

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 171/2016**

% **16th May, 2017**

TATA AIG GENERAL INSURANCE CO. LTD. Appellant

Through: Mr. Rudra Kahlon, Advocate.

versus

NEETA KUMARI & ANR. Respondents

**Through: Ms. Pratima Nain Chauhan,
Advocate for R-1.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? YES

VALMIKI J. MEHTA, J (ORAL)

FAO No. 171/2016 and C.M. Appl. No. 14768/2016 (for stay)

1. This first appeal under Section 30 of the Employee's Compensation Act, 1923 is filed by the insurance company challenging the judgment of the Employee's Compensation Commissioner dated 3.2.2016 by which the claim petition filed by the respondent no.1 herein was allowed and compensation of Rs.7,13,960/- was awarded along with interest at 12% per annum.

2. Two issues are called for decision in the present appeal. First issue is as to the meaning of the term 'accident' as found under Section 3(1) of the Employee's Compensation Act and second is how

is an onus of proof discharged with respect to the fact of the death or injury happening to the workman on account of the accident arising out of and in the course of employment.

3. The facts of the case are that the deceased Sh. Tilak Raj was employed by the respondent no.2 herein, to drive the vehicle bearing No. HR-55Q-7145 (TATA LPT), and which vehicle was owned by the respondent no.2. The deceased Sh. Tilak Raj had gone on a business trip from Delhi to Bangalore and on return from Bangalore he loaded vegetables (tomato) for his trip to Delhi. The deceased drove back the vehicle to Delhi and it was pleaded by the respondent no. 1 that the deceased drove continuously by putting extra hours so as to deliver the consignment in time and as a result of which the body of the deceased Sh. Tilak Raj was tired due to extreme stress and strain on account of long driving. It was further pleaded that on 4.9.2013 the deceased became unwell during the entire course of the day and took medicine and in the evening when he took a glass of lemon water he fell down and was therefore rushed to the Babu Jagivan Ram Memorial Hospital and where he was declared dead. MLC was prepared bearing no. 65755 dated 4.9.2013 and DD Entry No. 28A dated 4.9.2013 was registered with the Police Station Adarsh Nagar, Delhi. The subject claim petition was hence filed seeking

compensation by pleading that the death took place of the deceased Sh. Tilak Raj on account of an accident arising out of and in the course of employment.

4. Respondent no. 2 herein, the employer, appeared before the Employee's Compensation Commissioner and admitted the claim filed by the respondent no. 1. It was admitted that the deceased Sh. Tilak Raj was in the employment of respondent no. 2 and that the deceased died on 4.9.2013 out of and during the course of employment. It was also pleaded by respondent no. 2 that the vehicle in question was insured with the appellant for the period from 27.6.2013 to 26.6.2014 and an additional premium was charged by the appellant under the Employee's Compensation Act.

5. The following issues were framed by the Employee's Compensation Commissioner:-

- “(i) Whether the deceased died out of and during the course of employment?
- (ii) If yes, what relief he is entitled to?
- (iii) Any other relief?”

6. The Employee's Compensation Commissioner has discussed the evidence led in the present case on behalf of claimant/respondent no. 1 in paras 7 and 8 of the judgment, and in para

10(a) while deciding Issue no. 1 it has been held that the deceased died out of an accident arising out of and in the course of employment. The relevant paras of the impugned judgment of the Employee's Compensation Commissioner being paras 7, 8 and 10(a) read as under:-

“7. After framing of the issues the matter was adjourned for filing evidence by the petitioner. On the next date of hearing held on 08/05/14, petitioner filed evidence by way of affidavit dated 07/05/14. The matter was adjourned for Chief and Cross by the respondent. On a subsequent date of hearing held on 20/10/14 claimant tendered his evidence as per details as below:-

