Sumedh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 480 OF 2018

New India Assurance Co Ltd …Appellant
Versus
Senehar Bibi Johar Shaikh & Anr …Respondents

Ms Poonam Mital, *for the Appellant.*
Mr TJ Mendon, *for Respondent No. 1.*

CORAM Kamal Khata, J.
DATED: 12th April 2024

PC:-

1. This First Appeal under Section 30 of the Employees Compensation Act 1923 ("EC Act") impugns the judgement dated 17th May 2014 in WCA No 103/B-31 of 2011 whereby the Appellant and Respondent No 2 are directed to pay compensation of Rs 7,69,825/- jointly and severally to Respondent No 1 along with interest at the rate of 12% p.a. from the date of accident i.e. 22nd October 2010 till realization.

2. Brief facts that led to this Appeal are as follows:

3. Senehar Bibi Johar Shaikh (Respondent No 1 – Original Applicant) (***"Senehar Shaikh"*** for short) is the mother of Tinku (***"deceased"*** for short) a 22 year old who died during the course of his employment on 22nd October 2010. The deceased was a construction worker with M/s Gayatri Associates Co. Ltd. (Respondent No 2 – Original Opposite Party No 1) (***"Employer"*** for short) which was constructing a building on plot no 24-29, sector-4 palm beach road, (palm beach residency) Nerul, Navi Mumbai. The New India Assurance Company Limited (Appellant – Original Opposite Party No 2) (***"Insurer"*** for short)

4. The Application states that the deceased was making concrete on the 5th floor of "H" tower when he slipped and fell due to concrete and water. When reported to the police station, an offence was registered and witness statements were recorded. The Employer in its written statement admitted that the deceased was working for them on salary of Rs 7000/- per month and was validly insured by Insurer at the time of the accident. Senehar Shaikh in her application has claimed a sum of Rs 7,74,795 [Rs 3500 (50% of salary) x 221.37 (multiplier age factor)] from the Employer and the Insurer.

5. In the written statement filed by the Insurer, apart from admitting that the Employer had taken the policy, there are bare denials of all contentions including, that the deceased was in the employment of the Employer, that the deceased was paid Rs 7000/- as salary, that the deceased was aged 22 years and that Senehar Shaikh was entitled to compensation.

6. The Commissioner heard the matter, framed issues and passed a reasoned judgement allowing the claim with costs.

7. Aggrieved by this judgement the Insurer filed this First Appeal.

8. I heard both Advocates.

9. Ms Mital for the Insurer reiterates the grounds in the Appeal and seeks support from the caselaw referred therein. Mr Mendon opposed the appeal on the ground that the Commissioner had given a reasoned order and consequently no substantial question of law arose in order to maintain the appeal. With the help of both Advocates I also perused the affidavit in lieu of examination in chief of Senehar Shaikh, the written statement of the Employer and Insurer and the cross examination of Senehar Shaikh along with the impugned judgement of the Commissioner.

10. Pertinently, only Senehar Shaikh filed her affidavit in lieu of Examination in chief. Evidently, no questions, apart from the employer paying Rs 20,000/- to her, were put by the Employer's Advocate. More significantly, the Insurer has merely put a couple of assertions and suggestions to Senehar Shaikh and consequently has failed to disprove the case put up by Senehar Shaikh and the assertions by the employer. Insurer thus even failed to prove its case. Extracted herein below is the cross examination of Senehar Shaikh for ready reference:

> "**Cross-examination by Advocate Miss Pradya Naik holding for Advocate Tidge for Opponent No.1.**
>
> Q: It is true that the Opp.Party No.1 has paid to you Rs.20,000/- for funeral expenses of your son?

Ans: Yes.

<u>Cross-examination by Advocate Mrs Kenjalkar for Opp.No.2</u>

Q: Whether you have filed your address proof?

A: No.

Q: I suggest that you are not residing in West Bengal?

A: It is not correct.

Q: It is true that you have not seen the incident?

A: Yes.

Q: I say that deceased was not 22 years old when he met with an accident?

A: Not correct.

Q: I say that deceased was not getting wages Rs. 7000/- p.m.?

A: Not correct.

Q: I say that the incident took place because of negligence of opponent no.1 for not providing safety belt?

A: Not correct.

Q: I say that Insurance Company is not liable for compensation?

A: Not correct.

Re-examination – Nil."

11. Interestingly, the Appeal raises various grounds. *Ex facie* these grounds are unsubstantiated. My analysis and reasons for rejecting the grounds are as under.

12. The Insurer contends that the Commissioner has not considered the facts, law and evidence. It is contended that no evidence was led by the Senehar Shaikh as well as the employer to disprove the case of the Insurer as set out in the written statement and therefore gives rise to a substantial question of law that requires interference from this Court in this Insurer's appeal. In support the Insurer relied upon the judgement of the Supreme Court in the case of *Shakuntala C Shreshti v Prabhakar M Garvali and Anr.*[1] which held that there must be some evidence that the employment contributed to the death of the deceased and it is required to be established that the death occurred during the course of the employment.

