
(1962) 12 CAL CK 0010
In the Calcutta High Court
Case No : A.F.O.O. No. 325 of 1959

Golden Soap Factory (P) Ltd.

APPELLANT

Vs

Nakul Chandra Mondal

RESPONDENT

Date of Decision : 17-12-1962

Acts Referred:

Workmens Compensation Act, 1923 — Section 1, 12(1), 12(2), 2(1), 3

Citation : AIR 1964 Cal 217 : 67 CWN 728 : (1963) 2 LLJ 580

Hon'ble Judges : P.B. Mukharji, J;C.N. Laik, J

Bench : Division Bench

Advocate : Nalini Kanta Mukherjee, for the Appellant; Phanindra K. Sanyal and N.C. Das Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Laik, J.—In this appeal the same old questions, viz., whether the appellant and the respondent satisfy the test of being the employer and the workman respectively, under the Workmen's Compensation Act (hereinafter called the Act); whether the employer is liable because of the introduction of a contractor in between the employer and the workman and whether the contractor is a necessary party in the proceeding; whether the type of the accident is such as is outside the scope of the Act, and lastly whether the accident "arose out of and in course of the employment about which phrase Lord Wrenbury in the case of *Armstrong Whitworth and Co. v. Redford* 1920 AC 757 (780) observed,

"The decisions upon it are such as that I have long since abandoned the hope of deciding any case upon the words "out of and in course of, upon grounds satisfactory to myself or convincing to others".

Speaking for myself, I cannot abandon so early the hope of deciding a case, according to my knowledge and satisfaction, when the point is argued.

2. The workman's case was simple. On May 27, 1958 at a time when an erection was being put up in the employer's premises and he was working as a fitter for

the erection, he fell from a height of 40 feet while he was fitting the frame and received personal injuries due to the accident which arose out of and in course of his employment. He claimed a lump sum of Rs. 4,900/- on the basis of cent per cent disability.

3. Over and above the argument of Mr. Mukherjee the learned Advocate appearing for the employer the appellant company, giving rise to the above question which I shall presently deal with he also argued that the accident did not happen within the premises of the appellant company but in the premises of another company, viz., Sree Iron Foundry Works (P) Ltd. and that the appellant company was neither aware of nor had any knowledge of any such accident. At the outset I dispose of this argument by saying that these are pure questions of fact found against Mr. Mukherjee's client on evidence, by the learned Commissioner, which it would not be possible for us to upset in the appeal. Moreover, neither the theory of notional extension of employer's premises controlling the general rule of commencement and place of employment as laid down in the case of Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja and Others, is applicable to the facts of the present case nor the tests where the employment is "for the purpose of the employer's trade or business", are necessary to be discussed here, as sought to be argued by Mr. Mukherjee, the facts being different.

4. Oral evidence was adduced on behalf of both the parties and considering all the evidence the learned Commissioner accepted the case of the workman and awarded in his favour the sum of Rs. 3430/- on the basis that there is permanent partial disablement and the total loss of the earning capacity is 70%. Against the said order the present appeal has been preferred by the employer company.

5. Mr. Mukherjee faintly suggested that the evidence is not sufficient to support the finding of the said loss of the earning capacity of 70%. In my view he is not correct. There is the evidence of the Doctor (P. W. 3) proving that the workman was totally incapacitated and he could not work. Over and above, the workman himself proved the same who was not cross-examined on this point. The workman lost his right hand, right leg and pelvis. Again these being all questions of fact cannot be upset in the appeal.

6. On the first question of law, as to the relationship of the employer and the workman it is argued that there is none as between a master and a servant.

7. The definition of workman in our Act is exhaustive and the Act applies only to certain classes of workmen defined in Section 2(n) and enumerated in Schedule II thereof. It is unlike the English Act which applies to all workmen. Again in our Act the definition of "employer" being an inclusive one is not exhaustive whereas in the English Act, unless the context otherwise requires the phrase "employer" includes any body or person, corporate or incorporate, and the legal personal representatives of a deceased employer and where the services of a workman are temporarily lent or let on hire to another person by the person with whom

the workman has entered into a contract of service or apprenticeship, the latter shall be deemed to continue to be the employer of the workman while he is working for that other person. Under the English Act the original employer remains the employer in case of lent services.

8. It is no doubt true that the general rule as laid down by the House of Lords in *Smith v. General Motor Cab Co. Ltd.* 1911 AC 188 is that there must be the relationship of master and servant between the employer and the workman. It is equally true that an independent contractor is not a workman in all cases. It cannot also be disputed that the workman, in order to be entitled to compensation, should be acting in the course of his employment, that is, when he is doing something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service and the word "employment" covers and includes things belonging to or arising out of it. But under the Indian Law, an employer is he, who controls the service of the workman or is in a position to command and control the workman in the manner of performing the work, when the accident occurs.