- (i) Certified copy of DD No.28A dated 04/09/13 of P.S.Adarsh Nagar, Delhi Exhibited as AW-1/1.
- (ii) Certified copy of dead body receipt dated 05/09/13 vide which dead body of deceased Sh. Tilak Raj S/o Sh. Hari Ram is handed over by Tajpal Singh, A.S.I, P.S Adarsh Nagar to Sh. Pawan Kumar younger brother of deceased Sh. Tilak Raj and Sh. Roshan Lal Thakur cousin brother of deceased. This is exhibited as AW-1/2.
- (iii) Certified copy of MLC No.65755 dated 04/09/13 time 9.27 P.M in R/o Sh. Tilak Raj in case DD No.28A of P.S.Adarsh Nagar exhibited as AW-1/3.
- (iv) Certified copy of post mortem report No. 768 dated 05/09/13 time 1.35 P.M. of BJRM Hospital in R/o Sh. Tilak Raj D/o Sh. Jinu Ram @ Hari Ram exhibited as AW-1/4.
- (v) Certified copy of death certificate No.C-5321589 issued by Sub-Registrar/Registrar of Birth & Death in r/o Sh. Tilak Raj exhibited as AW-1/5.
- (vi) Copy of Form-6, Form of Driving Licence No.T-1286/A/05 date of issue 14/09/05 issued by Licensing Authority M.V.Department Allahabad in r/o Sh. Thakur Tilak Raj S/o Thakur Hari Ram exhibited as AW-1/6.
- (vii) Copy of I.Card No.HP/SML/PSH/350, 2013/1 dated 20/08/13 issued by District Administration Shimla (Apple Control Room) in r/o Sh. Tilak Raj Thakur, Driver, Vehicle No. HR-55Q-7145 exhibited as AW-1/7.
- (viii) Copy of Insurance Policy No.0151988752 was issued by him in name of Smt. Gurleen Kaur for a period from 27/6/13 to 26/6/14 in r/q vehicle No.HR-55Q-7145 exhibited as AW-1/8.
- (ix) Copy of certificate of registration dated 13/07/12 issued by registering authority Gurgaon in r/o vehicle No.HR-55Q-7145 in name of Smt. Gurleen Kaur W/o Sh. Sarabjeet Singh valid till 18/07/14 exhibited as AW-1/9.

- (x) Copy of National Permit Authorization No. N.P./HR/5/072013/10199 dated 04/07/13 issued by Regional Transport Authority Gurgaon in r/o vehicle No.HR-55Q-7145 in name of Smt. Gurleen Kaur exhibited as AW-1/10.

8. On 20/10/14, Sh. Vijay Gupta, AR of R-2 cross examined the statement of Smt. Neeta Kumari, claimant and completed it. Matter was adjourned for filing RE by the respondent. Before filing his evidence, on a subsequent date of hearing held on 26/3/15, AR of R-2 filed application to call doctor from BJRM Hospital in P.M. Report No. 768 dated 05/09/13 to know the cause of death of deceased workman and also to call concerned SHO P.S.Adarsh Nagar Delhi in r/o DD No. 28A dated 04/09/13 and further investigation report if any. On his request, summons were sent to M.S., BJRM Hospital Delhi vide No. 335 dated 31/03/15 for appearance in this court. On subsequent date of hearing held on 02/07/15, in response to our notices, Sh. S.N.Bhardwaj, Post Mortem Asstt. of BJRM Hospital appeared in this court and stated that blood and viscera report in r/o deceased in P.M.No. 768 dated 05/09/13/ DD No.28A dated 04/09/13 may be available with concerned police I.O as police I.O. sends the samples of blood and viscera to CFL laboratory. After above statement of P.M. Asstt. of BJRM Hospital, AR of R-2 requested to call SHO, P.S.Adarsh Nagar alongwith CFSL report. In response to our summons, Sh. Tejpal Singh, ASI/I.O in case DD No. 28A dated 04/09/13 of P.S.Adarsh Nagar, Delhi appeared in this court on a subsequent date of hearing held on 08/10/15 and stated that they had sent the viscera samples in r/o Sh. Tilak Raj of CFSL Chandigarh on 24/10/13 but the viscera report is still awaited. Matter was adjourned for filing evidence and arguments by respondents and arguments by claimant. AR of claimant on a subsequent date of hearing held on 17/12/15 filed written argument on behalf of claimant which was taken on record and copy of the same was also supplied to AR of R-2. AR of R-2 preferred not to file evidence rather on a subsequent date of hearing held on 21/01/16 he filed W.A dated 14/01/16 which were taken on record and matter was reserved for passing final orders.

