

Margarida Gomes and anr. Vs. Mackinnor Mackenzie and Co. Pvt. Ltd.

Margarida Gomes and anr. Vs. Mackinnor Mackenzie and Co. Pvt. Ltd.

SooperKanoon Citation : sooperkanoon.com/342021

Court : Mumbai

Decided On : Aug-08-1967

Reported in : AIR1968Bom328; (1968)70BOMLR62

Judge : Patel, J.

Acts : Workmen's Compensation Act, 1923 - Sections 4A and 32; [Indian Succession Act, 1925](#) - Sections 306; Bombay Workmen's Compensation Rules, 1934 - Rule 41

Appeal No. : Civil Revn. Appln. No. 62 of 1966

Appellant : Margarida Gomes and anr.

Respondent : Mackinnor Mackenzie and Co. Pvt. Ltd.

Advocate for Def. : J.I. Mehta, Adv. i/b., Crawford Bailey and Co., Solicitors

Advocate for Pet/Ap. : J. Das and ;S.T. Mascarenhas, Advs.

Judgement :

Patel, J.

(1) One Santo line Fernandes was employed by the Opponents M/s. Mackinnon Mackenzie and Co. Private Ltd., on their vessel 'm. v. Pandua' on May 4, 1960. In the course of his employment, he suffered, while removing certain articles in the

store-room of the ship injury to his eyes by chilly powder. He washed his eyes and to some extent he felt some relief. But in about 4 to 5 days' time a film developed in the eyes. The Chief Officer had no medicine for the eyes. At Kobe in Japan, the master of the ship took him to a Japanese doctor. At Ure he was taken to a hospital. From there when the ship reached Yokohama he was taken to a hospital and an operation was performed. The petitioner remained in the hospital for six days. He was then transferred to a cargo ship 's. s. Umaria' belonging to the respondents and brought to Bombay. He then gave notice of the accident because permanent defects developed in his eyes and then he made the application for award of compensation against the respondents, claiming a sum of R 5,600.

(2) During the pendency of the application, the employee died and his heirs, now the two petitioners, made an application to the Commissioner for being brought on record as legal representatives. This application was resisted by the respondents. The Commissioner held that there was no provision in the Act for bringing heirs and legal representatives on record of the case, that the dependents were entitled in their own right to seek remedy under the Act and that, therefore, the application of the petitioners to be brought on record was not tenable and the claim abated.

(3) The first question is whether the claim of the workman has abated.

(4) The question must depend, in the first instance, upon the terms of the Act itself. Prior to the passing of the Act, a workman who suffered injury had no remedy except when he could justify the claim for damages on the ground of tort. By the Workmen's Compensation Act, he became statutorily entitled for compensation for injury and death under S. 3, if he was a workman and if 'accident arose out of and in the course of this employment'. By the same section, his employer became liable to pay compensation in accordance with the provisions of Chapter II of the Act, except in the excepted cases. Section 4(1) prescribes the amount of compensation which is calculated on the basis of his monthly wages as in Sch. IV. In the cases of total disablement, in cases falling within Sch. I. proportionately to the loss of earning capacity in accordance with the prescribed percentage of loss in that Schedule and in other cases not specified in Schedule I, in proportion to the loss of his earning capacity.

(5) Section 4A provides that the compensation under Section 4 shall be paid as soon as it falls due. This means that the payment of compensation is not dependent upon the determination of the same by the Court or in its discretion. But it must be paid immediately it falls due. By sub-section (2) even if the employer disputes the amount on the basis of the extent of the liability which he admits and by sub-section (3) it is provided that if the employer is in default in paying the amount within one month from the date it falls due, the Commissioner may direct simple interest at the rate of 6 per cent per annum together with a sum not exceeding 50 per cent by way of penalty if the Commissioner finds that there was no jurisdiction for the delay. Examination of S. 11 indicates that even where the workman has suffered injury by accident and is entitled to compensation, his right to compensation is suspended under sub-section (2) of that section because of his refusal to submit to medical examination, if he dies without his medical examination having been done his dependants may be able to obtain the same. Even if an employer transfers his assets before making payment of the amount due when the liability has accrued before the date of the transfer. Section 14A creates a first charge on the transferred assets.

