Mackinnon Mackenzie And Co. Ltd. vs Miss Velma Williams on 14 December, 1962

Equivalent citations: AIR1964CAL94, (1965)ILLJ632CAL, AIR 1964 CALCUTTA 94, (1965) 1 LABLJ 632

JUDGMENT

P.B. Mukharji, J.

1. This is an appeal under the Workmen's Compensation Act. The appellant is the employer Messrs. Mackinnon Mackenzie and Co. Ltd., a well-known shipping company in Calcutta. The claim for compensation was made by Miss Velma Williams who is an unmarried sister and dependant of the deceased James Williams.

2. The facts of the case He within a short, compass. James Williams was employed by Messrs. Mackinnon Mackenzie and Co. Ltd. as a seaman. It is alleged that he received personal injury by accident on the nth February 1957 arising out of and in the course of his employment resulting in his death on the nth February 1957. He was employed on board S. S. Staffordshire on the 18th September 1956. While the vessel was proceeding from Liverpool to Colombo he was lost overboard The claimant who was the unmarried sister dependant on him claimed compensation before the Commissioner under the Workmen's Compensation Act. In fact, this seaman James Williams lived with his uncle and aunt, his uncle's name being one Mr. Gomes of 18/1, Bowbazar Street, Calcutta along with this claimant, his unmarried sister. The employer objected to the compensation on the ground that the workman had no cause of action, that he did not die out of any accident arising out of and in course of his employment and his death was due to deliberate act of suicide. The Commissioner for the Workmen's Compensation passed judgment and order awarding to the claimant the sum of Rs. 3,500/- after holding that the seaman died by accident arising out of and in course of his employment. The only other fact that remains to be stated is that the dead body of the seaman was not found having been drowned in the sea.

3. To this appeal a preliminary objection was taken on behalf of the claimant that no appeal lay on the ground that there was an agreement between the parties to treat the decision of the Commissioner for the Workmen's Compensation as final and binding. This point depends on the construction of the clause for agreement contained in the 'Agreement for Seamen' signed between the seaman and the employer under Section 27 of the Indian Merchant Shipping Act, 1923. The relevant clause of the agreement on which this objection is made reads as follows ;

> "It is further agreed that, in the event of any of the said crew whose name is hereto subscribed sustaining any personal injury (including injury resulting in death) by accident arising out of and in the course of his employment, when the ship is not in

> India, the owner of the ship shall pay such amount of compensation as he would have been liable to pay under the Workmen's Compensation Act, 1923, being Act No. VIII of 1923 of the Indian Legislature, as amended from time to time, if the accident had occurred within India and it is further agreed that in the event of any question arising under these stipulations as to the liability of the owner to pay compensation, or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall in default of agreement be settled by a Commissioner for Workmen's Compensation duly appointed under Section 20 of the said Workmen's Compensation Act. 1923. And it is further agreed that the decision of the said Commissioner shall be final."

4. On behalf of the employer it has been argued that an appeal lies under Section 30 of the Workmens Compensation Act read with Section 21 thereof and that the clause in the agreement has really no application to the facts of this case on the ground that it was a case of suicide and not an accident admittedly arising out of and in the course of his employment. It will be seen from this that the preliminary point of objection on behalf of the claimant is inseparably connected with the question of merit whether the accident arose out of and in the course of employment both within the meaning of Section 3 of the Workmen's Compensation Act as well as within the meaning of that expression used in the clause of that agreement quoted above. It will be appropriate therefore to answer this preliminary objection at the conclusion of this judgment when the question of merit and fact has been decided.

5. The Commissioner for Workmen's Compensation decided that although it was a case of suicide, the suicide was due to temporary insanity or some kind of insanity and mental depression and that arose out of and in the course of employment, Normally this would be a question in fact with which this Court will ordinarily be disinclined to interfere. Here it is not so much a question of fact but an inference by the learned Commissioner for Workmen's Compensation which we find impossible to support on the facts of this case. Indeed it is more a conjecture by the Commissioner than an inference. The distinction between inference and conjecture is that an inference rests upon premises 'of fact, a conjecture does not as pointed out by Lord Shaw in Kerr v. Ayr Steam Shipping Co. Ltd., 1915 AC 217 at p. 233. It is necessary, therefore, to examine the facts on which the Commissioner came to his conclusion.

