The Regional Director,E.S.I. ... vs Francis De Costa & Anr on 11 September, 1996

Equivalent citations: AIR 1997 SUPREME COURT 432, 1996 AIR SCW 3814, 1996 LAB. I. C. 2720, (1997) 1 LAB LN 361, (1996) 8 JT 118 (SC), 1996 (6) SCC 1, 1996 (8) JT 118, 1997 (1) SERVLJ 1 SC, (1996) 6 SERVLR 553, (1997) 2 MAD LW 111, (1996) 4 SCT 228, (1997) 1 MAHLR 438, (1996) 2 CURLR 812, (1997) 2 GUJ LR 1336, (1997) 2 ACC 575, (1997) 2 MAD LJ 70, (1997) 1 ICC 182, (1996) ACJ 1281, (1996) 74 FACLR 2326, (1996) 2 MAH LJ 911, (1996) 2 KER LT 799, (1996) 2 LAB LN 895, (1996) 3 SCJ 264, (1996) MPLJ 1093, 1996 LABLR 953, (1997) 1 LABLJ 34, 1996 SCC (L&S) 1361

Bench: Chief Justice, Suhas C. Sen, Sujata V. Manohar

PETITIONER:
THE REGIONAL DIRECTOR,E.S.I. CORPORATION & ANR.

Vs.

RESPONDENT:
FRANCIS DE COSTA & ANR.

DATE OF JUDGMENT: 11/09/1996

BENCH:
CJI, SUHAS C. SEN, SUJATA V. MANOHAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T SEN, J.

Francis De Costa, the first respondent herein, met with an accident on June 26, 1971 while he was on his way to his place of employment, a factory at a Koratty. The accident occurred at a place which was about one kilometer away to the north of the factory. The time of occurrence was 4.15 P.M, It has been stated that the duty-shift of the respondent would have commenced at. 4.30 P.M . The

respondent was going to his place of work bicycle. He was hit by a lorry belonging to his employers, M/S J and P Coats(P) Ltd.

The respondent's collar- bone was fractured as a result of the accident and he had to remain in hospital for 12 days, His claim for disablement benefit was allowed by the Employees' State Insurance Court. The appeal filed against that order was dismissed by the Kerala High Court which also dismissed an application for a certificate of fitness to appeal to the Supreme Court. The petitioner filed an application for Special Leave to this Court on 16,4.1979. Special leave was given by this Court, but the employers' state Insurance Corporation was directed to pay the first respondent the compensation due to him in terms of the order of the Employees' State Insurance Court and also of this appeal in any event. It has been stated that the compensation money has already been paid to the first respondent.

Since there was difference of opinion between the two Judges who heard the appeal, the matter was directed to be placed before a larger Bench for deciding the controversy .

In order to appreciate the scope of the controversy, it will be necessary to set out the relevant, provisions of the Employees' State Insurance Act, 1948:

"2(8)" "employment injury" means a personal injury to an employee caused by accident. or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India;

51. Disablement benefit.- Subject to the provisions of this Act-

(a) a person who sustains temporary disablement for not less than three days (excluding the day of accident) shall be entitled to periodical payment at such rates and for such period and subject to such conditions as may be prescribed by the Central Government;

(b) a person who sustains permanent disablement, whether total or partial, shall be entitled to periodical payment at such rates and for such period and subject to such conditions as may be prescribed by the Central Government.

51-C. Accidents happening while travelling in employer's transport.-(1) An accident happening while an insured person is, with the express or implied permission of his employer travelling as a passenger by any vehicle to or from his place of work shall, notwithstanding that he is under no obligation to his employer to travel by that vehicle, be deemed to arise out of in the course of his employment, if-

(a) the accident would have been deemed so to have arisen had he been under such obligation;

and

(b) at the time of the accident, the vehicle-

(i) is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer, and

(ii) is not being operated in the ordinary course of public transport service.

