

(1986) 04 OHC CK 0035
In the Orissa High Court
Case No : Misc. Appeal No. 208 of 1981

Bhajanlal Padia

APPELLANT

Vs

Bajinath ' Bajnath Majhi and Others

RESPONDENT

Date of Decision : 18-04-1986

Acts Referred:

Motor Vehicles Act, 1939 — Section 95

Workmens Compensation Act, 1923 — Section 12, 12(1), 14, 19(1), 19(2)

Citation : (1987) ACJ 572 : (1986) 62 CLT 13 : (1986) 1 OLR 607

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Mohapatra, for the Appellant; P.K. Pattnayak, for respondent
No. 1, M. Sinha and Md. Yusuf, for the Respondent

Judgement

S.C. Mohapatra, J.—Within the limited scope of consideration of substantial question of law, this appeal u/s 30 of the Workmen's Compensation Act, 1923 in short, "the Act") arises out of an order of the Commissioner for Workmen's Compensation at Baripada (hereinafter referred to as "the Commissioner") awarding compensation to the father of the deceased workman.

2. Appellant carries on the business of mining. In course of and for the purpose of the said business, he transports the minerals from Suleipat mining area to Badampahar railway station. To execute the work of transport, he had oral contract with respondent No. 2, who was transporting the mineral in his truck (OR J 3978). Bidar Majhi, the son of the criminal (respondent No. 1) was engaged as a coolie in the said truck for loading the minerals at Suleipat and unloading the same at Badampahar railway station and for that purpose he was making to and from journey between Suleipat and Badampahar in the truck. On 30-1-1977 at about 8 a. m. when the truck loaded with minerals was proceeding from Suleipat to Badampahar railway station, it dashed against a tree. In the accident Bidar Majhi died on the injuries sustained at the spot.

3. Respondent No. 1 the father of the deceased, filed an application u/s 22 of the

Act in Form "G" prescribed under Rule 20 of the Central Rules made under the Act before the Commissioner claiming compensation as a dependant on account of the death of his son.

4. On receipt of notice from the Commissioner, the appellant and respondent No. 2 appeared. The appellant in his written statement explained that he had entrusted the work of transporting the mineral including loading and unloading to respondent No. 2 and had no responsibility in the matter of movement of the truck and the deceased who was not she employee of the appellant having died in the accident far away from the mining area of the appellant (Suleipat), he had absolutely no responsibility in the matter.

Respondent No. 2 in his written statement while admitting death of Bidar Majhi, the coolie, in course of his moving in the truck carrying minerals as per the contract of transport with the appellant, claimed that he had no responsibility for loading and unloading and the deceased was an employee under the appellant to carry out the said job. He attributed the fatal injuries to the carelessness of the deceased.

The insurer (respondent No. 3), who was made a party on the prayer of both the respondent Nos. 1 and 2, disowned any liability on the grounds that the appellant was not insured by it and its insured, respondent No. 2, was not to be indemnified since the terms of the insurance had been violated. It took shelter u/s 14 of the Act limiting the liability-to insolvency of its insured in case the latter is held to be the employer.

5. The Commissioner directed the appellant to pay Rs.11,520/-as compensation to the respondent No. 1 on the findings that-(i) the respondent No. 1 is the dependant of the deceased, (ii) the deceased was an employee of respondent No. 2 getting Rs. 120/- as monthly wages, and (iii) the appellant being the principal of respondent No. 2 is liable u/s 12(1) of the Act. In the absence of a claim for indemnity u/s 12(2) of the Act, following the procedure under Rule 39, the appellant was denied the same. Insurer was not made liable in the absence of any proof of insolvency of respondent No. 2.

