

P.E. Davis and Co. Vs. Kesto Routh

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Court : Kolkata

Decided On : Feb-03-1967

Reported in : AIR1968Cal129,(1968)IILLJ393Cal

Judge : D.N. Sinha, C.J. and ;A.K. Mukherjea, J.

Acts : Workmen's Compensation Act, 1923 - Sections 3, 4(1) and 24A; ;Bengal Workmen's Compensation (Amendment) Act

Appeal No. : A.F.O.O. No. 136 of 1961

Appellant : P.E. Davis and Co.

Respondent : Kesto Routh

Advocate for Def. : Manick Lal Mukherjee, Adv.

Advocate for Pet/Ap. : Mahadev Ghose, Adv.

Disposition : Appeal allowed

Judgement :

A.K. Mukherjea, J.

1. There is an appeal against the judgment and order dated 30th November, 1960 passed by the Commissioner for Workmen's Compensation.

2. The facts of the case are as follows: The petitioner Kesto Routh was a workman employed by a contractor of the opposite party P. E. Davis and Company, a firm of stevedores who were registered under the Calcutta Dock Labour Board. I shall refer to the petitioner as Routh hereinafter. On the night of 30th April, 1959, Routh was working on board the vessel S. S. Fern Leaf which was berthed at the King George's Dock buoy. Routh was assaulted by the crews of the said vessel and received certain injuries in his neck, chest, head, eyes, ears, teeth and almost all over the face. At the time of this incident Routh was receiving a sum of Rs. 172.50 P. as monthly wages. Routh claims compensation from the opposite party for the injuries which he had received at a time when he was in their employment.

3. The opposite party in its written statement has resisted the claims of Routh mainly on the following grounds:

(i) that the applicant did not receive the injuries out of and in the course of stevedoring work.

(ii) that the average monthly wages of the applicant were not correctly stated in the claim petition.

On these pleadings the learned Commissioner for Workmen's Compensation framed the following issues:

(1) Was there any accident arising out of and in the course of the applicant's employment?

(2) What is the rate of monthly wages of the appellant?

(3) Has the applicant sustained any permanent partial disability? If so, to what extent?

4. Apart from Routh who himself gave evidence, five other witnesses were examined by the applicant in support of his case. Routh stated the circumstances in which he had received the injuries. He says that he is an employee of the Dock Labour Board, his status being that of a 'khamali'. He was working in the second shift on the night of 30th April, 1959 on S. S. Fern Leaf. At about 2 or 2-30 A.M. he

became thirsty and came to the dock for some drinking water. He asked the foreman who suggested that he should go and find out where water could be found. He found water in a room in the rear portion of the ship and drank it. While he was coming out of that room, two European 'Sahibs' fisted him. He fell down and apparently fainted and did not know what happened thereafter. He says that he had noticed the two 'Sahibs' in another room while he was entering the room where he found the drinking water. The 'Sahibs' did not object to his going into that room at that time. He also deposed that when a ship is in the mid-stream, as S. S. Fern Leaf was on that occasion, the workmen get their drinking water on board the vessel itself. He says that the stevedore did not make any arrangement for drinking water and there was no notice prohibiting the drinking of water on the vessel. Routh was incapacitated as a result of the assault for three months and seventeen days. He received Rs. 626.75 nP. as injury leave allowance. At the time of the incident his earning was between Rs. 100 to Rs. 200 per month. Routh says that he cannot see well or hear well even now and that he feels pain in several parts of his body. In cross-examination he said that he was working in the hold of the ship and that there was nobody with him when he went to drink water. He cannot suggest any reason why he was beaten. A suggestion was made to him that he had gone to sleep in the cabin of a Sahib but he denies that. He also denies the suggestion that he had entered the cabin of a crew for committing theft. He says that he gets 'a guaranteed wages of Rs. 134/8/-'. He further admits that he is still doing the work of a khamali and is getting the same wages but, he complains, cannot work to the same extent any longer and other members of his gang have to work for him. (After discussing the evidence in Paras 5 to 10 the judgment proceeded).

11. On the first question as to whether the injuries sustained by Routh were received in an accident arising out of and in course of employment', it has been answered in the affirmative by the learned Commissioner. It was suggested on behalf of the appellant's that it was no part of the workman's employment to go into the cabin or to go near the cabin of the crew of the ship and that, therefore, the injuries that he received cannot be said to have been received in course of employment. What was sought to be argued is that at the exact moment or even shortly before the moment of receiving the injuries the workman was not actually