6. These are the clear facts established and proved in this case and are indisputable. On the 9th February 1957, the seaman tried to take his life and commit suicide. The log book entry shows that at breakfast he was seen crying and saying that he was going to take his life. He pulled oft his shirt and ran up the ladder to the poop. He ran to the ship's side and put one leg over the rail preparing to jump over the side. He was then caught by other workers and seamen who took him down to his room. On being questioned by the Ship's Master and the doctor, his complaint was that he was worried because he had received no letter from home. He detested the sea-faring life and wanted to give it up. He, however, promised never to attempt suicide The seaman was then examined by the Ship's Surgeon J. D. Hodgson. Ship's Surgeon certifies that in his opinion this man is "a manic depressior psychotic suffering from persientory ideas and therefore he is in danger of taking his own life." He records that he has apparently made one attempt this morning (that is, on 9-2-57) to

commit suicide by trying to jump overboard. Then the Ship's Surgeon proceeds to record :

> "I feel he should be kept under constant supervision, using force if necessary and transferred to a mental institution on reaching Colombo."

As a result of this medical examination the seaman was put into the ship's hospital and six men were detailed to keep watch on him, in batches of three of two men each. He was under constant watch night and day. On the very following day, that is, on the 10th February 1957, the log book entry reveals the following facts :

7. The seaman was seen in the morning by the Ship's Surgeon and he suggested that while he would be confined to a single berth cabin at night, he should be allowed out under the constant watch of two men during the hours of day light so that continuous confinement in a room might not lead to deterioration in his mental state. Accordingly the seaman was allowed to go on deck escorted by two men all the time. What happens thereafter is that this seaman walking up and down with two guards on either side suddenly seized both and threw them sideways with such force that each man fell down on the deck. Then this seaman Williams ran to the ship's side while one of the fallen guards got up and started chasing him again and when he had managed to get sufficiently near him to catch Williams by the shirt, Williams jumped over the side into the sea, tearing off his shirt. Two life buoys were immediately sent down. A search was made for Williams in the sea. Men overboard sounded signal. In spite of intensive search of the whole area, the body of Williams could not be recovered,

8. That being the fact it follows that (i) Williams committed suicide (ii) that when he committed suicide, he was detained in the ship's hospital and (iii) that he was not doing any work in course of his employment. His excursion on the deck under guard was not in the course of his employment either within the meaning of the statute or within the meaning of the clause of the agreement. He was a sick man in the ship's, hospital and his excursion was intended for his health and mind and not in the course of his employment.

9. The inference, therefore, from these facts drawn-by the learned Commissioner for Workmen's Compensation that, he died by reason of accident arising out of and in the course of his employment cannot be sustained.

10. The Commissioner for Workmen's Compensation was persuaded to come to this decision and to this inference by a wrong interpretation of the expression 'arising out of and in the course of his employment' in Section 3 of the Workmen's Compensation Act and by the reasoning that 'such rests for illness on the ship itself does not cause a break in the continuity of the employment' and by holding that 'the man, seized with a fit of insanity would have a fatal fall into the waters only because of the risk of the locality attached to his employment.' After giving an anxious consideration to these reasons for this inference we are unable to uphold the conclusion of the Commissioner for Workmen's Compensation.

