as to the degree of proof which is sufficient to justify an inference being drawn, but' the evidence must be such as would induce a reasonable man to draw it. Lord Birkenhead L.C. in Lancaster v. Blackwell Colliery Co. Ltd., (1) 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 fails 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 balancing 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."*

(**underlined by me**)

18 To the similar effect is the judgment of the Supreme Court rendered in the case of **Malikarjuna G. Hiremath** (supra).

19 At this juncture, I deem it appropriate to refer to paragraphs 7 and 29 of the judgment passed by the Supreme Court in **Regional Director ESI Corporation vs Francis De Costa, (1996) 6 SCC 1,** which, for facility of reference, are reproduced hereunder"

HIGH COURT JAMMU & KASHMIR

7.Unless an employee can establish that the injury was caused or had its origin in the employment, he cannot succeed in a claim based on Section 2(8) of the Act. The words "accident..... arising out of.....his employment" indicate that any accident which occurred while going to the place of employment or for the purpose of employment, cannot be said to have arisen out of his employment. There is no causal connection between the accident and the employment".

29. Although the facts of this case are quite dissimilar, the principle laid down in this case, are instructive and should be borne in mind. In order to succeed, it has to be proved by the employee that (1) there was an accident,(2) the accident had a causal connection with the employment and (3) the accident must have bee suffered in course of employment. In the facts of this case, we are of the view that the employee was unable to prove that the accident had any causal connection with the work he was doing at the factory and in any event, it was not suffered in the course of employment".

20 The distinction between the two terms 'arising out of' and 'in the course of employment' has been drawn by the Supreme Court by deriving inspiration from **Dover Navigation Co. Ltd vs. Isabella Craig (1940) AC 190** wherein it has been held thus"

HIGH COURT
JAMMU & KASHMIR

"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 casualty. 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."

21 The High Court of Madras in the case of **P. Kalyani vs Divisional Manager, Southern Railway, (2003) 3 MLJ314** has, on the basis of the case law enunciated by the Supreme Court culled out three pre-requisite conditions for laying a claim under Section 3 of the 1923 Act i.e (i) personal

injury; (ii) injury must be as a result of an accident and (iii) the injury has arisen out of and in the course of employment.

22 When we apply the law as laid down by the Supreme Court and followed by almost every High Court to the facts of the instant case, we clearly find that the murder of the driver in the instant was not an accidental murder. Neither there was any attempt on the part of the claimants to plead an accidental murder, nor was there brought on record any evidence to show that the death of the deceased driver was caused due to an accident which was not an intended murder.

23 I have already noticed that the claimants who led their oral evidence before the Commissioner neither produced a copy of the FIR nor made any attempt to get the final report summoned from the concerned police station. This would have thrown sufficient light on the manner in which the deceased driver was killed on the fateful night. The claimants have though amply proved that the at time of his death, the deceased driver was in the course of employment of respondent No.7, yet there is no evidence brought on record to show that the death was an accidental murder occurred out of his employment. The co-relation of death of the deceased driver and nature of his employment is completely missing. There is, thus, no causal connection between the death of the deceased driver and his employment as driver to drive the vehicle i.e Truck.

HIGH COURT JAMMU & KASHMIR

24 The judgments relied upon by the respondents-claimants are beside the point. In all those cases, the murder of the workmen was not intended, but it happened during the course of stealing of the vehicle, the workmen were in-charge. There was an attempt and in some cases successful

attempt to steal the goods or even the vehicles from the workmen. The intended felonious act in all those cases was theft, but during the course of theft, and to accomplish the said act, the workmen, in-charge of the insured vehicle(s) also came to be murdered. In such cases, there was direct causal connection between the death and the employment of the workmen. However, in the instant case, the claimants have not discharged the burden of proving that death of the deceased driver was on account of accident arising out of his employment. The causal connection between his death and employment is completely missing. Neither the Truck was stolen by the assailants, nor the goods, if any, loaded therein were stolen. Possibly, the deceased driver was murdered because of some old enmity or for reasons not connected with the use of vehicle under his control.

HIGH COURT
JAMMU & KASHMIR

25. For all these reasons and having answered the questions framed, I find merit in this appeal. The appeal is, accordingly, allowed. The impugned award passed by the Commissioner is set aside. However, in the interest of justice and having regard to the fact that the claimants have lost their breadwinner, it is provided that the award amount or any part thereof received by the claimants, if any, shall not be recoverable.

(SANJEEV KUMAR)
JUDGE

Jammu
02.02.2024
Sanjeev

whether order is speaking:Yes

Whether order is reportable:Yes