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10. Now coming to decide the claim petition dated 09/12/13 filed by claimant, issue wise replies are as under:-

- (a) **ISSUE NO.: (i):-** As per record available in file, R-1 vide his written statement dated 30/1/14 had admitted that the deceased Sh. Tilak Raj S/o Sh. Hari Ram was employed with her as a driver on her vehicle bearing No.HR-55Q-7145(TATA LPT) and on 04/09/13 he died out of and during the course of employment. Further perusal of contents of DD No.28A dated 04/09/13 of P.S.Adarsh Nagar(AW-1/1) reveals that at about 8.30 P.M on 04/09/13 an information was received that one person at 33 TPT is sick and who is not taking breath. After receipt of this information, Asstt. Sub-Inspector Sh. Tejpal Singh alongwith Constable Mukesh No. 2384 N/W proceeded towards the site. The reported sick person was taken to BJRM Hospital by police personal. A perusal of MLC No. 65755 dated 04/09/13 time 9.27 P.M. reveals that in case DD No.28A, ASI Tej Pal Singh brought

the sick person to BJRM Hospital who was identified as Sh. Tilak Raj R/o village Pantedi P.S.Hamirpur Post Office Dinheri Distt. Hamirpur (H.P.). In the MLC it is recorded, "B/B Police in unconscious state". On examination doctors found the pupils of the patient as fixed and dilated. His heart and respiratory sound was absent. ECG was done and ECG showed stagnant and flat line. On this basis patient was declared as dead by the doctors of BJRM Hospital (AW-1/3). Further in the Post Mortem Report No. 768/13 dated 05/09/13 time 1.35 P.M of BJRM Hospital in r/o Sh. Tilak Raj S/o Sh. Jinu Ram @ Hari Ram in the column titled 'Brief History', it is recorded, "alleged history of found lying unconscious on 04/09/13, taken by PCR to casualty of BJRM Hospital on the same day where declared brought dead vide MLC No. 65755 dated 04/09/13 at 9.27 P.M (AW-1/4). Further a perusal of Copy of Identity Card No. HP/SML/PSH/350, 2013/1 dated 20/08/13 issued by District Administration Shimla (Apple Control Room) in r/o Sh. Tilak Raj Thakur, Driver Vehicle No.HR-55Q-7145 (exhibited as AW-1/7) reveals that Sh. Tilak Raj Thakur was driver of vehicle No.HR-55Q-7145. As per AW-1/8, the said truck owned by R-1 was insured with R-2 for the period from 27/06/13 to 26/06/14. Keeping into view above mentioned records, other record available in file, W.S of R-1 and pleading of the parties, it is held that Sh. Tilak Raj S/o Hari Ram @ Jinu Ram was employed as Driver on truck bearing No.HR-55Q-7145 owned by R-1 and insured by R-2. His body was found in unconscious state by police authorities of P.S.Adarsh Nagar who brought the same to BJRM Hospital where the doctors after examination found that his heart and respiratory sounds were absent. After conducting the ECG, doctors found that ECG shows stagnant and flat line. On these basis, he (patient Tilak Raj) was declared brought dead by doctors of BJRM Hospital. Keeping into view these documents, pleadings of the parties and other record available on file, it is held that said Sh. Tilak Raj died out of and during the course of his employment." (underlining added)

7. In view of the aforesaid discussion, Employee's Compensation Commissioner by the impugned judgment has awarded compensation along with interest to the respondent no. 1 as stated above.