11. The branch of the law on this point is well-settled by a number of leading judicial decisions. Disappearance of seamen at sea has been the subject of many decisions. Two main principles are

deducible. One is supported by the famous observations of Fletcher Moulton L.J. in Bender v. Owners of Steamship Zent, (1909) 22 KB 41 at pp. 44 and 45 where it was said by the learned Lord Justice :

> "Speaking for myself, I should not in the case of a seaman lost at sea be very tardy in a proper case to draw the inference that it arose also 'out of his employment, but the circumstances in this case appear to me not to give sufficient ground for such an inference. If one of the watch on a stormy night was found to be missing, I should have very little difficulty in drawing the inference that the probable cause of the accident was the increased danger to which the seaman was subjected by having to do the duty of a seaman on watch, in such perilous circumstances. But, in the present case, the weather was fine; it was daylight, and there is no suggestion that any portion of this man's duties would lead him into a position of danger at all. All we know is that he was missing."

12. In this case applying that dictum of Fletcher Moulton L.J. it is necessary to emphasise that this seaman was not on watch duty and that not only was there no danger inherent or incident to the work of the seaman which this present seaman was expected to fulfil, but it had also been established that he had attempted to take his life the day before the event and that he had to be put in the ship's hospital under guard as mentally insane.

13. The other famous observation is the opinion of Farwell, L. J. at p. 50 of the same report of the same case laying down the second principle which is as follows :

> "Perhaps it is dangerous to give illustrations but to illustrate my meaning I may add this : If an ordinary sailor is a member of the watch and is on duty during the night and disappears, the inference might fairly be drawn that he died from an accident arising cut of his employment. But if, on the other hand, he was not a member of the watch, and was down below and came up on deck when he was not required for the purpose of any duty to be performed on deck and disappeared without our knowing anything else, it seems to me that there is absolutely nothing from which any Court could draw the inference that he died from an accident arising out of his employment. I fail to understand why the Legislature in this Act had added the words 'arising out of the employment', unless it intended those words to mean what they say. One can see that the burden on employers will be much greater if they are made to insure the men's lives against accidents however occurring."

14. Applying this dictum it follows that only because the seaman was formally in service his "continuity of service" does not bring him within the expression 'arising out of and in the course of his employment' in Section 3 of the Workmen's Compensation Act. See the observations of Hanworth M.R. in Church v. Dugdale and Adams, Ltd., (1929) 22 B.W.C.C. 444 at 449 quoted later in this judgment.

15. The accident has to arise (a) out of and (b) in the course of employment within the meaning of the statute. Employment as such alone is not a life insurance, or an accident insurance. The event of death or accident for which the Workmen's Compensation Act provides compensation must be one arising out of and in course of employment. Otherwise, it is not compensable within the meaning of this Act. This point was forcefully emphasised in the leading case of the House of Lords in Marshall v. Owners of S. S. Wild Rose, 1910 AC 486 where at p. 496 Lord Shaw observed:

> "I do not see my way to hold that this is equivalent to saying the employer is liable to pay compensation in respect of the death of any workman should the death occur during the period, and at the place of his service. To do so would, in my opinion, be to interpret a language setting up definite conditions and canons of liability as if it were really a life insurance."

16. The case of the "Wild Rose" is important from another point of view. It was a case of an engineer who was employed on board a steam trawler lying in a harbour basin. The engineer went on deck to cool himself on a very hot night. His dead body was found the next morning in the water just under the rail on the starboard quarter where he was in the habit of sitting in hot weather. There was no evidence how the death happened. Although Lord Loreburn L. C. and Lord James of Hereford dissented, three of the Lord Justices, Lords Atkinson, Shaw and Mersey came to the conclusion that as a matter of fact there was no evidence to show that the engineer's death was caused by an accident arising out of his employment. Lord Atkinson at p. 491 expressly observes in his judgment that there is nothing to show that he did not deliberately jump or throw himself into the water beyond the greater probability of accident as compared with suicide. Now in the facts of this case before us the evidence is complete and settled. The evidence proved beyond doubt that the man was insane, that he attempted to take his life once before and finally that even at the time of taking his life on the day in question, he did it deliberately by throwing down his guard and jumping into the sea.