13. In the present case the Judgement of *Shakuntala C Shreshti (supra)* is clearly distinguishable. The basic and foundational facts that it had been a case of death in the course of employment have been established by the Senehar Shaikh. Her affidavit in lieu of examination in chief that stated the facts has remained uncontroverted. Thus, there is no substantial question of law so as to call for interference by this Court. Moreover, the Commissioner whilst dealing with issues 1 to 4 in paragraphs 8 to 11 of the judgement has dealt with both the evidence led and the failure of the Insurer to prove its case.

14. Upon perusal of the cross examination, it can be evinced that the Insurer failed to disprove the assertions of the specific case put up in the affidavit in lieu of examination in chief by Senehar Shaikh

1 (2007) 11 SCC 668

in cross examination. The Insurer also led no evidence to prove its case. It therefore cannot simply rely upon its averments in the written statement and contend that Senehar Shaikh failed to overcome the denials. Consequently, the Insurer's assertions have not been proved. The onus shifted once the Senehar Shaikh led evidence and offered herself to be cross examined. It is at this stage that the Insurer necessarily had to disprove Senehar Shaikh's case made out in the affidavit in lieu of examination in chief. On failure to do so it was required to lead evidence in support of its denials/assertions in written statement and offer its witness for cross examination. Since the Insurer failed to disprove Senehar Shaikh's case in any manner, now merely by raising a ground in the Appeal would not suffice for the Insurer.

15. The Supreme Court in the case of *C Manjamma vs The New India Assurance Co. Ltd.*[2] has held that a question of law would arise when the finding is perverse or when no legal evidence is adduced to establish the jurisdictional facts. The Insurer has not shown any other background aspect or any other clinching feature that caused death or laid any evidence that could attribute the cause of death to any other fact. The Supreme Court further held that if the view taken by the Commissioner had been a possible view of the matter in the given set facts and circumstances, there was no reason for the High Court to interfere with the same as it would not involve any substantial question of law within the meaning of Section 30 of EC Act.

2 (2022) 6 SCC 206

16. The next contention that the Commissioner misconstrued the case law and has not applied his mind to the pleadings is also baseless. The Commissioner has dealt with the issue of the accident (cause of action) and that can be evinced from paragraphs 8, 9 and 10 of the judgment. I find that the Commissioner has not only considered the pleadings of the parties, the evidence that was led but has applied his mind with regard to the law and rightly negatived the contentions of the Insurer. The learned Commissioner has rightly observed that the contentions raised by the Insurer were not pleaded. Further, upon perusal of the evidence and cross indicates that the Insurer has not disproved the case of the Senehar Shaikh nor proved its own case. Thus, in my view, this ground also deserves to be rejected.

17. Then the contention is that the Commissioner has ignored contradiction of evidence. Whilst the contention is raised, there are no particulars stated in the Appeal. Upon perusal the evidence and cross on record, I find no contradiction of evidence.

18. The ground in the appeal that the Commissioner has failed to appreciate 'the piece of evidence properly.' The ground is very loosely worded. The Appeal does not specify as to what 'piece of evidence' was not appreciated or considered by the Commissioner. Therefore, the reliance placed on the judgment in the case of *Usha Bai vs Yogendra Sing*h[3] which held that the Court has the power to interfere with or setting aside a finding of fact that is based on

3 2002 SCC OnLine MP 43; (2002)IIILLJ87MP(DB) misreading or ignoring of evidence, will not be of any assistance to the Insurer in the facts of this case.

19. The other inter linked contentions are that the employer-employee relationship is not established by the employer by leading any evidence or producing documents, the Commissioner has awarded amounts in absence of original documents substantiating the wages, the employment and the loss of income to the claimant and consequently the inferences drawn by the Commissioner are entirely misconstrued and erroneous.

20. The above contentions also deserve to be rejected as it is not substantiated by any particulars. The Commissioner in paragraph 10 has considered the FIR, the spot panchnama and the inquest panchnama and relied upon the statement of the employer with regard to the deceased being in their employment. The Commissioner has also considered the assertions made in the written statement filed by the employer and reiterated by Senehar Shaikh in her affidavit in lieu of examination in chief. therefore, it cannot be stated that the Commissioner has based his conclusions on mere inference. Moreover, the Insurer has neither called upon the witnesses to produce any documents nor raised any questions in cross-examination creating a doubt on the authenticity of the assertions in the examination in chief. The assertions made in the affidavit in lieu of examination-in-chief thus remain uncontroverted and therefore, proved. The above contentions is to say the least are thoroughly baseless and clearly an afterthought.