(2) In this section" vehicle"

includes a vessel and an aircraft."

That the first respondent has suffered a personal injury is not in dispute. The only dispute is whether the injury will amount to "employment injury" with in the meaning of Section 2(8), so as to enable the respondent to claim benefit under the Act. The definition given to "employment injury" in sub-section (8) of Section 2 envisages a personal injury to an employee caused by an accident or an occupational disease "arising out of and in the course of his employment", Therefore, the employee, in the order to succeed in this case, will have to prove that the injury that he had suffered arose out of and was in the course of his employment. Both the condition will have to be fulfilled before he could claim any benefit under the Act. It does not appear that the injury suffered by the employee in the instant case arose in any way out of his employment. The injury was sustained while the employee was on his way to the factory where he was employed. the accident took place one kilometer away from the place of employment. Unless it can be said that his employment began as soon as he set out for the factory from his home, it cannot be said that the injury was caused by an accident "arising out of ...his employment". A road accident may happen any where at any time. But such accident cannot be said to have arisen out of employment. unless it can be shown that the employee was doing something incidental to his employment.

In our judgment, by using the words "arising out of....his employment ", the legislature gave a restrictive meaning to "employment injury ". the injury must be of such an extent as can be attributed to an accident or an occupational disease arising out of his employment. "Out of" in this context, must mean caused by employment., Of course, the phrase "out of" has an exclusive meaning also. If a man is described to be out of his employment, it means he is without a job. The other meaning of the phrase "out of" is "influenced, inspired, or caused by: out of pity; out of respect for him". (Webster Comprehensive Dictionary- lnternational Edition-1984). In the context of Section 2(8), the words "out of" indicate that the injury must be caused by an accident which had its origin in the employment. A mere road accident, while an employee is on his way to his place of employment cannot be said to have its origin in his employment in the factory. The phrase "out of-the employment" was construed in the case of South Maitland Railways Pty. Ltd. v. James, 67 C.L.R 496, where construing the phrase "out or the employment", Starke, J,, held "the words 'out of' require that the injury had its origin in the employment".

Unless an employee can establish that the injury was caused or had its origin in the employment, he cannot succeed in a claim based on Section 2(8) of the Act. The words "accident . . . arising out of . . . his employment"

> indicate that any accident which occurred while going to the place of employment or for the purpose of employment, cannot be said to have arisen out of his employment. There is no causal connection between the accident and the employment.
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> The other words of limitation in sub-section(8) of Section 2 is "in the course of his employment". The dictionary meaning of "in the course of" is "during (in the course of time, as time goes by), while doing (The Concise Oxford Dictionary, New Seventh Edition). The dictionary meaning indicates that the accident must take place within or during the period or employment. If the employee's work shift begins at 4.30 P.M., any accident before that time will not be "in the course of his employment". The journey to the factory may have been undertaken for working at the factory at 4.30 P.M. But this journey was certainly not in course of employment. If employment begins from the moment the employee sets from his house for the factory, then even if the employee stumbles and falls down at the door-step of his house, the accident will have to be treated as to have taken place in the course of his employment. This interpretation leads to absurdity and has to be avoided.
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> We were referred to a number of cases on this point. In the case of Regina v. National Insurance Commissioner. Ex parte Michael, (1977) 1 Weekly Law Reports 109 the Court of Appeal in England had to construe a phrase "caused by accident arising out of and in the course of his employment"

in Section 5(1) of the National Insurance (Industrial Injuries) Act, 1965. Lord Denning M.R. started his judgment with the observation:-

> "So we come back, once again, to those all too familiar words 'arising out of and in the course of his employment'. They have been worth-to lawyers-a King's ransom.
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> The reason is because, although so simple, they have to be applied to facts which very infinitely. Quite often the primary faces are not in dispute: or they are proved beyond question. But the inference from them is matter of law. And matters or law can be taken higher. In the old days they went up to the House of Lords. Nowadays they have to be determined, not by the courts, but by the hierarchy of tribunals set up under the National Insurance Acts."