9. In the instant case I am, satisfied on the evidence that the appellant company was in a position to command and control the respondent in the manner of performing the work when the accident happened. The learned Commissioner was right in holding that the respondent was a workman who had been employed by the appellant, that is, there is relationship of employer and workman between the appellant and the respondent. I might add that though the decisions are not uniform, it should be held that our Act should be given a benevolent construction, the same being not a quasi-penal statute. The view that it must not be interpreted with sympathetic leniency but must be construed very strictly, is not in my opinion, correct.

10. On the second question of law as to the exemption of the employer's liability because of the interposition of the contractor and whether he is a necessary party, the general notion is that it is ordinarily part of a business of a person to execute certain work, then ordinarily he will do that work by his own servants, he is not to escape liability for any accident that takes place merely by interposing a contractor -- the contractor undertaking to do what ordinarily the principal would do for himself. In England, the statute reserves to the workman the right of recovering compensation either from the principal or from the contractor who employs him directly but not from both; but it is doubtful as to whether the workman there, may make both the principal and the contractor respondents, in the proceedings. In Scotland, the workman could not claim compensation against both the undertaker and the contractor "jointly and severally or severally" (*Goddes v. Dunfermlinc District Committee* (1927) 20 BWCC 815). In Ireland, the liability of the principal and the contractor is neither joint, nor joint and several; and that if the workman obtains an award against one, he cannot proceed against the other in the event of the award being unproductive : *Meier v. Dublin Corporation* (1912) 6 BWCC 441.

11. In our Act, normally a workman can re-cover compensation from his employer. Exception is found in Section 12(1) of the Act which gives the workman a right to recover from the person who has entered into a contract with the workman's immediate employer and in that case Section 12(2) becomes operative and the principal who has engaged the contractor has a right to recover from the contractor by way of indemnity. The learned Commissioner disbelieved the story of the appellant that the workman had been engaged by Probodh, the Company's labour contractor. The Company did not produce any of its Directors or the persons who are in control of the Company to give evidence in support of its allegations. The workman was not cross examined on this point either. On the facts found in the instant case and as I have already held, affirming the finding of the learned Commissioner, that the workman was employed by the appellant company, it cannot escape the liability merely by interposing a contractor. The proceedings would not fall through because the contractor was not made a party in the proceeding.

12. On the third question of law the phrase arising out of and in course of the employment is taken from the English Act, originally appearing in the Act of 1897. It has been adopted in the American and Dominion Act. It also occurs in Newzealand Act and has the same meaning as that of the English Act. There is hardly any general principle which can be evolved to explain and define the phrase arising out of employment but attempts have been made to explain it by classification, viz., to the nature, condition, obligations and incidents of the employment. Whether in a given case, an accident arises on the one hand out of the injured person's employment, although he has conducted himself in it carelessly or improperly, or, on the other hand, arises not out of his employment but out of the fact that he was outside the scope of it. or has added to it some extraneous peril of his own making, or has temporarily suspended it while he pursues some excursus of his own, or has quitted it altogether, are all questions which, often as they arise, are susceptible of different answers by different minds as explained by several well-known Judges and Jurists and are always questions of nicety. So it is here. I doubt if any universal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on its own facts.

13. There is however in the opinion of Lord Sumner in the case of Lancashire and Yorkshire Railway Co. v. Heighley 1917 AC 352) one test, which is always at any rate applicable, which is this "Was it part of the injured person's employment to hazard, to suffer or to do which caused his injury? If yes, the accident arose out of his employment, if nay, it did not". The word "employment" again is not to be defined in a narrow manner by reference only to the duties of the workman; but the character, conditions, incidents and special risks involved in employment, would have to be taken into consideration in order to find out whether the accident "arose out of and in course of the workman's employment. I am satisfied that the above tests have been fulfilled in the instant case and I affirm the findings of the learned Commissioner that the accident arose out of and in

course of the workman's employment.

14. On the question of the type of accident, the well-known definition of accident by Lord Macnaghten in *Fenton v. J. Thorley and Co. Ltd.* 1903 AC 443 at page 448 is "an unlocked for mishap or an untoward event which is not expected or designed". There is no difference between the English and the India Statute as to the type of accident which gives the workman a claim to compensation and it would serve no useful purpose to discuss the cases of *Burrell*, *Walker*, *Evan* or *pets-chest* to see whether the accident in the present case was such a type of an accident which would not attract the operation of the Act. But surely the injury in the instant case cannot or even argued to be attributed to the serious and wilful misconduct on the part of the workman. It is amazing that when a man injures himself suddenly and unexpectedly by showing all his might and all his strength and all his energy ,into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act after putting on unduly restricted and narrow constructions on the same because he is not employed as a workman, because the accident is of a different type, because it does not arise out of and in course of his employment or because he exerted himself deliberately and there was an entire lack of the fortuitous element. I cannot think that this is right.

15. The appeal has no merit and is therefore dismissed with costs to the Respondent.

P.B. Mukharji, J.

16. I agree.