Ali Akbar Vs. Java Bengal Line

Ali Akbar Vs. Java Bengal Line

SooperKanoon Citation : sooperkanoon.com/866918

Court : Kolkata

Decided On : May-26-1937

Reported in : AIR1937Cal697

Appellant : Ali Akbar

Respondent : Java Bengal Line

Advocate for Pet/Ap. : Mr. Bhattacharjee

Judgement :

Costello, Ag. C.J.

1. This is an appeal from a decision of the Commissioner for Workmen's Compensation, Bengal dated 21st July 1936, whereby he dismissed a claim for compensation which had been made by one Ali Akbar against the Java Bengal Line. The applicant was claiming a sum of Rs. 756. We are not told that sum represented 40 per cent. of the sum which, having regard to the wages that the applicant was receiving, would be payable for total permanent disablement. The accident in respect of which the claim was made occurred on 3rd March 1936, while the applicant was serving in the M.V. Tosari belonging to the respondent. It is said that the applicant received treatment in the ship for a few days and was also treated in some hospital. But as to that there was no evidence at all before the learned Commissioner. The application was dated 22nd May 1936 and along with it the applicant submitted a certificate given by Lieut. Col. Denham White, a

medical practitioner who was until recently in the Indian Medical Service. That certificate is dated 20th May 1936.

2. The matter seems to have been first dealt with by the Commissioner on 13th June 1936. On that date he recorded this note on his order-sheet: 'P.F. evidence sufficient. Issue summons at 40 per cent.' That somewhat cryptic entry seems to mean this: The learned Commissioner was of opinion that the case put forward by the applicant was sufficient to establish prima facie a right to compensation and so a summons should be issued upon the employers requiring them to put in a written statement and make answer upon the footing that the claim was for an amount computed on the basis of 40 per cent. permanent disablement. As I have already stated, however, there is nothing in the application itself to indicate what was the actual basis of the claim. Therefore although a copy of the application was sent with the summons and particulars of the claim were stated to be contained therein, very little information was in fact given to the employers as to the precise nature and extent of the claim they were required to meet. However, on the 16th June 1936 the Java Bengal Line wrote a letter which was treated as the written statement called for by the summons. That letter was filed on the 22nd June 1936. The material part of it is as follows:

We are prepared to pay him any compensation that you may fix provided he can produce a certificate from a competent Medical Officer appointed by you stating that his injuries are of a permanent nature, the cost of the necessary certificate being borne by us, should we eventually be called upon to pay compensation, otherwise the cost to be for his account.

3. It appears, therefore, that the employers adopted an entirely reasonable and proper attitude. They do not seem to have disputed the fact that there was an accident and they did not dispute their liability to pay such amount as might be awarded by the Commissioner after an independent medical examination had taken place. On receipt of that written statement the learned Commissioner on the 22nd June recorded the following order:

Written statement filed by the Java Bengal Line praying for a medical assessor to sit with a Commissioner on the date of hearing. They have agreed to bear the cost

of the medical assessor. Prayer granted. Enquire from Dr. McCay whether he will be able to sit as a medical assessor on the 21st Just 1936.

4. Then under date 8th July 1936 we find this entry:

Read letter dated 7th July 1936 from Dr. McCay. Fix 21st July 1936 for hearing of the case and inform both parties.

5. We are concerned therefore with the events which took place on the 21st July 1936. At first sight it seemed as if this appeal was not competent because on the 21st July the learned Commissioner 'framed' one issue only and that was 'is there any permanent disability?' Generally speaking, the question of whether a workman has become subject to a disability or permanent disability is one a question of fact. The learned Commissioner came to the conclusion that there was no permanent disability and at the outset it rather appeared as if there was no question to be argued before us save the question whether the applicant Ali Akbar had been permanently disabled. If that were indeed the only question, then there would be no right of appeal, for the right to appeal is strictly limited and can only be had under the terms of Section 30 of the Act which contain the proviso that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and, in the case of an order other than an order such as is referred to in Clause (b), unless the amount in dispute in the appeal is not less than Rs. 300. As regards the amount in dispute, there was no difficulty, but it did seem originally that there was no substantial point of law involved.

6. The learned advocate appearing for the appellant has however challenged the legality of the procedure adopted on the 21st July by the learned Commissioner. The matter is raised by ground No. 3 in the memorandum of appeal which is in these terms:

The learned Commissioner was wrong in appointing an assessor to examine the applicant, there being no provision under the Workmen's Compensation Act to appoint such assessor, nor was there any occasion for such appointment and Dr. McCay is not competent to sit as assessor.