8. Learned counsel for the appellant argues that the present is not a case of an accident taking place of the vehicle in which the deceased Sh. Tilak Raj was appointed as a driver. It is further argued

that the present is not a classical case of an 'accident' happening. It is vehemently argued that in the facts of the present case the respondent no. 1 had failed to prove that the deceased died on account of an accident arising out of and in the course of employment because the death is not occasioned to have happened because of an injury caused by the employment. It is further also argued that it has not been proved by the respondent no. 1 that the deceased suffered from any physical condition or any injury which has a necessary connection or is caused on account of employment of the deceased Sh. Tilak Raj with the respondent no. 2 herein and which has resulted in the death of the employee.

9. Learned counsel for the respondent no. 1 in support of her argument has relied upon the judgment of the Employee's Compensation Commissioner and has argued that it is not necessary that there must be a classical accident for allowing of a claim under the Employee's Compensation Act. It is also argued that if an employee dies without an actual physical accident, but on account of injuries or a condition which is caused on account of employment resulting in death, a claim petition will be maintainable under the Employee's Compensation Act. Reliance in support of the argument that without there being a physical accident yet the employee can be said to die on

account of death arising out of and in the course of employment is placed upon the judgments of the Supreme Court in the cases of *Mackinnon Mackenzie & Co. Pvt. Ltd. Vs. Ibrahim Mahmood Issak, (1969) 2 SCC 607* and *Messrs. Mackinnon Mackenzie & Co. Pvt. Ltd. Vs. Ritta Farnandes, 1969 ACJ 419*.

10. The relevant paras of the judgment of the Supreme Court in the case of *Ibrahim Mahmood Issak (supra)* are paras 5, 6, 7, 11 and 13 and which paras read as under:-

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* 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 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.O., in *Lancaster v. Blackwell Colliery Company, Ltd.* 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 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.”

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 course of his employment. The question was considered by the House of Lords in *Kerr or Lendrum v. Ayr Steam Shipping Company, Ltd.* 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 were 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 bunk, 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 Lonsburn, 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 UPOLE 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 stated 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 Lonsburn observed: “that they should regard these awards in a very broad way and constantly remember that they were not the tribunal to decide.”

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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.”

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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 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 16th instant 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. 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 must be set aside.”
(emphasis added)

11. A reference to the relevant paras of the judgment in the case of *Ibrahim Mahmood Issak (supra)* shows that the Supreme Court has categorically observed that for a claim to be maintainable under the Employee’s Compensation Act and for holding that the death took place on account injury arising out of and in the course of employment, the injury must result from the employment and which injury the employee would not have otherwise suffered but for the reason of employment. It was held in the case of *Ibrahim Mahmood Issak (supra)* that if a seaman is found missing from a ship and there is otherwise enough evidence available on record of a seaman not being well then there is a presumption to be drawn that the accident is capable of being attributed to a risk which is ordinarily inherent in the discharge of the duties of employment. However in the facts of the case and in terms of the observations made in para 13 of the judgment in the case of *Ibrahim Mahmood Issak (supra)* the Supreme Court dismissed the claim petition filed by holding that it could not be held that the factum of missing of the seaman from the ship should be held to be an accident which arose out of the employment.

12. The relevant paras of the judgment in the case of *Ritta Farnandes (supra)* are paras 4 and 5, and which paras read as under:-

“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 & Company v. Hughes* where the deceased, whilst tightening a nut with a spanner, fell back on his hand and died. A post mortem examination showed that there was a large aneurism of the aorta, and that death was caused by a rupture of the aorta. 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 County 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 I 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 Macnaghten'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 everyman of commonsense who knew the circumstances would think it certain to happen.

5. It was, however, contended on behalf of the Appellant that there was no evidence whatever to establish in this case that the employment of the deceased contributed to his death. In other words the argument was that there was no evidence to establish that the death of the workman was caused not only by the disease but the disease as well as the employment. The difficulty in the present case is that the Appellant has not produced the necessary material to show that the workman was an indoor patient in the hospital from December 2 to his death on the 10th December and what his condition was during that period. Under Section 230 of the *British Merchant Shipping Act*, 1894 it is obligatory on the master of the ship to make such entries in the Log Book, the medical treatment given to ailing workman. In the present case, the Log Book is produced. The entries in that book indicate that on December 2, 1961 the deceased was admitted to the hospital, as he was suffering from hopatomagally and basal pulmonary congestion. This

