
(1991) 09 KL CK 0015
In the High Court Of Kerala
Case No : A.S. No's. 8 and 9 of 1987

Minerals and Chemicals

APPELLANT

Vs

Thevan

RESPONDENT

Date of Decision : 26-09-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Fatal Accidents Act, 1855 — Section 2, 3
Workmens Compensation Act, 1923 — Section 19(2), 3(5)

Citation : (1992) 1 ACC 154 : (1992) ACJ 230 : (1992) 1 ILR (Ker) 361 : (1992) 2 LLJ 769

Hon'ble Judges : Balanarayana Marar, J

Bench : Single Bench

Advocate : M.V. Joseph and Varghese Myloth, for the Appellant; Siby Matheww, A.A. Mohammed Nazir, for the Respondent

Final Decision : Dismissed

Judgement

Balanarayana Marar, J.—These two appeals arise from the common judgment of Sub Court, Ernakulam is O.S. Nos. 604/1983 and 124/1984. Compensation due to the death of two workers employed in a quarry was claimed in these suits. Plaintiffs in O.S. 604/1983 are the parents of one Velayudhan who died due to sliding of earth while he was engaged in removing earth, plaintiff in the other suit is the father of another employee of the same name. He too died in the same manner.

2. The allegations in both the complaints are identical. The deceased employees were engaged in the work of removing earth on April 30, 1982 at the work spot near Thrikkakara Pipe Line Road. First defendant is alleged to be the lessee of the mine of quarry and 2nd defendant is the contractor. While the two workers were engaged in work, mud fell on them and they died. The accident is alleged to have occurred due to lack of care on the part of defendants and insufficiency of safety measures required to be provided by them. Plaintiffs are the dependants of the

deceased. In each of the suits an amount of Rs. 100000/- is claimed as compensation.

3. First defendant resisted the suit and contended that he had not given any contract to 2nd defendant and that he had not employed the deceased persons. Second defendant used to sell earth to various parties and 1st defendant had purchased earth from him for which price was paid. He is not in anyway connected with the place from where earth was excavated. He therefore disclaimed liability to pay any compensation. It was further contended that the court is not the proper forum for claiming compensation for workmen's demise. The correctness of the amount claimed was also disputed. Second defendant in his written statement contended that he was only a labourer under Always Minerals and Chemicals, that he was not having any mineral licence, that he was only acting in accordance with the directions of the 1st defendant, that he had not worked as a contractor under the 1st defendant and that he is not liable to pay compensation. The allegation that the accident happened due to negligence on the part of defendants was denied. According to him the deceased were working as employees of 1st defendant. This defendant therefore disclaimed liability to pay any amount. The suits were tried jointly. Documents were marked and evidence taken in O.S. 604/1983. By a common judgment both the suits were decreed. Defendants were found liable to pay an amount of Rs. 50,000/- in equal halves in each of the suits. These two appeals filed by the 1st defendant are directed against that judgment. Since the appeals arise from a common judgment, they are heard jointly and are being disposed of by this common judgment.

4 The points for determination are :

(1) whether the suit is maintainable in view of the bar contained in Section 19 of the Workmen's Compensation Act, (2) whether the deceased were employees of defendants, (3) whether death occurred in the course of employment, and (4) whether defendants are liable to pay compensation and, if so, what is the quantum,

Point No. 1

5. The maintainability of the suit is questioned by the appellant for the reason that the jurisdiction of the civil court is taken away u/s 19(2) of the Workmen's Compensation Act, 1923 (hereafter referred to as the Act). That sub-section provides that no civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act. The liability having arisen under the Act on account of an accident during the course of employment, the question has to be settled by the Commissioner appointed under the Act, according to appellant. On the other hand, it is the contention of learned counsel for the plaintiffs that the claim arises out of a tortious liability and an alternate remedy is available by way of a proceeding before a civil court.

6. The matters in respect of which cognizance of a civil court are barred are enumerated in Section 19 of the Act. They are: (1) settling, or (2) deciding, or (3) dealing in question, and (4) enforcing any liability under the Act. In construing this provision we have to see whether the scope of the Act is to take away the jurisdiction of the civil court in regard to reliefs in tort and whether the remedy provided in the Act is an alternative optional remedy. As observed by Suranjan Chakraverti in his Commentaries on Workmen's Compensation Act, 1986 Edn. p. 365, two broad facts are needed for the Commissioner to act under this Act viz. (a) the parties must elect to go in for the reliefs that he administers which means that he must choose to forego his rights under the common law of the land, and (b) the facts giving jurisdiction to the Commissioner must also exist side by side. The learned author is of the view that it is only when these two conditions are strictly fulfilled that the Act seeks to bar the jurisdiction of the civil court on the topics,, viz. settling, deciding and dealing with any question involved in the proceedings together with the duty to enforce the liability the Commissioner may ultimately ascertain. The preamble to the Act states that it is an Act to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident. The employer's liability for compensation is fixed under S3. Sub-section (1) of that section provides that an employer shall be liable to pay compensation in accordance with the provisions of Chapter II of the Act if personal injury is caused to a workman by accident arising out of and in the course of his employment. Sub-section (5) reads:

"Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any Court of law in respect of any injury-

(a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act."