17. In fact, it has been settled by a long line of decisions and the test now is, that suicide when it results from insanity or mental derangement, consequent on personal injury by accident, has been rightly held to be death resulting from injury. The onus of proof is always on the applicant and he must show that the death is due to accident, that insanity is the direct result of injury and it is not sufficient to show that it is an indirect result such as that it was caused by brooding over an accident or worrying over the inability to work. In Dixon v. Sutton Heath and Lea Green Colliery Ltd (No. 2), reported in (1930) 23 BWCC 135 the, various decisions of the Court have been summarised in the following way :

> "If you can find that there is, as a result of an accident or of the shock resulting from an accident, a condition of nervous derangement which leads to the man committing suicide the applicant can get compensation under the Workmen's Compensation Act. If you cannot find that the accident has caused any physical derangement, but can only find this, that there being an accident with a physical result, the man when faced with it, thinking it over, brooding over it, loses his moral courage to face it, and thinks that the only way is to kill himself, that is not a consequence of the accident."

18. To hold in this case that the insanity was caused by the employment is to come to absurd results. First, the facts do not justify that conclusion; secondly such a conclusion would mean this, that the life of a crew or the seafaring life BO depressed the mind of this particular sailor that it caused him insanity, but the same life or same employment on the ship did not have that effect on other seamen and sailors who continued to work. In other words, it is not possible to hold that insanity and mental depression are ordinary chronic occupational risks of a sailor. Neither the facts of this case nor the generally known facts of nature and laws of the health and mind can justify the conclusion that insanity or mental derangement is an invariable consequence of a sailor's life or of a sea-faring life.

19. Viscount Haldane in Mrs. Margaret Thom v. Sinclair, 1917 AC 127 at p. 133 discussing this question of accident arising out of employment observed :

> "According to one of them the language used is satisfied if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the tune of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment. Once establish this and it is said that no further causal connection need be sought.
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> I think that this interpretation is too vague. It would cover the case of a farm labourer struck by lightning while walking across a field in the farm on which he was employed. Yet he might just as readily have been struck while walking also where off the farm. A further condition seem to be required, the condition that the injury should have arisen, not merely by reason of presence in a particular spot at a particular time, but because of some special circumstance attending the employment of the workman there. His duty may have occasioned his being near a tree which attracted the lightning, or being under a roof which for some reason fell in."

20. This observation of Viscount Haldane answers the reasoning given by the Commissioner in the present case about "locality" and wmters. No doubt a ship is always on the sea or at harbour, No doubt a ship floats always on water. No doubt, therefore, that a man on board the ship can be drowned but the condition about which Viscount Haldane holds is important and that condition is the 'locality'. It does not mean that became a man detests the seafaring life, therefore, the man must jump out deliberately off the deck and off the rails into the sea. If he does so, and specially in the facts of this case as found by as hem, he is certainly not doing it in the course of his employment'. In fact such drowning is not the 'condition' of his employment.

21. There is one other authority of the House of Lords which is relevant for the point that we are deciding in this appeal. That is in Charles R. Davidson and Co. v. M.'Robb, 1918 AC 304. There the Chief Engineer of a ship which was lying in a part of a public harbour taken over temporarily by the Admiralty and closed to the public and to which access was granted only by an Admiralty pass, went ashore on leave for parposes of his own. On returning to the ship after dark he fell from the quay and was drowned. If was held there that the accident was not shown to have arisen out of the employment. The significant observation of Lord Dunedin at p. 321 of that report explains clearly

the meaning and the import of the expression 'in the course of employment' in the following terms :

> "In my view "in the course of employment'' is a different thing from "during the period of employment". It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, on the natural incidents connected with the class of work -- e.g., in the workman's case the taking of meals during the hours of labour; in the servant's, cot only the taking of meals, but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof."