entry was made on December 3, 1961. The case of the Appellant is that the workman was in the hospital as an indoor patient from December 2, to 10. In the Log Book however, the only entry made after the one mentioned is regarding his death, which occurred on December 10, 1961. As to what happened between 2nd December and 10th December is not indicated by any entry in the Log Book. There is no entry to that effect in the Log Book, nor does the Log Book indicate what treatment he was given during the said period. It was said that the Appellant produced a special medical report of the surgeon of the ship before the Commissioner but it was objected on behalf of the Respondent presumably on the ground of want of necessary proof. There was however, no attempt on the part of the Appellant to prove that report in a legal manner. The result, therefore, is that there is no evidence to establish that the workman was lying in the ship's hospital as an indoor patient from December 2 to 10. The High Court has taken the view that the Appellant had special knowledge as to whether the workman was an indoor patient lying in the ship's hospital during the above mentioned period or whether he was asked to carry out his duties and since the Appellant produced no evidence an adverse inference should be drawn against the Appellant. The High Court observed that there was no evidence to establish that after December 2, 1961 the workman was not asked to work but was in the hospital right upto the date of his death. In the absence of necessary evidence which the Appellant could and should have led in the case the High Court drew the inference that the death of the workman arose out of and in the course of his employment, in our opinion the High Court was right in holding that in the circumstances of this case a duty was imposed on the Appellant to lead evidence which was within its special knowledge and in the absence of such evidence an adverse inference should be drawn against the Appellant. For those reasons we hold that the appeal fails and must be dismissed.” (underlining added)

13. A reading of aforesaid paras 4 and 5 show that the Supreme Court has observed that if a workman dies even from a pre-existing disease then there is an accident as per the meaning of the expression ‘accident’ under the Employee’s Compensation Act provided that the disease is aggravated or accelerated under the circumstances of the employment. It was held by the Supreme Court that injuries occurring on account of employment can result in the accident happening as is envisaged under Section 3(1) of the

Employee's Compensation Act. As per para 5 of the judgment in the case of *Ritta Farnandes (supra)* it was found as per the evidence led in the case that deceased died on account of the disease caused by the employment.

14. I would like to, at this stage refer to the two recent judgments of the Supreme Court and which held that the injury has to be caused as a result of the employment for the claim of compensation to be allowed and it is not enough that the injury is discovered during the course of employment for the same to be an accident under the Employee's Compensation Act. The Supreme Court has held that the injury which results in death must be necessarily attributable to the health condition which occurred during the service and not while in service. Supreme Court has also observed that every evidence does not necessarily mean discharge of onus of proof to hold that accident which is pleaded is on account of injuries caused by the employment as such only. These relevant judgments of the Supreme Court are the judgments in the cases of *Steel Authority of India Limited Vs. Madhusudan Das and Others (2008) 15 SCC 560* and *Dredging Corporation of India Limited Vs. P.K. Bhattacharjee (2013) 10 SCC 224*.

15. The relevant paras of the judgment in the case of *Steel Authority of India Limited (supra)* are paras 13, 20 and 21 and which paras read as under:-

“13. What would constitute “an accident arising out of and in the course of employment” has not been defined. Evidently, the said phraseology has been borrowed from the provisions of the Workmen's Compensation Act. We would, however, advert to the said question a little later.

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20. Reverting back to the question as to whether in a case of this nature, it was required to be pleaded and proved that the death occurred in an accident, we must advert to the meaning of the term accident. This Court in *Mackinnon Mackenzie and Co. (P) Ltd. v. Ibrahim Mahmmmed Issak*, held: (SCC p.611, para 5)

“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, 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’. 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.”

It was furthermore held: (SCC p.612, para 6)

“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.”

The said principle was followed by this Court in *Shakuntala Ghandrakant Shreshti v. Prabhakar Maruti Garvali*, (wherein one of us was a member), stating: (SCC pp. 675-76, paras 20 & 22)

“20. This Court in *ESI Corpn.* referred to, with approval, the decision of Lord Wright in *Dover Navigation Co. Ltd. v. Isabella Craig* wherein it was held: (All ER p. 563 G-H)

“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 causality. 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.”