6. The provisions under the Act, which is benevolent statute, are departure from the Common Law of Torts. Negligence of the employer causing injury to the workman is not a pre-requisite. Once there is injury to the workman in course of his employment, the employer is made liable to pay the compensation unless the exception u/s 3 of the Act are attracted where the employer is a contractor of another, the latter is made vicariously liable subject to satisfaction of the conditions of Section 12. In case of death of a workman, his dependants get the right to claim compensation. Negligence of the workman resulting in his death is not a consideration while awarding compensation, (See I.L. R. 1950 Cut. 60 Padam Debi v. Raghunath Ray). The Commissioner is required to be satisfied that :

(i) the dead or injured is a workman;

- (ii) the person claiming is the dependant of the deceased workman;
- (iii) the Injury or death was outcome of an accident in course of the employment of the workman; and
- (iv) the person against whom the claim is made is the employer of the workman or a person under whom the employer is the contractor.

7. Before the Commissioner, a faint contention was advanced that the deceased Bidar Majhi did not come within the meaning of workman and was only a casual employee in this Court, however, all the parties abandoned such assertion and there is no dispute now that the deceased was a workman.

8. There is no dispute that the claimant is the father of the deceased A father comes within the definition of dependant u/s 2(1)(d)(iii)(b) of the Act where he is wholly or partially dependant on the earning of his deceased son. Whether a person is wholly or partially dependant of another is a question of fact. Such a question can be considered in appeal u/s 30 as a substantial question of law where the finding is not based on any evidence since it would be a surmise or conjecture amounting to arbitrariness of the Commissioner., Arbitrariness is antithesis of the fundamental right of equal protection of law under Article 14 of the Constitution.

9. Respondent No. 1 filed the application u/s 22, as the dependant of the deceased. This assertion has not been denied in any of the written statements. A fact can be said to be admitted where the assertion is not denied by the contestant. Acceptance of a fact asserted which goes untraversed by the contestant is a sound principle of judicial inference. This principle has been adopted by this Court in a case reported in Bibhuti Bhusan Mukherjee Vs. Smt. Dinamani Dei and Others, . The Commissioner by applying the principle of non-traverse held that the applicant is a dependant. This finding cannot be said to be either arbitrary or based on surmises. It is a pure question of fact where no substantial question of law is involved.

10. It is not in dispute that Bidar Majhi was moving in the truck for discharging his duties of loading and unloading. His movement was so closely linked with the duty to be performed that it can safely be held that he died in course of his employment when the accident occurred.

11. u/s 3 of the Act, the employer is liable to pay the compensation. The Commissioner has found the respondent No. 2 to be the employer on assessment of evidence of the witnesses, O. P. W. Nos. 1 to 4. On this finding respondent No. 2 cannot escape the liability.

12. There is no dispute that respondent No. 3 is the insurer in respect of the vehicle causing the accident. Under the Motor Vehicles Act, 1939, insurer becomes liable to pay the compensation. To escape the liability, the insurer took the plea that the terms of the policy were violated. The policy containing the terms was not produced. No explanation has been offered as to why the policy

could not be produced. In such circumstances adverse inference can safely be drawn that in case the policy would have been produced it would have indicated that the terms contained therein were not violated. In case the claim would have been made u/s 110-A of the Motor Vehicles Act, 1939 the insurer could not have escaped the liability. It has been laid down by this Court in a recent decision reported in *Bibhuti Bhusan Mukherjee Vs. Smt. Dinamani Dei and Others*, that the amount of compensation determined can be recovered by the Commissioner under the Act. The limited liability of the insurer u/s 14 of the Act does not exclude the general liability u/s 95 of the Motor Vehicles Act.

13 . The liability of respondent No. 2 or the jurisdiction of the Commissioner to recover the compensation from the insurer respondent No (3) would be of no assistance to the appellant since the liability of the appellant is not excluded there by. It is now clear that respondent No. 2 is the contractor of the appellant. u/s 12(3) a claimant has been given the option to prefer the claim either against his employer or against the principal of his employer who is liable u/s 12(1). There is, however, no prohibition under the Act or the Rules made there under to make the claim against both. When, as in this case, claim has been made against both, the Commissioner was required to decide the question of liability as provided u/s 19(1) which is his exclusive jurisdiction since the jurisdiction of the Civil Court is barred u/s 19(2) of the Act.