7. It seems that the course of events was something like this. Having perused the application, and the certificate of Lieut. Col. Denham White attached to it, the learned Commissioner took the view that there was a prima facie case and that therefore he was entitled and indeed required to call upon the employers to make answer to the claim. The answer made was-as I have already stated-that the respondents were prepared to abide by his decision provided the appellant was examined by some independent medical man and he should say that there was disablement. Before dealing with the main points which have been urged on behalf of the appellant, I am constrained to say that in our opinion the procedure adopted by the learned Commissioner was wholly irregular in that he did not strictly comply with the provisions of Rule 20, Workmen's Compensation Rules 1924. Rule 20 is in these terms:

(1) On receiving such application, the Commissioner may examine the applicant on oath or may send the application to any officer authorized by the Local Government in this behalf and direct such officer to examine the applicant and his witnesses and forward the record thereof to the Commissioner; (2) The substance of any examination made under Sub-rule (1) shall be recorded in the manner provided for the recording of evidence in Section 25.

8. Section 25 says this:

The Commissioner shall make a brief memorandum of the substance of the evidence of every witness as the examination of the witness proceeds, and such memorandum shall be written and signed by the Commissioner with his own hand and shall form part of the record.

9. The joint effect of Rule 20 and Section 25 therefore is that before proceeding with the matter of an application, the Commissioner must first of all either by himself or by some officer authorized by the Local Government, take evidence from the applicant in order to ascertain whether there really is a prima facie case and so whether there is in fact any case for the employers to answer. Rule 21 provides:

The Commissioner may, after considering the application and the result of any examination of the applicant under Rule 20 summarily dismiss the application if, for reasons to be recorded, he is of opinion that there are no sufficient grounds for proceeding thereon.

10. That Rule does not come into the present case, because there was no result of the 'examination of the applicant' for the Commissioner to consider. All that he could consider and apparently did consider was the application itself, the medical certificate attached to it, and it was upon his consideration of these documents that he thought there was a prima facie case. A fortiori he might have thought there was a case and would most likely have thought that there was a prima facie case, bad he in addition taken oral evidence as required by Rule 20. As Rule 21 did not come into operation in the circumstances of the case, the matter might have been dealt with as directed by the provisions of the next Rule, i.e. Rule 22 which is in these terms:

If the application is not dismissed under Rule 21, the Commissioner may, for reasons to be recorded, call upon the applicant to produce evidence in support of the application before calling upon any other party and, if upon considering such evidence the Commissioner is of opinion that there is no case for the relief claimed, he may dismiss the application with a brief statement of his reasons for so doing.

11. That provides for an intermediate position as it were but it was not availed of by the Commissioner, so the matter came under Rule 23 which is as follows:

If the Commissioner does not dismiss the application under Rule 21 or Rule 22, he shall send to the party from whom the applicant claims relief a copy of the application, together with a notice of the date on which he will dispose of the application, and may call upon the parties to produce upon that date any evidence which they may wish to tender.

12. It is quite obvious that the learned Commissioner did not properly or indeed at all comply with the Rules I have quoted. He acted in the first instance, as far as one can see, solely upon what was stated in the application itself supported as it

was by the medical certificate, we have thought it right to call attention to the irregularity in procedure for the guidance of the Commissioner for Workmen's Compensation in the future rather than for present purpose, because the irregularity which occurred is one which clearly operated in favour of the applicant, that is the workman, who is the appellant before us. That being so, it is obviously not open to him to come before this Court and make any complaint with regard to it and in fact he has not done so. There is nothing in the grounds of appeal which can reasonably be taken to be the making of a grievance of the fact that the applicant was not required to give evidence before the Commissioner prior to the time of issuing of the summons upon the respondents. There seems to be no doubt that the learned Commissioner was influenced and indeed induced to take the course he did by the presence of the certificate of Lieut-Col. Denham White. That certificate is in these terms:

Ali Akbar reports an injury to the back on 3rd March 1936; there is now great pain over lumber spine and in left hip joint and undue prominence of left great trochanter. There is no crepitus now, but movements are painful, and he is unable to take weight on the left side. There has in my opinion been a fracture of the pelvis, but without an X Ray I am unable to estimate its extent, with the facts at my disposal. I should estimate the permanent disability at 40 per cent. of his earning capacity.