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22. There are a large number of English and American decisions, some of which have been taken note of in *ESI Corpn.* in regard to essential ingredients for such finding and the tests attracting the provisions of Section 3 of the Act. The principles are:

(1) There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.

(2) The onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

(3) If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case.”

21. Yet again, recently in *Oriental Insurance Company Limited v. Sorumai Gogoi*, this Court observed: (SCC p. 579, paras 21-22)

“21. In *Jyothi Ademma v. Plant Engineer* also this Court held: (SCC pp. 514-15, paras 6-7)

‘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: (AC p. 676)

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

22. 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.”

(underlining added)

16.(i) A reading of the aforesaid paras of the judgment of the Supreme Court in the case of *Steel Authority of India Limited (supra)* shows that the Supreme Court has referred to the para 5 of the judgment in the case of *Ibrahim Mahmood Issak (supra)* and which observed that there must be a connection between the death and the conditions of employment. The Supreme Court in the case of *Steel Authority of India Limited (supra)* has also referred to para 6 of the judgment in the case of *Ibrahim Mahmood Issak (supra)* that the burden of proof is cast upon the workman to prove that accident arose out of employment and in the course of employment though this need not be done by direct evidence and there can be inference as per the facts of each case, however, equally the Employee’s Compensation Commissioner cannot surmise, conjuncture or guess as regards the

facts with respect to accident arising out of and in the course of employment. The evidence must be such that a reasonable man is forced to draw a necessary inference of the accident arising out of and in the course of employment.

(ii) Supreme Court thereafter in the case of *Steel Authority of India Limited (supra)* has referred to the case of *Shakuntala Chandrakant Shreshti Vs. Prabhakar Maruti Garvali and Another, (2007) 11 SCC 668* and wherein it was observed that the accident must necessarily arise out of the employment. In the relevant para 22 of *Shakuntala Chandrakant Shreshti's* case (*supra*) there is also a reference to the judgment of the Supreme Court in the case of *Regional Director, E.S.I. Corporation and Another Vs. Francis De Costa and Another, (1996) 6 SCC 1* observing that there must be necessarily a causal connection between the injury and the accident and the factum of the accident having connection with the work done in the course of employment as also the fact that the onus is upon the applicant to show that it was work and the resulting strain which contributed to or aggravated the injury.

17. (i) In *Dredging Corporation of India Limited (supra)* the relevant paras are paras 3 to 5, and these paras read as under:-

“3. Although ordinarily we would be loathe to peruse the evidence led by the parties especially encountering concurrent conclusions, we have done so in the present case. The Employee's Compensation Act is intended for the benefit of an employee, and quintessentially is a no-fault liability. It appears to us that both the Courts below have misdirected themselves in law in that because the illness of the employee was discovered while he was in actual service it has led them to the conclusion that compensation is payable under Section 3 of the Employee's Compensation Act, 1923. We are also mindful of the fact that the Commissioner, being the Court of first instance, has held that he met with an accident on 27.12.1999, and that he suffered 100% loss of earning capacity as he was permanently unfit for sea-service. It ought to have distinguished between the discovery of the health condition while in service and the health condition having occurred during service.

4. So far as the arguments of the Company are concerned, especially in the Appeals filed assailing the decision of the Commissioner, the emphasis has been that the ischemic heart condition of the employee discovered while he was actually serving with the Appellant, was not related to his service. The learned Commissioner ought to have satisfied himself fully on this aspect of the case rather than come to a conclusion that an accident had occurred, for which the evidence is extremely scanty. Faced with this predicament, Mr. Rana Mukherjee, learned Counsel appearing for the employee has endeavoured to establish that an ischemic heart condition can result from job stress which was continuously encountered by the employee.