22. It is not necessary to multiply authorities but having regard to the importance of the question we shall refer briefly to two more decisions of the House of Lords : (i) Simpson v. London, Midland and Scottish Rly. Co., 1931 AC 351. In this case Lord Tomlin explains the authorities relating to "unexplained" accidents. Here on the facts of this case the accident is not only not unexplained, but explained with medical evidence of the Ship's Surgeon and the documentary evidence of the log book entries. But this decision of the House of Lords is important because ot the principle which Lord Tomlin lays down at p. 369 of that report in the following terms :

> "Now, my Lords, from these passages to which I have referred I think this rule may be deduced for application to that class of case which may be called unexplained accident cases -- namely, that where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence aa to the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of employment; but the inference as to the origin of the accident may be displaced by evidence tending to how that the accident was due to some action of the workman outside the scope of the employment".

23. We can only say and repeat that here in this case the origin of the accident is not only not unexplained but has been proved to have been due to deliberate action on the part of the seaman outside the scope of his employment. A wrong application of the principle laid down in Simpson's case was corrected by the House of Lords again in Rosen v. Owners of Steamship 'Quercus' 1933 AC 494 specially by the observation of Lord Buck-master at pp. 499-500.

24. In Marriott v. Maltby Main Colliery Co. Ltd. reported in (1920) 13 B WCC 353 at p. 359, Lord Sterndale M. R. puts the law in a nutshell at p. 359 of the report in the following terms where he quoted Lord Cozens-Hardy, M. R. in Withers v. London Brighton and South Coast Rly. Co., 1916-2 KB 772 :

> "It has been said that there is some doubt whether suicide can be the result of an accident within the Workmen's Compensation Act. I confess I do not feel that doubt at all. I have no doubt it may be. I have no doubt that an accident may be of such a

nature that there is a lesion of the brain, a structural injury to the brain itself, which accident may lead to an unsoundness of mind which may directly lead to suicide."

25. Again in Church v. Dugdale and Adams Ltd., reported in (1929) 22 BWCC 444 at p. 449 Lord Hanworth, M.R. expressed the law after quoting these decisions in the following terms :' "The upshot of all that is, that when one turns to see the facts of the case before the Court it is necessary to find not merely that there has been suicide, not merely at the time of the suicide that there was some depression and some delusions, but you must find that the condition of the man was such that the accident disabled him from exercising a judgment, and in that sense caused the accident. If you find merely that in consequence of the accident he is brooding in fear of poverty, or in distress, or in a mental condition which is consistent with the condition of a, person not suffering from an accident, there you do not find and are not entitled to draw the inference that his mind has become unhinged so as to dethrone his power of volition, and in that sense there is no proof and no necessary connection between the accident and the suicide."

26. For these reasons and the principles stated above, we set aside the finding of the Commissioner for Workmen's Compensation and we hold that the accident in this case was not due to any personal injury caused to the workman by any accident arising out of and in course of his employment within the meaning of Section 3 of the Workmen's Compensation Act so as to make the employer liable thereunder.

27. A last minute attempt was made by Mr, Sanyal appearing for the respondent claimant to rely on two cases -- (i) Chillu Kahar v. Burn and Co. Ltd., Howrah, and (ii) Vishram Yesu v. Dadabhoy Hormasji and Co. AIR 1942 Bom 175. These two cases do not help the respondent claimant. All that the Calcutta case holds, is that a series of tiny accidents each producing some unidentifiable result and operating cumulatively to produce the final condition of injury, constitute together an accident within the meaning of Section 3 of the Act. There the eyes of the workman were exposed to the glare of the furnace and on each occasion they were struck by ultra violet rays which they absorbed, and finally at the last incident it reached such a condition that he reached the stage of a serious defect of vision. The present is not a case of "tiny accidents" ultimately producing the big accident and the principle of a series of tiny accidents is not applicable in this case. Mr. Sanyal tried to draw an analogy by saying that the slow working of the mind gradually depressed him to the state of insanity because the" seaman did not receive letters from home and did not like the seafaring life. The absence of letters from home or the seafaring life cannot be regarded as accident, tiny or otherwise, to lead to final act of suicide, so that there is no connecting link between the accident and the suicide. The Bombay case also does not help the respondent. There the deceased workman was employed as a Khalasi on a barge which was tied up along side a steamer. The khalasis employed on the barge had to prepare and take their meals on the barge and sleep on the hatches when there was work at night. The deceased was seen going to bed at abouf 9 P.M. but when his companions got up early in the morning, he was found to be missing. It was held that he was entitled to compensation and the accident arose out of and in the course of employment within the meaning of Section 3 of the Workmen's Compensation Act. But then Beaumont C. J. at pp. 176 and 177 makes it clear that :

