

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO.23 OF 2015
WITH
CIVIL APPLICATION NO.381 OF 2015**

The Shipping Corporation of India Ltd. .. Appellant

vs.

Mrs.Mariana Felipa Das Neves Pereira .. Respondent

Mr.Ankit Tripathi i/b M/s.FF and Associates for the appellant

Mr.Ghanashyam Ramchandani for the respondent

**CORAM : K.K.TATED, J.
DATED : 24/07/2015**

JUDGMENT:

1 Heard the learned counsel for the parties.

2 By consent of both the parties, matter is taken up on board for final hearing at the stage of admission itself.

3 Counsel for the appellant filed compilation of documents including Claim Application filed by respondent, written statement filed by appellant, affidavit of examination-in-chief of appellant and respondent, written argument of both the parties and other relevant documents.

4 For the sake of convenience, the nomenclature of the parties as is stated in the application will be referred to hereinafter as the appellant / Opposite party and respondent / applicant.

5 This First Appeal is preferred by opposite party challenging the judgment and award dated 22.5.2014 passed by Commissioner for Workmens Compensation and Judge, 3rd Labour Court, Mumbai in Application (WCA) No.373/B-77 of 2013 holding that the applicant is entitled compensation of Rs.5,81,324/- with 12% simple interest from 30.1.1998 till actual deposit of the amount with penalty Rs.2,00,000 and also cost of Rs.5000/-.

A few facts of the matter are as under:

6 Applicant's late husband Mr.Inacio Francisco Colaco was working with opposite party as a seaman. He was getting salary of Rs.60,000 per month. The opposite party has head office at Mumbai and branch office at Gujarat. The opposite party Mumbai Branch had given order to the applicant's husband to report for duty at Kandla Port in Gujarat State on 26.12.1997. The deceased had joined the duties on the same day after signing of agreement from the master of opposite party. Thereafter, the applicant had received telegram from the opposite parties branch office at Gujarat on 2.1.1998 stating that her husband was missing from 30.12.1997. Thereafter, the Gujarat Police Station registered the missing report on 3.1.1998. They made attempts to trace the deceased person but could not trace him. Thereafter, the concerned police at Gujarat State had issued certificate stating that all the possible efforts were made to trace the missing person but he could

not be traced. Thereafter, the applicant filed R.C.S. No.2/08/B in the court of Civil Judge, Junior Division at Quepem. That suit was decreed on 20.6.2008 declaring that the whereabouts of missing person was not known for continuous period of more than 7 years. Hence, the same is presumed to be dead. On the basis of the said declaration the applicant filed application under Workmens Compensation Act, 1923 (hereinafter referred to as the "said Act") for compensation of Rs.33,00,000/- with 12% interest.

7 In the said application for compensation, opposite party filed their written statement and raised the objection about maintainability of Claim Application. The opposite party raised objection that application under the said Act is maintainable only in case the person is injured and or dead during the course of employment. They raised objection about maintainability of the Claim Application on the ground that in the present proceeding neither the deceased was injured in an accident and or died during the course of employment. He was missing and therefore, the Civil Court had declared him as a dead person. Hence, the applicant is not entitled to any compensation from the opposite party as per the provisions of the said Act. They also raised several other objections about his employment, quantum of compensation etc. The Trial Court considering the evidence on record held that the applicant is entitled Rs.5,81,324/- with 12% simple interest from 30.1.1998 by way of compensation with penalty amount of Rs.2,00,000/- and cost of Rs.5,000/-. Hence, the present First Appeal.

8 The learned counsel for the opposite party submits that Trial

Court erred in coming to the conclusion that the applicant is entitled compensation under the said Act. He submits that as per Section 3 of the said Act, employer is liable for compensation if accident arises only out of and in the course of employment. He submits that in the present proceeding, applicant has not placed on record any document to show that the deceased was injured during the course of employment and or died. It is the case of the applicant herself that the deceased was missing for more than 7 years and therefore, the Civil Court had declared him as dead. These facts are not considered by the Trial Court properly. In support of this contention, the learned counsel for the opposite party relies on the judgment of the Apex Court in the matter of Mackinnon Mackenzie and Co. Private Ltd. vd. Ibrahim Mahommad Issak¹. He relies on paragraph 12 of the said judgment which reads thus:

“12. 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 chest 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 15th, 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 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 duty 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.