Under the Employees' State Insurance Act 1948, a tribunal has been set up to decide, inter alia, any claim for recovery of a benefit admissible in this Act. A reference lies to the High Court on a question of law. In other words, the decision of the Insurance Court set up under the statute is final and bindings, so far as the findings of fact are concerned. But, if any error of law has been committed the Courts are expected to correct it and to give guidance to the Insurance Court.

Construing the meaning of the phrase "in the course of his employment", it was noted by Lord Denning that the meaning of the phrase had gradually been widened over the last 30 years to include doing something which was reasonably incidental to the employee's employment. The test of

"reasonably incidental" was applied in a large number of English decisions. Buts Lord Denning pointed out that in all those cases the workman was at the premises where he or she worked and was injured while on a visit to the canteen or other place for a break. Lord Denning, however, caution that the words "reasonably incidental"

> should be read in that context and should be limited to the cases of that kind. Lord Denning observed:-
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> "Take a case where a man is going to or from his place of work on his own bicycle, or in his own car. He might i.e said to be doing something "reasonably incidental"
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> to his employment. But if he has an accident on the way it is well settled that it does not "arise out of and in the course of his employment". Even if his employer provides the transport, so that he is going to work as a passenger in his employer's vehicle (which is surely reasonably incidental" to his employment) nevertheless if he is injured in an accident, it does not arise out of and in the course of his employment. It needed a special "deeming" provision in a statute to make it "deemed" to arise out of and in the course of his employment."
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> This is precisely the case before us. Here also, we have at case of a person going from his home to his place of work. But he suffers injury in an accident on the way. It cannot be said that the accident arose out of and in the course of his employment. It was faintly suggested by Mr. Chacko, appearing on behalf of the respondent that the bicycle was bought by taking a loan from the employer. That however, is of no relevance. He might have borrowed money from his Company or from somewhere else for purchasing the bicycle. But the fact remains that the bicycle belonged to him and not the employer. If he meets with an accident while riding his own bicycle on the way to his place of work, it cannot be said that the accident was reasonably incidental to the employment and was in the course of his employment. The deeming provision of Section 51-C which came into force by way of an amendment effected by Employee's Life Insurance (Amendment) Act of 1966 (Act No.44 of 1966), enlarged the scope of the phrase "in the course of employment" to include tavelling as a passenger by the employer's vehicle to or from the place of work. The legal fiction contained in Section 51-C, however, does not come into play in this case because the employee was not travelling as a passenger in any vehicle owned or operated by or on behalf of the employer or by some other person in pursuance of an arrangement made by the employer.
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> The meaning of the words "in the course of his employment" appearing in Section 3(1) of Workmen's Compensation Acts 1923. was examined by this Court in the case of Saurashtra Salt Manufacturing Co. v, Bai Valu Raja, AIR 1958 SC 881. There, the appellant, a salt manufacturing company, employed workmen both temporary and permanent. The salt works was situated near a creek opposite to the town of Porbandar. The salt works could be reached by at least two ways from the town, one

an over land route nearly 6 to 7 miles long and the other via a creek which had to be crossed by a boat. In the evening of 12.6.1952, a boat carrying some of the workmen capsized due to bad weather and over-loading. As a result of this, some of the workmen were drowned. One of the questions that came up for consideration was whether the accident had taken place in the course of the employment of the workers. S. Jafer Imam, J., speaking for the court, held "As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded." After laying down the principle broadly, S. Jafer Imams, J., went or to observe that there might be some reasonable extension in both time and place to this principle. A workman might be regarded as in the course of his employment even though he had not reached or had left his employer's premises in some special cases. The facts and circumstances of each case would have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension. But, examining the facts of the case in particular, after noticing the fact that the workman used a boat, which was also used as public ferry for which they had to pay the boatman's dues, S.Jafer Imam, J. observed:-