7. A reading of Sub-section (5) would indicate that the workman has an option either to claim compensation under the Act or for recourse to the civil court for damages for the injury sustained. In case he chooses the civil court as the forum, he foretells his right to compensation under the Act. Similarly it is not open to him to maintain an action before a civil court in case he had preferred to move the Commissioner for determination of compensation under the Act. In short the workman has the liberty to elect and can avail either the remedy in tort for damages for negligence before a civil court or for compensation under the Act. The scope and scheme of the Act is therefore not to take away from the civil court the jurisdiction to give relief in tort, but to provide for an alternative remedy for certain classes of persons in certain circumstances.

8. The Madras High Court in the decision in Trustees of the Port of Madras Vs. Bombay Co. (P) Ltd., Madras, had occasion to consider this aspect. After noticing that there are three classes of cases in which a liability may be established founded upon a statute (1) where there was a liability existing at common law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law (2) where the statute gives the right to sue, but provides no particular form of remedy, and (3) where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it, the Madras High Court held:(p.691):

"It should be noticed that the workman has an option to either claim compensation under the Act or have recourse to the Civil Court for damages in respect of the injury. If he had exercised his option and gone to the Civil Court, he forfeits his right to compensation under the Act. Similarly, he cannot maintain a suit for damages in a Civil Court if he had instituted a claim for compensation before the Commissioner under the Act. The workman has the liberty to elect and avail himself of a remedy in tort for damages for negligence or wilful act against an employer or against some other person."

9. A Division Bench of this Court in K.S.E. Board v. Sundaram Estate 1957 II LLJ 31 held that the workman is entitled to institute a claim under the Act only if he abandons his right of suit in a civil court, and submits himself to the summary jurisdiction of the Commissioner. On the other hand, if he did not have recourse to the remedy provided under the Act, and he has sustained the injury on account of the negligence or the wrongful act of his employer or a stranger, it would be open to him to proceed against the tortfeasor by means of a suit for damages.

10. The question whether the Act abrogates the right arising under the Fatal Accidents Act was considered by the Patna High Court in Union of India v. Satyabati (AIR) 1966 Patna 130. It was held that a special statute does not derogate from another special statute without express words of abrogation. Section 2 of the Fatal Accidents Act contains a proviso to the effect that not more than one action or suit shall be brought for and in respect of the same subject matter of complaint. S.3 of that Act stipulates that the plaint in any such action or suit shall give full particulars of the person or persons for whom or on whose behalf such action or suit shall be brought and of the nature of the claim in respect of which damages shall be sought to be recovered. Interpreting these provisions and the provisions contained in the Act it was held that a workman making a claim under the Act has an alternative remedy in the civil court. The Patna High Court quoted with approval the following observation of the Rangoon High Court in Syan Hoe v. Narayana (AIR) 1937 Rang. 451:

"In cases of this kind it is not for us to criticise the scale of damages which is laid down but it may be useful to observe in the interest of those who may receive injuries in the future that when negligence and a breach of duty are proved against the employer there are other remedies which may be found by a

workman, and in pursuing them a degree of compensation may be reached which is more commensurate with the actual loss and injury involved".

11. The alternative remedy available to a workman under the common law is more advantageous in view of the ceiling put to compensation u/s 4 of the Act. The amount of compensation as per Sub-section (1) of Section 4 in the case of death resulting from injury is an amount equal to 40% of the monthly wages of the deceased workman multiplied by the relevant factor or an amount of Rs. 20,000/- whichever is more. If it is advantageous to the injured workman or the dependants of a deceased workman to claim more than what is provided for in Section 4 of the Act, there is no bar in seeking the remedy in a civil court for damages in tort. The provisions of the Act do not in any way exclude the jurisdiction of civil court in such cases and, as observed by the Patna High Court in Satyabati's case (supra) the Workmen's Compensation Act, which is a special statute, does not derogate from the Fatal Accidents Act, which also is a special statute, without express words of abrogation. There is no provision in Section 19 of the Act which abrogates the rights arising under the Fatal Accidents Act. The civil court has therefore jurisdiction to entertain the claim for compensation.

12. In this connection learned counsel for appellant draws attention to the decision of the s in Kamala Mills Ltd. Vs. State of Bombay, The Supreme Court was considering whether the suit should be dismissed on the preliminary ground of lack of jurisdiction. The Supreme Court held that in cases where the exclusion of the civil court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive. It was further held:

"If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil courts are prescribed by the said statute or not".