21. The Insurer is entirely wrong in contending that the learned Commissioner ought to have given credence to the assertions of the Insurer in the written statement. In this regard, the Supreme Court in the case of *Mahakali Sujatha v Branch Manager, Future Generali India Life Insurance Company Ltd. and another*[4] referring to Sections 101 to 104 of the Evidence Act stated as under:

> "41. … **Section 101 of the Evidence Act, 1872 states that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. This Section clearly states that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. Simply put, it is easier to prove an affirmative than a negative. In other words, the burden of proving a fact always lies upon the person who asserts the same.** Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Further, things which are admitted need not be proved. Whether the burden of proof has been discharged by a party to the *lis* or not would depend upon the facts and circumstances of the case. The party on whom the burden lies has to stand on his own and he cannot take advantage of the weakness or omissions of the opposite party. Thus, the burden of proving a claim or defence is on the party who asserts it.
>
> **42. Section 102 of the Evidence Act, 1872 provides a test**

4 2024 SCC OnLine SC 525

regarding on whom the burden of proof would lie, namely, that the burden lies on the person who would fail if no evidence were given on either side. Whenever the law places a burden of proof upon a party, a presumption operates against it. Hence, burden of proof and presumptions have to be considered together. **There are however exceptions to the general rule as to the burden of proof as enunciated in Sections 101 and 102 of the Evidence Act, 1872, i.e., in the context of the burden of adducing evidence : (i) when a rebuttable presumption of law exists in favour of a party, the onus is on the other side to rebut it;** (ii) when any fact is especially within the knowledge of any person, the burden of proving it is on him (Section 106). In some cases, the burden of proof is cast by statute on particular parties (Sections 103 and 105).

43. There is an essential distinction between burden of proof and onus of proof; burden of proof lies upon a person who has to prove the fact and which never shifts but onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. For instance, in a suit for possession based on the title, once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof, the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title vide *RVE Venkatachala Gounder* v. *Arulmigu Viswesaraswami and VP Temple*, (2003) 8 SCC 752.

44. In a claim against the insurance company for compensation, where the appellants in the said case had discharged the initial burden regarding destruction, damage of the showroom and the stocks therein by fire and riot in support of the claim under the insurance

> **policy, it was for the insurance company to disprove such claim with evidence, if any, vide *Shobika Attire* v. *New India Assurance Co. Ltd.*, (2006) 8 SCC 35.**
>
> **45. Section 103 of the Evidence Act, 1872 states that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.** This Section enlarges the scope of the general rule in Section 101 that the burden of proof lies on the person who asserts the affirmative of the issue. Further, **Section 104 of the said Act states that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. The import of this Section is that the person who is legally entitled to give evidence has the burden to render such evidence. In other words, it is incumbent on each party to discharge the burden of proof, which rests upon him.** In the context of insurance contracts, the burden is on the insurer to prove the allegation of non-disclosure of a material fact and that the non-disclosure was fraudulent. **Thus, the burden of proving the fact, which excludes the liability of the insurer to pay compensation, lies on the insurer alone and no one else.**

(Emphasis supplied)

22. Consequently, a mere denial in the written statement cannot be given credence for holding against the Senehar Shaikh who had not only made statements on oath, but those assertions have not been disproved by the Insurer nor substantiated its own case in accordance with Sections 101 to 103 of the Evidence Act. It is amply clear that the Insurer's Advocates have miserably failed to establish their case in cross examination although an appropriate defence was raised in the written statement. A division Bench of this Court in the case of *Sanjeev Builders Private Ltd. and Another v Life Insurance Corporation of India*[5] held that it is open to the court to consider the relevance and weightage to be given to any such statement in the examination-in-chief when there is no foundation laid in the pleadings whilst confirming the view of the judgement in the case of *Cesar Rego Fernandes v Angela Ninette Oliveira Fernandes and other*.[6]

23. The next contention that the Commissioner has drawn an inference regarding the age of the deceased as well as the computation to arrive at the compensation payable. On a bare perusal of paragraph 11 of the said judgment, it is clear that the Commissioner has relied upon a copy of the School Leaving Certificate which evinced the date of birth of the deceased and has accordingly confirmed the age of the deceased. It therefore cannot be contended by the Insurer that the Commissioner has erred in believing the age of the deceased. In paragraph 13 of the judgment, it is amply clear that the Commissioner has duly computed the compensation payable.

24. Another contention raised is that the Insurer is not liable for payment of any interest and penalty under the terms and conditions of the policy. In this regard the Commissioner relied upon the judgements in the case of *Ved Prakash Garg v Premi Devi*[7] and *LR*

5 2022 SCC OnLine Bom 2766

6 2007 SCC OnLine Bom 840: 2008 1 Bom CR 270 : 2008 3 AIR Bom R 310

7 (1997) 8 SCC 1

Ferro Alloys Limited v Mahaveer Mahato And Another[8] and correctly arrived at the conclusion that since there was a default of payment of the amount within one month the Senehar Shaikh was entitled to interest. Under the issue nos 6 & 7 in paragraphs 15 to 17, the Commissioner rightly held that the Insurer was liable to pay interest and the Employer was liable to pay the penalty equivalent to 50% of the compensation.

25. In my view therefore, the Commissioner has given sufficient reasons for each of his findings on each of the issues framed. I find no error, no substantial question of law involved and thus no need to set aside the judgement by this Appeal.

26. I therefore pass the following order:

(a) The Appeal stands dismissed.

(b) The Appellant is directed to pay the balance compensation, if any, along with interest to the Respondent No. 1/Claimant on or before 19th April 2024.

(c) No order as to costs.

(Kamal Khata, J)

8 (2002) 9 SCC 450