> "The most natural inference to draw is that the accident occurred because for some reason or other in the middle of the night the workman fell, off the barge either in his sleep or when half awake and struck his head in the process. I say that because the evidence is that he was a good swimmer. So he must have lost consciousness before he got into the water. No doubt there are other possible inferences. It is conceivable, though highly improbable, that the man committed suicide. It is conceivable, and rather less improbable, that he was murdered and his body was thrown into the water. But there is absolutely no evidence to suggest suicide or homicide and the most natural inference from the evidence is that he met with an accident which arose out of his duty in sleeping on the barge."

28. But this logic is not available to the respondent in this case on the facts and there is evidence and strong evidence, established and uncontroverted evidence, that it was a case of suicide and there was no scope left for the natural inference that it was 'not a case of suicide. Besides this Bombay decision comes within the principles laid down by Lord Dunedin in 1918 AC 304 at p, 321 already quoted above.

29. This finding to which we have arrived answers the preliminary point of objection, set out at the beginning of this judgment. The objection is that the appeal is barred by reason of the second proviso to Section 30(i)(e) of the Workmen's Compensation Act which reads as follows :

> "An appeal shall lie to the High Court from the following orders of a Commissioner, namely :
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> * * * Provided, further, that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner or in which the order of the Commissioner gives effect to an agreement come to by the parties."

It is contended on behalf of the respondent that the agreement quoted above bars this appeal and brings it within the proviso quoted above. The appellant contended that there was no agreement as permitted by Rule 38 of the Workmen's Compensation Rules and submits that the agreement is not recorded by the Commissioner nor signea by him. The appellant supports this submission by reference to Section 22 of the Act dealing with the form of the application. Reference is also made in support of this contention to Section 28 of the Act which requires registration of an agreement and Section 29 of the Act dealing with the effect of the failure to register such an agreement. These considerations, however, do not appear to give any conclusive answer to the objection raised by the respondent.

30. Many references are made to "Agreement' in the different sections of the Workmen's Compensation Act. It will not be necessary to scrutinise, analyse and interpret the word 'agreement' used in these different sections, such as Section 19, Section 30 and Section 17. Broadly speaking this statute recognises the principle that the parties can abide by in agreement between them or by an agreement to abide by the decision of the Commissioner of Workmen's Compensation, with this sensible limitation that it declares null and void any agreement whereby the workman is made to

relinquish the compensation to which he is entitled under Section 3 of the Act. This limitation is in obvious protection of the workman who may not have equal bargaining power with the employer. Section 19 of. the Workmen's Compensation Act in Chapter III of the Statute dealing with Commissioner expressly uses the word 'agreement' and says that if any question arises in any "proceedings" under this Act as to the liability of any person to pay compensation or its amount or duration, that question shall in default of agreement be settled by a Commissioner. 'Agreement for Seamen' quoted here is an agreement long prior to any dispute and was made at the time when the sailor entered the employment and long before the payment of the amount of compensation arose. The word 'agreement' used in the second proviso to Section 30(i)(e) of the Act quoted above occurs in the context of appeals in the same chapter of the statute and provides for "the parties having agreed to abide by the decision of the Commissioner or in which the order of the Commissioner gives effect to an agreement come to by the parties". The idea of this proviso is certainly wholesome in the sense that liability for compensation and its quantum and duration are better settled by agreement of parties and the Commissioner only comes in when such an agreement cannot be had. It is wholesome because it avoids protracted litigation which is against the spirit and the purpose of the Act. It does not infringe Section 17 of the Workmen's Compensation Act occurring in a different chapter, namely Chapter n of this Statute dealing with workmen's compensation. An agreement to abide by the decision of the Commissioner i. e., impliedly not to appeal from his decision is not "contracting out" of compensation within the meaning of Section 17 of the Act. The second proviso of Section 30(i)(e) of the Act preventing appeal is itself a part and provision of the Act and therefore cannot be said to militate against Section 17 of the Act because of the expression "under this Act" in that Section 17. Therefore, such an agreement cannot be null and void under Section 17 of the Workmen's Compensation Act because it is not "contracting out of the Act", but in consonance with the Act recognising "agreement" of parties as indicated above.