As has been held by the Division Bench of this Court in a decision reported in 1979 A. C. J. 477 (*Executive Engineer, National Highways, Division No. II v. Kamala Gouduni and others*) affirming the decision reported in I. L. R. 1976 Cut. 1451 (*National Highways, Division No. II v. Kamala Gouduni and others*) the object behind the provisions of Section 12 of the Act is to secure compensation to the workman who cannot fight out his battle for compensation by a speedy process. A person who employs others to advance his own business and interest is expected to provide a surer basis for payment of the compensation to the injured workman than the intermediary, who may often turn out to be a man of straw, from whom compensation may not be available. This is the purpose for which the claimant is given the option u/s 12(3) to claim the compensation either from the principal or from the employer. Therefore, unless it is held that the principal has less paying capacity than the employer, he will be made liable to pay the compensation leaving him to be indemnified by the employer as provided u/s 12(2).

14. However, to make the principal liable u/s 12 of the Act, the following essentials are to be satisfied as has been held in 1979 A. C. J. 477 (*supra*) :

(i) The principal is carrying on trade or business and in the course of or for the purpose of that trade or business engages a contractor to execute the work.

(ii) The work in question is ordinarily a part of trade or business of the principal.

(iii) The accident must have occurred on, in or about the premises on which the principal has undertaken or usually undertakes to execute the work or which is in

his control or management.

(iv) The accident must have occurred while the workman was in the course of his employment in executing the work.

If all the conditions are not satisfied, the principal cannot be made liable u/s 12 of the Act.

15. On my discussion made earlier, there is no room for doubt that the essential Nos. (i), (ii) and (iv) are satisfied. Mr. R. K. Mohapatra learned counsel for the appellant, however, very strongly urged that the accident having occurred at a far off place from his mines cannot be said to be "on, in or about" the premises or which is in his control or management, essential No. (iv) is not satisfied.

16. While considering whether a coolie engaged for loading and unloading in a truck at a distant place from the work site is a workman, in a decision reported in 1971 (2) C. W. R. 636 (Resident Engineer, M/s. Patel Engineering Co. v. Chanda Bewa) this Court observed that no distinction can be made between one who actually works at the site or who works at a distance for the purpose of the work.

In *Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja and Others*, it was observed that the employer's premises can be notionally extended to an area in which the workman passes and repasses in going to and in leaving the actual place of work which would depend upon facts and circumstances of each case. The observation of the Supreme Court while considering whether the accident was in course of employment of the workman has full application to determine whether a distant place on a public road would be "on, in or about" the premises of the principal.

17. In an English decision of Court of Appeal reported in (1899) 1 Q. B. 157 (*Powell v. Brown & another*), the phrase "on, in or about" was interpreted to mean either on the land or premises where the workman was engaged or in close proximity to such places. In another decision reported in (1903) 1 Q. B. D. 861 (*Atkinson v. Lumb*) while construing the liability of a principal u/s 7 of the English Workmen's Compensation Act, 1897, which is similar to Section 12, it was held that notwithstanding the considerable distance that existed between the place where the workman was engaged in course of his business and the place where the principal was executing the work, it can be held that the workman was employed "on or in or about" the premises.

18. In a decision reported in (1905) 2 K. B. 832 (*Rogers v. Cardiff Corporation*) a similar view was taken. However, in a case reported in (1908) 2 K. B. 567 (*Andrews v. Andrews and Mears*), it was held that the principle would not be applicable where the accident occurred on a public street or highway through which the workman was passing in course of his employment. In this decision, however, the contractor was engaged to cart materials and remove rubbish. While removing the rubbish, the cart faced an accident two miles away from the site of work. The contractor was free to move in any direction and dump the

rubbish anywhere as it would be convenient to him. In this context, it was held that the phrase could not be attracted to any public street or highway where the accident occurred.