"It is well settled that when a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. A workman is not in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him. In the present case, even if it be assumed that the theory of notion extension extends upon point D, the theory cannot be extended beyond it. The moment a workman left point B in a boat or left point A but had not yet reached point B, he could not be said to be in the course of his employment and any accident happening to him on the journey between these two points could not be said to have arisen out of and in the course of his employment. Both the Commissioner for Workmen's Compensation and the High Court were in error in supposing that the deceased workmen in this case were still in the course of their employment when they were crossing the creek between points A and B. The accident which took place when the boat was almost at point A resulting in the death of so many workmen was unfortunate, but for that accident the appellant cannot be made liable."

The point raised before us can be answered on the basis of the principle laid down in the aforesaid two cases. But Mr. Chacko, appearing on behalf of the respondent has contended that proximity of time end place is a factor to the borne in mind. The employee was to report for duty at 4.30 P.M. The accident took place at 4.15 P.M. only one kilometer away from the factory. In our view this cannot be a ground for departing from the principle laid down by the aforementioned cases that the

employment of the workman does not commence until he has reached she place of employment. What happens before that is not in course of employment. It was also pointed out by Lord Denning in the aforesaid case of Regina v. National Insurance Commissioner, Ex. Parte Michael (supra) that the extension of the meaning of the phrase "in the course of his employment" has taken place in some cases but in all those cases, the workman was at the premises where he or she worked and was injured while on a visit to the canteen or some other place for a break. The test of what was "reasonably incidental" to employment, may be extended even to cases while an employee is sent on errand by the employer outside the factory premises. But in such cases it must be shown that he was doing something incidental to his employment. There may also be cases where an employee has to go out of his workplace in the usual course of his employment. Latham, C.J. in South Maitland Railways Proprietary Limited v. James (67 CLR 496) observed that when the workmen on a hot day in course of their employment had to go for a short time to get some cool water to drink to enable them to continue to work without which they could not have otherwise continued, they were in such cases doing something in the course of their employment when they went out for S water. But the case before us does not fall within the exceptions mentioned by Lord Denning or Latham, C.J. The case squarely comes within the proposition of law propounded by S. Jafar Imam, J.

Strong reliance was placed by Shri Chacko on a decision of this Court in General Manager, B.E.S.T. Undertaking, Bombay v. Mrs. Agnes (1964 (3) SCR 930). In this case, one bus driver of the appellant- Corporation after finishing the day's work left for home in a bus belonging to employer's undertaking which met with an accident as a result of which he died. His widow claimed compensation under the Workmen's Compensation Act and the question was whether the accident had arisen out of and in course of employment. It was held by Subba Rao and Mudholkar, JJ. (Raghubar Dayal, J. dissenting) that the bus driver was given facility by the management to travel in any bus belonging to the undertaking. It was given because efficiency of the service demanded it. Therefore, the right of the bus driver to travel in the bus was to discharge his duty punctually and efficiently. This was a condition of service and there was an obligation to travel in the said the buses as a part of his duty. It was held that in the case of a factory, the premises of an employer was a limited one but in the case of City Transport Service, the entire fleet of buses forming the service would be "premises". This decision in our view does not come to the assistance of the employee's case. An employee of a Transport Undertaking was travelling in a vehicle provided by the employer. Having regard to the purpose for which he was travelling and also having regard to the obligation on the part of the employee to travel in the said buses as a part of his duty, the Court came to the conclusion that this journey was the Course of his employment because the entire fleet of buses formed the premises within which he worked.

But in the case before us, the facts are entirely different. The employee was not obliged to travel in any particular way under the terms of employment nor can it be said that he was travelling in a transport provided by the employer.