13. According to learned counsel for the plaintiffs the observations of the Supreme Court are not applicable to the present case since lack of jurisdiction has not been pleaded. In the written statement filed by the appellant the only plea seen raised is that the court is not the proper forum for claiming compensation for workman's demise. It has not been specifically pleaded that the civil court has no jurisdiction by virtue of the bar contained in Section 19 of the Act. The Supreme Court rendered the decision while considering Section 20 of the Bombay Sales Tax Act. In view of the other decisions cited earlier including a Division Bench decision of this Court which had considered the Workmen's Compensation Act, it has to be held that the civil court has jurisdiction. Point No.

1 is therefore answered against the appellant.

Point 2 to 4.

14. The fact that three persons died by fall of earth while they were engaged in removing earth is not disputed. The claim in the two suits is by the dependants of two of them. The 1st defendant is alleged to be the lessee of that place and 2nd defendant the contractor. First defendant disclaimed liability by contending that he has nothing to do with the operation of that mine though he admitted that 2nd defendant used to supply earth. Account Books maintained by 1st defendant were produced to show that he has purchased earth from various persons including the 2nd defendant. On the other hand, 2nd defendant while admitting that the two persons died while they were engaging in removing earth from the Mada (mine) at Kythappadu contended that he is not a contractor under the 1st defendant, but only an employee. He admitted that the wages due to the labourers were paid by him, but would state that the 1st defendant used to entrust the money to him for such payment. From the testimony of 2nd defendant it is thus clear that the wages of the workers were paid by the 1st defendant through 2nd defendant. Ext. XI. dt. June 1, 1976 was produced to show that 1st defendant is the lessee. That is an agreement entered into between K.C. Ahammed and M.M. Kuriakose on behalf of the 1st defendant and one Khader Pareeth under which the right to remove clay was leased to the 1st defendant at the rates mentioned therein. The agreement is for a period of five years. The execution of that agreement is admitted, but the contention is that it was not acted upon and no licence was obtained by the 1st defendant as required under the Mines Act. Appellant has a further contention that the period prescribed in Ext. XI has expired. According to them they had taken on lease another Mada owned by one Namboodiri and clay was removed from that Mada. But D.W. 1 admitted that the account books will not show removal of earth from that Mada. The fact that 2nd defendant had supplied earth is evidenced from entries contained in the account books Exts. 61 and B2. True, the account books show payment of amounts which, according to appellant, represents the price paid. Appellant would have it that the entries in Ext. B1 and B2 represent the price paid to the 1st defendant for the earth supplied by him. Several others had also supplied earth and payments to those persons also find a place in the account books. But in view of Ext. XI agreement and the testimony of 2nd defendant as D.W.2, the only conclusion possible is that 1st defendant is a lessee of Kythappadu Mada and 2nd defendant was the contractor employed by them. Otherwise there was no possibility for the 2nd defendant to pay the wages of the workers engaged in the removal of earth from that Mada. No document has been produced to show that 2nd defendant is the lessee. He had stated that he does not possess a licence to remove earth. The conclusion reached by the court below that 1st defendant is the lessee of the Mada and 2nd defendant the contractor is therefore justified and does not call for interference. That the two deceased workmen were engaged in removing earth from Kythappadu Mada has been proved beyond doubt by the testimony of P.Ws. 1 to 5. They were engaged

in removing earth. It was during the course of employment that earth fell on them causing their death. It is the case of the plaintiffs that defendants were negligent and did not provide the necessary safety measures required under the rules. First defendant pretended ignorance of the circumstances under which the workmen died. They also contended that they had no responsibility to provide safety measures. It is not pleaded that there was no negligence on their part, nor did they attribute negligence to the workmen. In the circumstances defendants are found to be negligent and the finding of the lower court on this aspect has only to be sustained.

15. Regarding the quantum of compensation to be awarded no serious dispute is seen raised in the written statement. The only plea is that the amount claimed is exorbitant. Though an amount of Rs. 100000/- was claimed as compensation, the court below has awarded only Rs. 50000 in each of these cases to be paid by the defendants in equal halves. The claim has been considered in paragraph 20 of the judgment of the court below. The wages of the workmen and the number of days for which they would get employment are taken into consideration. True, the parents of the deceased are aged, but taking into account their age at the time of the accident and other circumstances the total amount awarded as compensation cannot be said to be excessive. There is no reason to reduce the same.

16. For the reasons stated above both these appeals are found to be devoid of merits and in confirmation of the judgment and decree of the court below the appeals are dismissed with costs of 1st respondent in A.S.8/1987 and respondents 1 to 3 in A.S. 9/1987.