1 AIR 1970 SC 1906

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 3 ½ 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 must be set aside.”

9 The learned counsel for the opposite party also relies on the judgment of the Apex Court in the matter of Oriental Insurance Company Limited vs. Soremui Gogoi and Others². He relies on paragraph 17 of the said authority which reads thus:

“17. 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 record 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

2 (2008) 4 SCC 572

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 record.”

10 The learned counsel for the opposite party further submits that the Labour Court erred in holding that they were liable to pay penalty of Rs.2,00,000/-. He submits that the Labour Court failed to appreciate the fact that the eligibility of the deceased to receive compensation itself was being challenged by the opposite party. Hence, there is no question of imposing penalty of Rs.2,00,000/-. On the basis of these submissions, the learned counsel for the opposite party submits that the impugned judgment and award passed by Labour Court awarding compensation in favour of applicant is required to be set aside.

11 On the other hand, the learned counsel for the respondent / applicant submits that the impugned award passed by Labour Court is according to law. He submits that there is no dispute that the deceased was in employment of the opposite party. He submits that as per the directions given by the opposite party, the deceased went to Gandhidham from Mumbai. He reported in their local office. Since then, the deceased was missing from Hotel Gokul in Gujarat State. This itself shows that on the day on which the deceased was missing he was on duty and therefore, the opposite party is liable to pay compensation as per the said Act. Thereafter, the Civil Court declared Inancio Francisco Colaco as a dead person. He submits that these facts are considered by the Labour Court correctly and awarded sum of Rs.5,81,324/- with 12% interest and also Rs.2,00,000/- towards penalty and cost of Rs.5,000/-. He submits that as the deceased was

missing for more than 7 years, the applicant filed appropriate proceeding in the court of law. Hence, there is no question of interfering with the judgment and award passed by Labour Court and awarded compensation in favour of the applicant.

12 I have heard both the sides at length. I have gone through the copy of Claim Application, written statement, other documents on record as well as written submissions filed by both the parties in the Trial Court. On the basis of submissions of both the counsel at length the following substantial questions of law arise in the present First Appeal:

- a) Whether the respondent's deceased husband was injured and or dead in an accident that arose out of and during the course of employment within the meaning of section 3 of the said Act?
- b) Whether the compensation can be awarded when death of person is declared by operation of law on the ground of missing?

13 Both the questions are interrelated and the same can be answered simultaneously.

14 In the present proceeding, there is no dispute that Mr. Inanco Francisco Colaco was working as a Chief Cook with the opposite party. As per the directions issued by the opposite party, the deceased went to Gandhidham in Gujarat State and stayed at Gokul Hotel. Before boarding the ship, he was missing from Gokul Hotel. Therefore, both

the parties made efforts to find out the deceased person. When the police authorities closed the file, the applicant filed Suit in Civil Court for declaration that Mr. Inanco Francisco Colaco be declared as a dead person and same was declared by the Civil Court. Hence, the question is whether the present case can be covered as per Section 3 (1) of the said Act. Section 3 (1) reads thus:

“3. Employer' s liability for compensation.-

(1) If personal injury is caused to an 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, 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 employee, 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 employees.

.....”