In the case of Sadgunaben Amrutlal and others v. The Employees State Insurance Corporation, Ahmedabad (1981 LAB. I.C 1653), it was held by the Division Bench of the Gujarat High Court that though as a rule, employment of a workman did not commence until he reach the place of employment and did not continue after he has left the place of employment, the proposition was

subject to the theory of notional extension of the employer's premises. The notional extension theory could not be related to the place of employment only. It could also be taken recourse to in order to extend the time in a reasonable manner. The court took the view in the case, where an employee on his way to the factory died of acute cardiac arrest, that it was caused by accident arising out of and in course of employment. The employee was employed as a jobber in the Wrapping Department of the mill. He worked in the premise from 8 A.M. to 4.30 P.M. On December 22,1974, while was on duty in the mill, he felt unwell. He took medical treatment on the next day (December 23,1974) which was an off-day for him. On December 24, 1974, he left his residence at about 7.20 A.M. i.e. 40 minutes before the reporting time. Hi walked a short distance from his house to the nearest bus stop and was waiting for a bus to take him to the mill. While waiting for the bus, he felt unwell. He complained to an ex-employee of the mill who was also waiting to board the that it was due to the excessive and strenuous nature of work which he was required to do at the mill that he was feeling unwell. When the bus arrived, Amrut Lal, the employee was about to step into the bus when he collapsed and became unconscious. The postmortem reavealed that he died of cardiac failure. Both the Employees Insurance Court and the single Judge of the High Court held that the employee had not died as a result of an accident in the course of employment. On appeal, the Division Bench held that both the Employees Insurance Court and the single Judge were in error in holding that the death was not in course of employment.

It is doubtful whether this decision can be reconciled with the principle laid down by S. Jafer Imam, J. in the case of Surashtra Salt Manufacturing Co.(supra). It is also to be noted that the death was not caused by an accident. The death was due to acute cardiac failure. The causal connection between the death and employment had not been established. Moreover, walking to the bus stop from the employee's residence and boarding the bus for going to the place of work cannot be acts in course of employment.

In the case of Bhagubai v. Central Railway, Bombay, (1954) L.L.J., a Division Bench of Bombay High Court dealt with a case where a workman on his way to work was murdered. There was no evidence to show that he murder was due to any motive against the deceased workman. It was held that the death took place because of an accident arising out of employment. Chagla, C.J. emphasised that there must be a causal connection between the accident and the death before it could be said that the accident arose out of employment of the concerned workman. In that case, the deceased was employed by Central Railway at Kurla Station and he lived in the railway quarters adjoining the station. It was found as a fact that the only access for the deceased from his quarters to the Kurla railway station was through the compound of the railway quarters. On December 20,1952, the decease left his quarters a few minutes before midnight in order to join duty. While on his way, he was stabbed by some unknown persons. It is not disputed by the railway company that the deceased died as a result of an accident nor was it disputed that the accident arose in the course of his employment. The dispute was limited to the question whether the accident arose out of the employment of the deceased.

It is of significance that the deceased used to live in the railway quarters adjoining the railway station and the compound through which he had to go the place of work belonged to the railway company. In other words he died on the premise belonging to the railways. It was found as a fact

that the stabbing which led to the death was not due to any personal enmity. That means it was an occupational hazard of the employee who went to join work at midnight from the railway quarter to the railway station through the railway compound. The facts of the case before us are quite dissimilar to the facts on the basis of which the case of Bhagubai (supra) was decided.

We were also referred to two American decisions. The first case is J.J.O' Leary, Deputy Commissioner Fourteenth Compensation District, Etc. v. Brown-Pacific-Maxon, Inc., et al (95 L.ed. 483=340 us 504-510). In this case an employee of a Government contractor was at a recreation center maintained by his employer near an ocean shore along which ran a channel so dangerous for swimmers that its use was forbidden and signs to that effect erected. On perceiving that two men standing on a reef beyond the channel were signalling for help, he undertook with others, to swim the channel, and was drowned. The Administrative Tribunal found that the employee's death arose "out of and in course of his employment". Six member of the U.S. Supreme Court concurred with the opinion of Frankfurter J. that the administrative decision was supported by "substantial evidence" and therefore was beyond the scope of permissible judicial review. Minton, J., with whom Jackson and Burton ,JJ. agreed was of the opinion that the administrative finding was without any evidence.