(6) I am clear, therefore, on the provisions of this Act that the liability in the case is created immediately on the accident occurring to the workman suffering injury and must amount to a debt payable to the workman.

(7) In this connection I may usefully refer to the decision in *United Collieries, Ltd. v. Isabella Simpson (or Hendry)* 1909 AC 383 where the question arose under the English Act of 1906 in a slightly different form the question being whether the right of the dependant of a deceased workman who died as a result of an accident arising out of the employment passes to the executor of the sole dependent who died without having made a claim Lord Loreburn L C (P. 389) said:

'Now when the Act says that the employer is liable to make compensation in the event of death in case there are dependants. Irrespective of their expectation of life, and they are described as the persons for whose benefit it is to be paid, that certainly looks like a debt arising on the death from employer to dependants. When I turn to the other provisions of the Schedule I think they fit this view'.

Lord Macnaghten expressed the view that as under the Act in the absence of an agreement, the amount of compensation in the case of death was to be paid into court and that there being no provision for any refund, would indicate that in the case of death when the liability once accrued and the right of the dependant came into existence, it fell upon the employer to satisfy the liability and that he had no further concern in the matter. Lord Dunfermline said, 'in view of the provisions of the statute, it seems to be impossible to contend successfully that the liability of the employer was not of the nature of a debt' Similar observations have been made in the earlier case in *Darlington v. Roscoe and Sons*. (1907) 1KB 219. In a similar case under the present Workmen's Compensation Act, following the decision in 1907 1 KB 219 the Andhra Pradesh High Court in *Radhakrishna Rice Mill Pendalapaka v. Gangalagurti Appalacharyulu*, 1958 1 LLJ 746 held that the right of dependant to get the compensation passed on to the heir of the defendant.

(8) In America, it seems the question has largely been decided by reference to the provisions of the statute under which compensation becomes payable. In *American Jurisprudence*. Vol. 58, in para 577, it is said: 'The survival of the right to compensation is dependent, in most jurisdictions, upon whether such compensation had become due and payable at the time of the death of the beneficiary' and in part 578 it is said: 'It is generally held that instalments of Workmen's Compensation which were due, but unpaid at the time of death of the beneficiary constitute assets of his estate, in the absence of any provision to the contrary' Similarly in *corpus Juris Secundum*, Vol. 100, para 417, it is said: 'Unless the Compensation Act provides otherwise, the general rules governing the abatement or actions apply in actions for compensation', and under the heading. 'Death of employee', it is said: 'Under some statutes it has been held that a proceeding for compensation does not abate on the death of the employee before an award, and the death of the employee does not deprive the commission or board of jurisdiction to proceed further'.

(9) Since under the Act, the liability accrues on the accident or the death occurring it cannot abate unless there is in law some provision by reason of which it ceases. It is argued by Mr. Mehta that Section 306 of the Indian Succession Act is such a provision which reads as follows:

'All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour or against a person at the time of his decease, survive to and against his executors or administrators: except causes of action for defamation assault as defined in the Indian Penal Code or other personal injuries not causing the death of the party and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory'.

It is argued that the words used in the exception are large enough to exclude all personal injuries which dispossess not cause the death of the party and the present must be regarded as such injury. The question is whether this contention is sound.

(10) This Section is based on the ancient common law rule *actio personalis moritur cum persona*. as to which Sadashiva Ayyar J, in *Rustomji Dorabji v. Nurse*, ILR 44 Mad 357=AIR 1921 MaD 1 said:

'I may add that it seems to me to be based upon no principle of justice, equity or good conscience and that the technical common law rules as to forums of action and the distinction between real and personal actions might have had much to do with its survival in modern days,'

I agree, with respect, with the said observation. This maxim was considered in the case of *United Collieries Ltd.*, 1909 AC 383 (referred to earlier) by the House of Lords Macnaghten (391) observed that the application of the maxim is limited to actions in which remedy is sought for a tort or for something which involves, at any rate, the notion of wrong-doing and this is generally the opinion expressed in decided cases, to which I have already referred.