15 Bare reading of the Section 3 shows that to claim the compensation under this Act, injury or death by accident must arise in the course of employment. Unless and until the same is proved,

employee cannot claim any compensation. He has to prove that the injury or death arises out of and in the course of employment. In the present proceeding, the deceased Mr. Inanco Francisco Colaco was missing from Hotel Gokul at Gandhidham, Gujarat State. There is no provision in the Section 3 of the said Act for awarding compensation if the person is missing during the course of employment. There should be injury or death. The Apex Court in the matter of Mackinnon Mackenzie and Co. Private Ltd. vd. Ibrahim Mahommad Issak (Supra) categorically held that if a person is missing during the course of employment, his legal heirs cannot claim compensation under the said Act. In similar way, Allahabad Court in the matter of United India Insurance Co.Ltd. vs. Chhamta Gupta³ held that if a person is missing during the course of employment then, his legal heirs are not entitled to claim any compensation under the said Act. Under this Act, there cannot be a presumption of the death of a person. Paragraph 5 and 6 of that judgment reads thus:

“5. Assailing the award, Sri V.C. Dixit, learned Counsel for the appellant, submitted that even if a presumption of death of Naresh Chand Gupta can be drawn under section [108](#) of the Evidence Act, no presumption could be drawn with regards to the date of his death as also that he died due to an accident arising out of use of the motor vehicle. In support of his contention Sri Dixit placed reliance on a decision of the Apex Court in the case of Oriental Insurance Company Ltd. v. Sorumai Gogoi [MANU/SC/7156/2008](#) : (2008) 4 SCC 572. In that case, the driver was found missing with the vehicle. Neither the dead body nor the vehicle was found. Taking the aid of section [108](#) of the Evidence Act, a claim under the Workmen Compensation Act, 1923 was set up taking a plea that he went missing during the course of employment and since he was not heard for over seven years his death be presumed and compensation be awarded. The Commissioner

3 2014 (105) ALR 896

allowed the claim and the High Court dismissed the appeal. Allowing the appeal of the insurance company, the Apex Court observed as follows:

"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 are satisfied.

17. The employer lodged a first information report against Bipul Gogoi. A charge-sheet was also filed. There is nothing on record to show that 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 alongwith the vehicle or have 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 of or in the course of an employment. Some evidence should have been adduced in that behalf. If the version brought on record by the police was correct, namely, he had himself run 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 record.

18. 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 where 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 or evades 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 self-serving statements made by the claimants that they had not heard of their son for a period of seven years. The Commissioner of Workmen's 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.

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

6. Relying on the observations made by the Apex Court in the aforesaid decision, Sri Dixit submitted that in absence of any evidence that Naresh Chand Gupta died in an accident arising out of the use of the vehicle, no liability could be fastened on the Insurer either under the provisions of the Motor Vehicles Act or under the provisions of Workmen's Compensation Act, 1923. It was submitted that for a claim to be maintainable under the Motor Vehicles Act, the death must occur due to an accident arising out of the use of motor vehicle and for a claim to be sustainable under the Workmen's Compensation Act, 1923, it must be substantiated that injuries were caused by an accident arising out of and in the course of his employment. It was submitted that in absence of the necessary ingredients to maintain a claim, as stated above, the Tribunal had no jurisdiction to entertain such an application under section [163A](#) of the Motor Vehicles Act. It was further submitted that even if it is presumed that Naresh Chand Gupta was dead, as he was not heard of for last more than seven years, it cannot be presumed that he died due to an accident arising out of the use of the motor vehicle. It was thus submitted that the judgment and award passed by the Tribunal is manifestly erroneous in law and is liable to be set aside."

16 In the above mentioned facts and the law laid down by the Apex Court, I am of the opinion that applicant is not entitled to claim any compensation under the said Act taking recourse of Section 3. Hence, both the questions are answered in the negative. Hence, following order:

- a) First Appeal is allowed.
- b) Judgment and award dated 22.5.2014 passed by Commissioner for Workmens Compensation and Judge, 3rd Labour Court, Mumbai in Application (WCA) No.373/B-77 of 2013 is set aside.
- c) If any amount is deposited by the appellant/opposite party, they are entitled to withdraw the same with accrued interest if any, after appeal is over.
- d) In view thereof, Civil Application does not survive. The same is also disposed of.
- e) No order as to costs.

(K.K.TATED, J.)