This case really is an authority on the scope and extent of power of judicial review of an administrative order. The important fact which was noted in that case was that the deceased along with other employees had discovered that third persons who were in danger were in a recreation area maintained by his employer for the benefit of the employees. This finding was held to be based on substantial evidence. Frankfurter, J. observed that "We do not mean that the evidence compelled this interference; we do not suggest that when the Deputy Commissioner had decided against the claim, the court had been justified in disturbing his conclusion. We hold only that on this record, the decision of the District Court that the award should not be set aside should be sustained". In other words, Frankfurter, J. was of the view that from the evidence on record, either of the two conclusion could have been drawn. It is well settled that the Court will not disturb a finding of an administrative tribunal merely because it could have taken a contrary view had it heard the case on evidence, when the view taken by the Tribunal is also a plausible view.

The other American decision is in the case of O' Keeffe, Deputy Commissioner. v. Smith, Minchman & Grylls Associates, Inc., et al.(13 L.ed.2d 895). In that case, a private engineering concern's employee hired to work in South Korea on a 365-day basis was drowned while boating on a South Korea lake. The Deputy Workmen's Compensation Commissioner determined that the employee's death arose out of and in course of employment so as to entitle his widow and minor child to death benefits. The decision being challenged by a writ, a panel of the Court of Appeals for the Fifth Circuit reversed the award. The Supreme Court held that there was no scope for reviewing the decision of the Deputy Commissioner. The Court of Appeal erred in summarily reversing the judgment. It was observed that "while this Court may not have reached the same conclusion as the Deputy Commissioner, it cannot be said that his holding that the decedent's death, in a zone of danger, arose out of and in the course of his employment is irrational or without substantial evidence on the record as a whole."

Here again, the U.S. Supreme Court declined to intervene with the decision reached by the Deputy Commissioner on evidence and reversed the decision of the Court of Appeal for doing what it should not have done by adopting what appeared to the Court to be a better view.

We fail to understand how these tow American decision which really dealt with the scope and extent of judicial review of a decision based essentially on finding of fact can come to the aid of the employee in this case.

It has to be borne in mind that this is not a case of judicial review. The Employees' State Insurance Act, 1948 provides for reference to the High Court by the statutory court set up under the Act, any question of law arising out of its decision (Section 81). There is also a provision for appeal in certain cases on a substantial question of law(Section 82).

We are of the view that in the facts of this case, it cannot be said that the injury suffered by the workman one kilometer away from the factory while he was on his way to the factory was caused by an accident arising out of and in the course of his employment.

In the case of Dover Navigation Company Limited v. Isabella Craig(1940 A.C 190), it was observed by Lord Wright that-

> "Nothing could be simpler than the words" arising out of and in the course of the employment." It is clear that there are two condition to be fulfilled. What arise "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 occur 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."

Although the facts of this case are quite dissimilar, the principle laid down in this case, are instructive and should be borne in mind. In order to succeed, it has to be proved by the employee that (1) there was an accident,(2) the accident had a causal connection with the employment and (3) the accident must have bee suffered in course of employment. In the facts of this case, we are of the view that the employee was unable to prove that the accident had any causal connection with the work he was doing at the factory and in any event, it was not suffered in the course of employment.

The appeal, therefore , succeeds. The judgement dated 25.11.1977 passed by the High Court is set aside. However, in terms of the order passed by this Court on 16.4.1979, the appellants will have to bear the costs of this appeal in any event. The costs are assessed at Rs.3000/- and will be paid by the appellant to the fist respondent within a period of four week from date. The first respondent will also be entitled to retain the money paid to them by the Regional Director, Employees' State Insurance Corporation pursuant to the order of this Court passed on 16.4.1979.