(11) The language of Section 306 of the Succession Act may no doubt appear to be general, but it is not always that a word of general import must necessarily receive a general and wide meaning. The words 'other personal injuries' not causing the death of the party' are preceded by the words 'defamation, assault as defined in the Penal Code' The words 'other personal injuries..... ' must therefore receive colour from the earlier words and ought to be construed *eiusdem*

generis with the words preceding. ILR (1904) 31 Cal 993. The other High Courts also agreed that the words 'other personal injuries not causing death of the party' should be construed ejusdem generis as has been done by the Calcutta High Court, but differ from it in holding that they include injury caused by malicious prosecution. See ILR 44 Mad 357=AIR 1921 Mad 1, Punjab Singh v. Ramautar Singh, 4 Pat LJ 276=AIR 1920 Pat 841; Motilal Satyanarayan v. Harnarayan Premsookh 47 Bom 716=AIR 1923 Bom 408 and Mahtab Singh v. Hub Lal : AIR1926 All610 . The preponderance of the view, therefore, of the Courts in India is that the words 'other injuries' must be confined to the injuries of the nature referred to earlier.

(12) Under the Act, the compensation becomes payable not because of a tort, or wrong doing by the employer. 'Liability under the Workmen's Compensation Act has no connection with any wrong-doing on the part of the employer. It does not result from any neglect or any default on his part. Indeed, in the case of death, or 'serious and permanent disablement', the event may be the consequence of 'serious and wilful misconduct' on the part of the workman while the employer is wholly free from blame, and yet compensation may be recoverable all the same' (United Collieries case 1909 AC 383. Under the present Act, the liability is negatived under Section 3(1)(b) only if the workman has been at the time of the accident under the influence of drink or drug or has disobeyed willfully an express order or an express rule for the purpose of securing safety of workmen or has willfully removed or disregarded any safety guard or other device which he knew to have been provided for the purpose of safety of workmen. Except in these limited cases, in all other cases of accident, the workman is entitled to compensation. Section 306 of the Succession Act, therefore, has no application in the present case.

(13) My attention has been invited to Halsbury's Laws of England, 2nd Edition, Vol. 34, page 398, para 1232, where it is said:

'The right to recover is not transmitted by the injured workman to the dependants.....',

and the cases referred to in foot-note (h), in particular the decisions in *Manton v. Cantwell*, 1920 AC 781 and *Cleverley v. Gas, Light and Coke Co.*, (1907) 24 TLR 93. These cases have in my view absolutely no application to the facts of the present case. The question in each of the cases was whether by reason of an agreement made by the employer with the employees who had sustained an accident, the employer was estopped from contending, that the accident did not arise out of and in the course of employment or that the workman was not employee in an application made by the dependants to obtain in case of death of the employee by the accident was independent of the employee, there could be no estoppel by reason of the agreement.

(14) The further question then is whether the application abates, and the petitioners must file a second application for the purpose. This is not a case where the death has occurred by reason of the accident taking place in the course of the employment. By reason of the accident personal injury was caused to the workman. The petitioners would have been entitled to present an application if death had occurred as a result of the accident. In the present case however they would not be able to make an independent application in their own right, since the death has occurred by reasons extraneous to the accident. The right of the workman himself having survived, is it necessary that they should be driven to any other proceeding either under the Act or under the general law? I think, not.

(15) Under Section 32 of the Act, the State Government is entitled to frame rules to carry out the purposes of the Act and under sub-section (2) it is entitled to make rules for prescribing the procedure to be followed by the Commissioner in the disposal of the cases under the Act. Under the powers vested in it, the State Government by Rule 41 has applied some of the provisions of the First Schedule of the Civil Procedure Code to a proceeding under this Act. Nonetheless, as the right given by the Act is transmitted to the petitioners, the application cannot be dismissed, since there is no provision for the dismissal of an application of the ground of death. It has to be prosecuted and conducted to its legitimate end. There is no prohibition in the Act and the rules framed under Section 32, that the heirs cannot be brought on record. In law all procedure is permissible as is not specifically prohibited. *Abdul Gani Sumar v. Reception Committee of the 48th*

Indian National Congress, 38 Bom LR 380=AIR 1936 Bom 250 and Narsingh Das v. Mangal Dubey, ILR (1882) 5 All 163. If so, in my view the petitioners are entitled to be brought on record of the proceeding.

(16) I accordingly set aside the order made by the learned Commissioner and direct that the petitioners be brought on record of the case and the case be proceeded with from the stage from which it was left. There will be no order as to costs.

(17) Order set aside.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com