13. It is clearly upon the basis of that statement that the learned Commissioner made the order 'Issue summons at 40%'. How that percentage was estimated and on what basis the figure 40% was given rather than any other figure, we do not know. The fact remains however that it did undoubtedly in the first instance influence the mind of the learned Commissioner. That was entirely and definitely wrong. The learned Commissioner neither at that stage nor at any other stage should have paid any attention whatever to a medical certificate no matter how eminent the giver of it might be. It has been laid down in England on more than one occasion that medical certificates are not of themselves admissible in evidence. If the workman on his side and the employers on their side desire to put medical testimony before the Court, they must do so by calling medical witnesses. In this connexion, I will refer to one authority only: Richards v. Sanders & Sons

(1912) 5 B W C C 352. In that case the workman (a painter) claimed compensation for a strain to his heart which he said occurred whilst he was at work on a scaffold. The Judge accepted the applicant's evidence as to the nature of the accident and the manner in which it happened and admitted as evidence, although objection was made, three certificates of a certain doctor (who had failed to attend on subpoena) and on the strength of these certificates awarded compensation to the workman. The employers appealed and the Court of Appeal held that the certificates were inadmissible. The Master of the Rolls (Cozens-Hardy) said:

It would be the worst example if we did not allow a new trial here. Three certificates were deliberately tendered in evidence and objected to and yet they were put in. It has not been attempted to support them. I feel great surprise that the workman's counsel persisted in putting them in when they were objected to. There must be a new trial and the costs of this appeal must be the appellant's costs in any event.

14. In the light of that authority, it is manifest that there was irregularity of procedure in the present case in that the learned Commissioner allowed himself to be influenced into thinking that there was a prima facie case by the fact that there was a doctor's certificate attached to the application. That certificate ought to have been disregarded altogether and the learned Commissioner should have proceeded as directed by Rule 20. In regard to this however, no complaint can be made by the appellant. The irregularity such as it was operated wholly in his favour.

15. I now come to the matter which is the real basis of this appeal. The employers having in effect said that they had no objection to the payment of compensation if it was found by independent medical examination that there was disablement, the learned Commissioner sought the services of Dr. McCay. The heading of the order or more accurately the decision or award given on 21st July 1936 as recorded by the learned Commissioner is 'Parties present: Dr. McCay sits as assessor'. The judgment is a short one and reads as follows:

Dr. McCay examined the applicant exhaustively in my presence and in the presence of opposite party and the applicant's pleader. He advises me that there is now no disability at all and that the fracture of the pelvis, if any, has completely healed. This confirms my own opinion derived from the fact that I observed no distortion of posture, lack of nutrition, difficulty in movement. I find as a fact that there is no disability.

16. I pause here to make the observation that but for the circumstances that the appellant is challenging the regularity and indeed the legality of the procedure, that finding would have been entirely conclusive. The learned Commissioner then proceeds thus:

No other matter was in dispute. Parties did not wish to argue or adduce further evidence. I therefore dismiss the claim and I award Rs. 5 nominal costs to opposite party.

17. Then follows the following observation 'in view of the obvious attempt to obtain compensation by fraud'. Mr. Bhattacharjee appearing for the appellant has argued that the course adopted by the learned Commissioner was wholly irregular and illegal in that he had no right to summon Dr. McCay to his assistance; that he had no right to have Dr. McCay sitting as assessor, and that in any event it was quite wrong that Dr. McCay, if he was functioning as assessor, should himself examine the applicant, that is to say, make a physical examination of the applicant. It was further urged that it was altogether wrong that the learned Commissioner should have acted upon the opinion arrived at by Dr. McCay as a result of such examination. Mr. Bhattacharjee has argued that the law in India is essentially different from what it is in England and there is really no provision in the Workmen's Compensation Act, 1923 for any procedure of the kind adopted by the learned Commissioner in this matter. There is no doubt that the law in this country is somewhat different as regards using the services of experts for the determination of Workmen's Compensation cases. But it is not essentially and vitally different. In my opinion, so far as it is different, it gives greater latitude to the Commissioner for Workmen's Compensation, Bengal, than there would be in the case of a County Court Judge in England sitting as arbitrator under the Workmen's

Compensation Act, 1925. The matter is dealt with in Section 20 of the Indian Act which in Sub-section (3) says:

Any Commissioner may, for purpose of deciding any matter referred to him for decision under this Act, choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry.