engaged in the job which it is his duty to carry out in terms of his employment, i.e. to say, he was not engaged in the job of a Khamali. This objection which is based on a very narrow construction of the words 'arising out and in course of employment' is not tenable. Even when there is a short break or a recess, the course of employment is not interrupted. It has been held in India as well as in England and America from where the concept of workmen's compensation has been borrowed and imported to India that an injury received within reasonable limits of time and space for instance, in cases where the workman meets with an accident while in the act of satisfying thirst or satisfying his bodily needs in the use of food, drink and even tobacco, is to be regarded as employment injury i.e., to say, injury received in course of employment. In *K. Ramabrahmam v. Traffic Manager, Vizagapatam Port*, AIR 1943 Mad 353 a contractor of the Vizagapatam Port authorities employed labourers for loading manganese ore into ships at a dump within the harbour premises. The hours of work were from 2 P. M. to 10 P. M. It was usual for labourers to take refreshments in turn after they had worked for several hours. Two of these workmen had left the harbour premises to drink some coffee and after having partaken of coffee returned to the harbour premises to resume their work. They took a short cut for which they had to cross certain railway lines. While crossing these lines a railway engine ran into them and both were killed. A Division Bench of the Madras High Court held that the accident which befell these workmen was one which arose out of and in the course of their employment. In *Cook v. Gateshead Corporation*, (1944) 37 BWCC 106 a worker during a short recess of twenty minutes for mid-day meal went away from his place of work in a lorry to have his meal in a place with better facilities and came across an accident. It was held that there was no cessation of employment and the workman was entitled to compensation for the injuries he had received. Mid-day meals and refreshments have been considered incidental to employment in various other cases. See, for instance, *Scott v. Seymour*, (1941) 2 All ER 717; *Blovelt v. Sawyer*, (1904) 1 KB 271; *Armstrong, Whitworth and Co. Ltd. v. Bedford*, (1920) 13 BWCC 68; *Knight v. Howard Wall Ltd.*, (1938) 4 All ER 667. Similarly, when the workman goes to answer a call of nature, the course of employment continues without a break. See, *Doncaster v. Tinsley Park Colliery Co. Ltd.*, (1943) 36 BWCC 10. Accidents happening on the way to reach lavatory

Fernley v. Bates, (1919) 10 BWCC 308 have been held to be accidents arising out of and in course of employment. The principle underlying all these cases is that an act which is reasonable or necessary, having regard to all the circumstances, though not one which is part of the workman's original duty may be within the sphere of his employment. What is necessary is that there should be a causal connection between the accident and the employment and further that the cause should be a proximate cause and not a very remote cause. But at the same time it has been held repeatedly that if a workman in the course of his employment has to be in a particular place and by reason of his being in that particular place has to face a situation in which he receives injuries that fact itself would be a sufficient casual connection between the employment and the accident. In this case the workman was on board the ship in course of his employment. But for his employment he had no reason to be there. A workman while in employment must necessarily be subject to all the needs and calls of nature to which any other man would also be subject. The need of a labourer, who is doing loading operations in the ship, for drinking water now and then must be taken to be an essential and unavoidable contingency. Therefore, if he goes to drink water or even to look for water and gets assaulted while doing so, it must be taken that the assault took place while he was in course of his employment.

12. There were a number of suggestions in the cross-examination that the workman concerned trespassed into the cabin of a crew or in officer and that is why he was assaulted. There is also a suggestion that he was caught red-handed while committing theft in one of the cabins. These are all airy suggestions not backed up by any positive evidence in support of these allegations. No Court can decide anything on the basis of mere suggestions in cross-examination, The evidence is that the workman was found injured in front of a cabin. There is also evidence that there was a bathroom near the place where the workman lay unconscious. There is further evidence that another workman also went to drink water to the same place and indeed did have a drink there. Since we have to rely on evidence and cannot make out a case based on speculation, we do not see how we can come to any finding on the first issue other than what the learned Commissioner came to. It is undoubtedly true that the fact that the workman was suddenly assaulted seriously by the crew gives rise to a suspicion that this could

not have been unprovoked and that he must have done something to offend their susceptibilities. There is, however, nothing on evidence to support that suggestion. Even the witness on behalf of the opposite party does not say that immediately after the incident he had met anybody, who made any allegation against the workman. In view of the evidence that is on record we find ourselves in agreement with the learned Commissioner on this issue.

13. On the second issue the learned Commissioner's finding was that the workman fell within the wages group of Rs. 100 to Rs. 200 per month. The workman's petition as well as the evidence on record support this and we have no hesitation in accepting this.

14. The third issue as to the amount of permanent partial disability, in our opinion, has not been properly dealt with. In any case, it does not appear that the learned Commissioner appreciated the real importance of measuring the amount of permanent partial disability. Indeed, the misapprehension from which the learned Commissioner apparently suffers is one which seems to be all too common in the cases that have been coming up on appeal before us. What the Commissioner has to assess is really the loss of earning capacity of the workman. That is a question of fact and has to be assessed on evidence adduced before the Commissioner. The medical evidence regarding the extent of physical disability sustained as a result of an accident is only one of the factors in measuring the loss of earning capacity. The compensation has to be awarded in proportion to the percentage of loss of earning capacity. There are certain scheduled injuries in regard to which the percentage of loss of earning capacity has been statutorily fixed so that in those cases the Commissioner has only to refer to the appropriate schedule and find out the quantum of compensation that has to be awarded to the workman. But where the Commissioner has to deal with cases of permanent partial disablement inflicted by injuries which are not scheduled, the provisions of Section 4(1)(c)(ii) of the Workmen's Compensation Act are attracted and the Commissioner has to assess the compensation in terms of those provisions. In assessing the compensation in such cases the most important and, indeed, the paramount thing that the Commissioner has to consider is the loss of earning capacity. There can be no question that diminution of physical powers or any