5. For these reasons, it appears to us to be expedient and just to set aside the impugned order as well as the order of the Commissioner and remand the matter back to the Court of the Commissioner for fresh adjudication de novo. It would then be advisable that a specific issue be struck as to whether the employee's ischemic heart condition developed as a consequence of any stress or strain of his employment with the Appellant-company. There can be no gainsaying that the Employee's Compensation Act, 1923 is a beneficial legislation requiring some play at the joints so far as considering a disabled employee's claim is concerned. In these circumstances, parties shall appear before the Commissioner, Workmen's Compensation (1st Court) West Bengal or its successor Court, as the case may be, on 11.11.2013.” (underlining added)

(ii) It is seen that Supreme Court in the case of ***Dredging Corporation of India Limited (supra)*** has observed that merely because an illness is discovered while an employee is in service would not mean that compensation would be payable under Section 3 of the Employee's Compensation Act. Supreme Court has categorically

observed in this case that while deciding cases under this Act distinction must be made between discovery of the health condition while in service and the health condition having occurred during service. In para 4 of the *Dredging Corporation of India Limited's* case (*supra*) Supreme Court has clearly observed that the ischemic heart condition of the employee being discovered while he was serving with the employer has necessarily to be found to be relatable to employment i.e caused by the service of the employee and that the Employee's Compensation Commissioner should have satisfied himself fully on this aspect. Supreme Court has also observed that scanty evidence is not sufficient for discharging the onus of proof with respect to the death occurring on account of conditions relating to employment and job stress.

18. In view of the aforesaid position of law let us examine the evidence which has been led in the present case and which is referred to in paras 7, 8 and 10 (a) of the judgment of the Employee's Compensation Commissioner and which have been reproduced above. A reading of the evidence shows that there is only evidence with respect to the factum of death as per the MLC report no. 65755 dated 4.9.2013 as also the postmortem report dated 5.9.2013, but how the death was caused because of the employment has not been proved,

because, in spite of sending the blood and viscera report to the competent authority no final report was received as to the cause of death of the employee/workman. Therefore, it is seen that there is absolutely no evidence which is led whatsoever that the death of the deceased Sh. Tilak Raj was on account of bodily injury and ailment directly attributable to or caused by the employment or an existing injury being aggravated on account of employment.

19. In my opinion, therefore, the respondent no.1 has failed to discharge the onus of proof in the facts of the present case that the deceased died on account of any physical condition or any ailment caused on account of job stress and that the death occurred on account of injuries arising out of and in the course of employment.

20. What should therefore be done in a case like this is an issue. I however do not have to travel long in this case as to what should be the course which should be adopted by this Court because that is provided by the Supreme Court in the case of *Dredging Corporation of India Limited (supra)* wherein the matter has been remanded back to the Employee's Compensation Commissioner for leading of fresh evidence to show that the death of the employee/workman is or is not on account of injury sustained or a physical condition or ailment caused on account of and arising out of in the course of employment. At the cost of repetition it is

necessary to state that as per the observations of the Employee's Compensation Commissioner in para 8 of the impugned judgment the final blood and viscera report was not received from CFSL, Chandigarh, and therefore there is no evidence whatsoever as to what has caused the death of the deceased Sh. Tilak Raj.

21. In view of the above discussion, the impugned judgment dated 3.2.2016 is set aside. The matter is remanded back to the Employee's Compensation Commissioner to allow the respondent no.1 herein/claimant to lead evidence and the Employee's Compensation Commissioner thereafter shall decide the case as per the ratio and observations made in the present judgment and the ratios of the judgments of the Supreme Court in the cases as quoted above and the Employee's Compensation Commissioner must come to a finding as per evidence led which a reasonable man can believe that there exists such evidence and death having taken place of Sh. Tilak Raj on account of physical condition or ailment or injuries caused arising out of and in the course of employment.

22. Parties to appear before the concerned Employee's Compensation Commissioner on 1st June, 2017. The record of the Employee's Compensation Commissioner be sent back forthwith by the

Registry of this Court so that the same is available to the Employee's Compensation Commissioner on the date fixed.

MAY 16, 2017/ AK/ib

VALMIKI J. MEHTA, J