31. The learned Commissioner for Workmen's Compensation rested his decision under Section 21(1) proviso of the Workmen's Compensation Act. He claimed and based his jurisdiction on that proviso. He has also invoked the agreement to say that the parties had agreed to confer jurisdiction on him and under the agreement he would be like an arbitrator. The respondent claimant therefore contends on this ground also that no appeal from such an arbitrator lies. In support of this latter part of Commissioner's observation Mr. San-yal appearing for the respondent claimant has relied on the case of Johra Bibi v. B. I. S. N. Co., Ltd. where a seaman under the Indian Merchant Shipping Act entered into an agreement with a clause that compensation should be awarded for injury and that in case of dispute as to the amount of the award the parties would abide by the award by the Commissioner for Workmen's Compensation. The Court held there that the Commissioner acted as an arbitrator and did not act under the Workmen's Compensation Act, and therefore no appeal lay from the order of the Commissioner under such circumstances. At page 283 (of Cal WN) : (at p. 114 of AIR) of tbe report, Lodge, J., who delivered the judgment of the Division Bench observed:

> "It seems to us clear that the order of the Commissioner in the present case must have been passed by virtue of some jurisdiction conferred, upon him by agreement rather than of a jurisdiction conferred by the Indian Workmen's Compensation Act, 1923 Such being the case, his order was the order of an arbitrator in arbitration proceedings, and there is nothing to indicate that an appeal lies from such an order."

That case is distinguishable, first on the ground that the agreement here is of a different nature and uses different terms. Although the actual agreement was not quoted in Zohra Bibi's case, it seems clear from the observation of the learned Judge that the agreement was only with respect to the amount of the dispute. Now that particular aspect of the case is clearly provided for in Rule 38 of the Workmen's Compensation Rules and on that ground no appeal would lie in those circumstances in any event. Secondly, that case is distinguishable on the ground that here the Commissioner for Workmen's Compensation in his very judgment relied not merely on the agreement to give him jurisdiction but also on the proviso to Section 21(1) of the Workmen's Compensation Act. Zohra Bibi's case had neither any occasion to nor in fact did refer to or discuss the effect of the proviso to Section 21(1) of the Act. In so far as the Commissioner here assumed jurisdiction and decided under the proviso to Section 21(1) of the Act, an appeal obviously lies under Section 30 unless it is barred by the agreement mentioned in the second proviso to Section 30(1)(e) of the Act.