disablement of the body would in most cases affect the efficiency of the workman and also adversely affect his earning capacity but there is no arithmetical relation between the amount of disability and the amount of diminution in earning capacity in such cases. Indeed, everything will depend on the nature of the work that a workman has to do, the nature of the injury as well as on other environmental circumstances. As Chakravarti. C. J. observed in the case of *Kalidas Ghoshal v. S. K. Mondal* : AIR1957 Cal660 .

'It may very well happen that in spite of the weakening or even loss of a limb the capacity of the affected workmen to do the kind of work he was accustomed to do has not in the slightest degree been affected, nor has any difficulty arisen in the way of his getting employment of the usual kind by reason of the injury. In such a case in spite of the physical injury and the effect of it, there will be no loss of the earning capacity. On the other hand, it may happen that the diminution of physical powers or the destruction of a limb makes it impossible for the affected workman to do the kind of work he used to do formerly with equal efficiency as a result of which, although he finds it possible to obtain remunerated employment, he is not offered remuneration at the old rate. In such a case, there will be a reduction of the earning capacity but not total loss. Total loss will occur where, by reason of the infirmity caused by the injury the affected workman is unable altogether to perform duties of the nature he had been accustomed to perform and to obtain any employment because of his total incapacity for work. But total loss of earning capacity may also occur in another way. It may be that the particular physical injury suffered by the workman, such as the loss of an eye or loss of an arm has not in fact affected the workman's capacity for doing the kind of work he had been accustomed to do, and that physically he is still in a position to perform the same kind of work with an equal degree of efficiency and yet it may be that because of the visible disfigurement, he is refused employment by every one so that his labour has become altogether unsaleable in the market where he can take it and therefore his capacity for earning remuneration by work has in fact disappeared although physical capacity has not. The loss of earning capacity is not necessarily coextensive with the loss of physical capacity and certainly the former does not prove the latter.'

15. I have no hesitation in accepting with great respect the principles enunciated by Chakravartti, C. J. in their entirety. But in spite of the thoroughness and excellence of Chakravartti C. J.'s formulation it appears that these principles are consistently disregarded in most cases of workmen's compensation and Commissioners confuse between the measure of loss of earning capacity and the measure of permanent partial disability and base their judgment entirely on medical evidence. In a recent case, viz., the case of Baldeo Prasad Agarwalla v. B. P. Sukul, (1967) 71 Cal WN 167 my Lord the Chief Justice has in a judgment to which I was also a party, reiterated these principles in very strong language. His Lordship has in no uncertain manner condemned the practice of taking as decisive the evidence of the medical witness on the question of loss of earning capacity. In the instant case, the Commissioner has done exactly the thing that has been forbidden and disapproved in these cases. As in the case of B. P. Agarwalla (1967) 71 Cal WN 167 (supra), here also the learned Commissioner has not even raised an issue about the diminution in earning capacity and he has talked of percentages as if the injury and the diminution in earning capacity are co-extensive. It is strange that even the doctor who gave evidence merely said: 'I have assessed 30 per cent.' Standing by itself those words mean next to nothing. He does not even say what is the thing the percentage of which has been assessed by him at thirty per cent. With reference to the context where he has been speaking of physical injuries one can by some sort of remote suggestion perhaps refer the assessment to physical disability but it is impossible to connect that evidence with loss of earning capacity. It is interesting and rather surprising to find that the Commissioner reads the same words and has no difficulty in interpreting it as evidence of the assessment of permanent disability. The Commissioner's finding on this issue is recorded with the utmost economy. I can do no better than quote the words:

'As regards the question of permanent disability, I have carefully considered the medical evidence and find no reason to differ from the assessment thereof as made by Dr. Article M. Bhattacharjee, P. W. 2. In other words, I assess the loss of earning capacity of the petitioner at 30 per cent.'

16. Obviously, the Commissioner equates permanent disability with loss of earning capacity. We have no hesitation in rejecting the finding of the Commissioner on the question of loss of earning capacity. There is no evidence on record about the loss of earning capacity. On the other hand, the evidence is that the workman has been getting the same wages now as he used to get before the accident. These are supposed to be 'guaranteed' wages but we do not see why the fact that they are guaranteed wages would make any difference in regard to this matter.

17. In view of our finding on the most important issue of loss of earning capacity, it is obvious that the petitioner is not entitled to any compensation. The appeal must succeed and the workman's application must fail. We, therefore, order as follows: The appeal is upheld. The Commissioner's order dated 30th November, 1960 is set aside. The workman's application dated 20th January, 1960 is dismissed. In the fact and circumstances of the case we make no order as to costs.

Sinha, C.J.

18. I agree.