19. In a decision of Madras High Court reported in 1956(II) I. L. J. 44 Guruswami Mudaliar (K) v. Executive Engineer, Mettur Canals Division), it was held that the phrase "on, in or about" meant either on the land or premises of the employer or the land or premises where he was engaged with his workmen in doing the work or in close proximity to such place.

In a decision of Andhra Pradesh High Court reported in 1962(5) F. L. R. 186 (Bhuvaneswari Rice Mill, Guntur v. Mannaya Pullayya). It was held that a cartman engaged by the contractor of the appellant for hading, unloading and transporting, rite bags from the Rice Mill having died while returning from the Railway Station to the Rice Mill, the principal was liable though the accident occurred in A public street. This decision was affirmed by a Division Bench of that Court in a case reported in I. Satyanarayana, Manager, Bhuvaneshwari Rice Mill, Panpadiguda, Guntur Vs. Mannava Pullayya, .

20. On a reading of the aforesaid decisions and keeping in mind object of the provision in Section 12 in a benevolent statute a reasonable view is that in case of transport contracts, the principal would be liable u/s 12(1) of the Act in respect of a coolie of the contractor moving in the truck for loading at a fixed point and unloading at a fixed destination where the contractor has no freedom to deal with the goods carried in any manner even if the accident occurs in a public highway. If the goods are transported by a common carrier, the question would be different. Thus, analysing all the four essentials and the same having been satisfied, the appellant as the principal is liable to pay the compensation to the respondent No. 1.

21. To avoid the liability, Mr. R. K. Mohapatra, the learned counsel for the appellant, submitted that the application u/s 22 of the Act is not maintainable in view of non-compliance of the requirement of rule 20 (2) of the Rules inasmuch as the certificate has not been given, Strong reliance was placed by Mr. Mohapatra on a decision of this Court reported in 39 (1973). CLT 299 K. S. Modi v. Bichitrananda Swain) where it has been observed :

"...It appears from the record that these Rules which are mandatory have not been complied with and the consequence of such non-compliance is that the proceeding from the stage of Rule 20 Inclusive of the final order awarding compensation is vitiated..."

This decision has not taken into consideration the earlier decision of this Court reported in I. L. R. 1959 Cut. 464 (The Central Engineering Corporation v. Dorai Bai), where it has been clearly observed :

"...It was never the intension of the Legislature that a claim should not be entertained or enquired into or that no compensation should be granted unless

the application was in strict form. Consequently failure to give all the particular required by the section in the claim for compensation or to file a certificate referred to in Rule 20(2) of the Rules framed under the men's Compensation Act does not bar the claim. If these particulars and certificate are necessary, the Commissioner can obtain them...

In view of the earlier decision of this Court not considered by the later decision, the earlier decision is binding on me and the later decision relied upon by Mr. Mohapatra is to be confined to the facts and circumstances of that case alone having no universal application. In 39(1973) CLT 299 (supra), it has not been considered that the rules being only procedural without any penal sanction for non-compliance thereof are directory and not mandatory Procedure, after all, is a handmaid of justice and is not a weapon to obstruct free flow thereof.

22. In conclusion, the appellant as the principal has rightly been held to be liable to pay the compensation to the respondent No. 1 and the insurer (respondent No. 3) is to be directed to pay the compensation.

23. Mr. R. K. Mohapatra, submitted that the daily wages being Rs. 3/- the work for twenty-four days would bring the monthly wages to Rs. 72/- only and the compensation amount is wrongly calculated. The claimant asserted the monthly wages to be Rs. 120/- which was not denied in the written statement. The finding of the Commissioner that the monthly wages of the deceased was Rs. 120/- and awarding the compensation accordingly is not liable to be disturbed.

24. In the result, the appeal is allowed in part. The insurer (respondent No. 3) is directed to indemnify the amount of compensation to the appellant within three months from today failing which the Commissioner shall take steps to recover the amount from the insurer to be paid to the appellant There shall be no order as to costs in this appeal.