18. Mr. Bhattacharjee in elaborating his second and subsidiary point (ground No. 2) sought to argue that in any event Dr. McCay was not competent to sit as an assessor because it was not known at the time that he was a person possessing special knowledge of the matter or any matter relevant to the matter under inquiry. I need hardly say that is not an argument which meets with any favour with us. Dr. McCay is apparently a gentleman of high medical qualifications, at any rate he is a duly registered medical practitioner and as such obviously a person whose assistance might be taken by the learned Commissioner in a matter of this kind. But the objection put forward by Mr. Bhattacharjee goes deeper. It is quite clear to my mind that under the provisions of Section 20(3) it was open to the learned Commissioner to avail himself of the services of a medical practitioner for the purpose of deciding the issue which he himself had framed, namely whether there was any permanent disability or not. It has to be borne in mind that neither side gave any evidence whatever before the Commissioner. As I have already pointed out, the applicant was not required to give evidence either himself or by witnesses prior to the issue of the summons upon the respondents. When the matter came on for hearing, that neither the applicant nor the respondents, we find, desired to call any evidence at all. It is recorded 'parties did not wish to argue or adduce further evidence.' What the precise significance of the word 'further' is I am quite at a loss to understand, because up to that moment there had been no evidence. So that it was not a question whether the parties wished to give further evidence, but whether they wished to give any evidence and in fact they did not. The learned Commissioner was, therefore, in this position. He had to make up his mind and decide the matter with the assistance of the expert whom he had called in for the purpose. There being no evidence, the learned Commissioner as regards the medical aspect of the case was very much in the same position as he would have

been if doctors had been called on either side and had given contradictory evidence. If there had been medical testimony produced on behalf of the workman, and opposing it, medical testimony on behalf of the respondents, the learned Commissioner might then have found himself in such a position as would have made it quite impossible for him to decide the matter one way or the other. It obviously would then have been a reasonable and proper course for him to take to invite his medical assessor himself to conduct an examination of the applicant, in order that his opinion might, if I may use the expression, turn the scale one way or the other. That would be not only a reasonable but a proper course is shown by the case in Smith v. Foster (1913) 6 B W C C 498, the headnote of which is as follows:

Conflicting medical evidence was given in an arbitration before a Judge sitting with a medical assessor. The Judge directed the medical assessor to examine the workman in his private room. On his return the assessor communicated his opinion privately to the Judge, who then said he adopted the view the assessor had advised and found in favour of the employer. No objection was taken on behalf of the workman to the examination.

19. It was held by the Master of the Rolls sitting with Lord Justice Kennedy and Lord Justice Swinfen Eady that there was no misdirection and that in any event as no objection had been raised at the hearing, the point was not open to be taken on appeal. The judgment is a very short one and is as follows:

This appeal must be dismissed. There was plainly evidence to justify the finding and I think there was nothing wrong in what the County Court Judge did in consulting the assessor. In any case no objection was taken to his doing so. If an objection had been made at the time, there might have been some question for us to decide, but in the absence of objection, it is not for us to interfere at the present stage.

20. In the present case, as it seems to me, the learned Commissioner was very much in the same sort of position as the learned County Court Judge in the case to which I have just referred. If anything, he was in a worse position because here neither side adduced any evidence at all. So the Commissioner had to have

recourse to the services of the expert whom he had called to assist in the adjudication. It is recorded that the examination took place in the presence of the Commissioner himself and in the presence of the opposite party and of the appellant's pleader. It is clear beyond all question that the applicant's pleader not only did not raise any objection to what took place but actually acquiesced in the procedure adopted by the learned Commissioner. In these circumstances it is manifestly not open to the applicant to object now.

21. There is one other point to which I may refer. The learned advocate appearing on behalf of the appellant has taken exception to the fact that the learned Commissioner concludes his judgment by characterising the application as an obvious attempt to compensation by fraud. I am bound to say that it is somewhat difficult to understand exactly how the learned Commissioner came to that view, having regard to the fact that the application of Ali Akbar was supported by a medical certificate. One can only suppose that the learned Commissioner came to the conclusion that the applicant had somehow succeeded in misleading the medical man who gave the certificate. But the certificate is there and it stood unchallenged or uncontradicted until Dr. McCay had made his examination. For the reasons which I have already given, the learned Commissioner ought to have ignored that medical certificate altogether. Had he done so, the position would then have been that the workman was putting forward a claim entirely unsupported. In those circumstances, the learned Commissioner might then have had some cause for his somewhat drastic comment, but in the circumstances of the case the observation at the end of the judgment of the learned Commissioner would seem to be unwarranted. For the reasons I have given, the appeal must be dismissed. There will be no order as to costs.

Edgley, J.

22. I agree.