32. This leads us finally to the consideration, of the question of interpretation of the agreement quoted above. The express language of the agreement clearly stipulates 'the event' on the happening of which the Commissioner will decide. That 'event' is expressly said to be 'accident arising out of and in the course of employment'. Now if the accident did not arise out of and in the course of the employment of the workman as we find to ba the case in the facts here, then the jurisdiction of the Commissioner as arbitrator to act under this agreement does not exist. The agreement, therefore, gives jurisdiction to the Commissioner only where there is no dispute about the fact that the accident did arise out of and in the course of employment of The workman. It is only then that the Commissioner for Workmen's Compensation assumes jurisdiction under this agreement. That jurisdiction is again limited to certain express questions namely (i) liability of the owner to pay compensation (ii) the amount and (iii) the duration of the compensation including any question as to the nature and extent of disablement. Mr. Sanyal made a point that as 'liability' is expressly mentioned in the agreement, the question whether the accident arose out of and in the course of employment was also within the purview of the, agreement because that question relates to the liability of the employer. In support of this he drew our attention to the welt known words in Section 3(i) of the Workmen's Compensation Act where it is said that if the personal injury is caused to the workman by accident arising out and in the course of his employment, the employer shall be 'liable' to pay compensation. While the argument has apparent attraction it does not bear scrutiny and Section 3 itself gives the answer. There is a proviso at the end of Section 3 which exempts the employer from liability in certain events mentioned in Sub-clauses (a) and (b) of Section 3, after using the words "provided that the employer shall not be so liable" in respect of certain injuries which are mentioned there. The 'liability' therefore mentioned in the agreement is such question of liability which exempts the employer from being liable but not the pre-condition of the agreement to give jurisdiction to the Commissioner, namely, that the accident must admittedly arise out of and in the course of employment. It is necessary to emphasise in this connection that the parties cannot by consent create jurisdiction where there is none in law. If the statute permits creation of such jurisdiction by agreement, then the agreement must be strictly construed in the sense that a vague and miscellaneous jurisdiction should not be created by inappropriate construction for that will create confusion in the law and in the rights of the people who appear before such person. We have already indicated that the Workmen's Compensation Act does contemplate of certain agreements. This agreement is made under Section 28 of the Merchant Shipping Act. It does not militate against

the Workmen's Compensation Act. The workman in this case is an Anglo Indian an3 an Indian citizen. His home was in Calcutta. The employer Mackinnon and Mackenzie and Co., Ltd., carries on business within the local area over which the Commissioner for Workmen's Compensation has jurisdiction. It must be presumed that the law is known both to the employer and the workman. Clearly again it must be presumed that they were not making an agreement which is contrary to the law of the land or which was not permissible by the law of the land. The agreement expressly refers to the Workmen's Compensation Act. Therefore, the agreement must be so interpreted as to be consistent with the Act and not inconsistent with it. The only way to interpret the agreement consistently with the Act without jeopardising the rights and obligations of the parties, and here without confiscating the statutory right of appeal which a party normally has under Section 30 of the Act, is to confine the agreement only to the event when there is no dispute that the accident arose out of and in the course of employment as expressly mentioned in that agreement which event we read to be the condition precedent for jurisdiction of the Commissioner for Workmen's Compensation under the agreement as distinguished from his jurisdiction under the Act.

33. Section 21 of the Workmen's Compensation Act describes the venue of proceedings. In subsection (i), it expressly says that where any matter is under this Act to be done by or before a Commissioner, the same shall, subject to the provision of this Act, and to any rules made hereunder, be done by or before the Commissioner for the local area in which the accident took place and which resulted in the injury. It is then followed by the proviso which reads:

> "Provided that, where the workman is the master of a ship or a seaman, any such matter may be done by or before a Commissioner for the local area in which the owner or agent of the ship resides or carries on business."

The test laid down in this proviso is satisfied by the workman and the employer in this case. Therefore under this proviso of section 21(1) of the Workmen's Compensation Act, the Commissioner for the Workmen's Compensation has the statutory jurisdiction over the matter independently of any jurisdiction created by an agreement of parties. In so far as that jurisdiction is exercised by the Commissioner, an appeal must lie under Section 30 of the Act unless as I have said before it is barred by the second proviso to Section 30(1) of that Act. We do not consider on the facts and the reasons stated above that the agreement in this case on a proper construction bars the right of appeal on this particular question whether the accident itself in this case at all took place in circumstances which could be said to be "arising out of and in the course of employment" as interpreted by a long series of judicial authorities discussed above.

34. As we are of opinion that the workman in this case did not die of personal injury caused to him by any accident arising out of and in the course of his employment, the preliminary objection to this appeal must be overruled and the judgment or order and the award of the Commissioner must be set aside.

35. The appeal is allowed. There will be no order as to costs.

Laik, J.

36. I agree.