
(2009) 01 SHI CK 0015
In the High Court Of Himachal Pradesh

New India Assurance Company	Vs	APPELLANT
Neelam Kumari and Others		RESPONDENT

Date of Decision : 09-01-2009

Acts Referred:

Railways Act, 1989 — Section 2(34)

Citation : (2010) ACJ 1756 : (2009) 1 ShimLC 469

Hon'ble Judges : Kuldeep Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kuldeep Singh, J.—This appeal has been directed by the insurer against the award dated 3.12.2003 passed by Commissioner Workmen's Compensation, Hamirpur in Case No. 2/97, awarding Rs. 3,22,088/- compensation to respondents No. 1 to 4 with a direction to appellant insurer to indemnify respondents No. 5, 6 and deposit the award amount within one month, failing which, there shall be an additional liability to pay the interest on the amount payable in accordance with law.

2. The brief facts of the case are that respondents No. 1 to 4 being widow and minor children of Ram Pal, filed claim petition under the Workmen's Compensation Act, 1923 (for short Act) against respondents No. 5 and 6 owners and appellant-insurer of tractor No. HP-22-4952 on account of death of Ram Pal on 9.11.1996 while ploughing field of Mansa Ram. It has been alleged that Ram Pal aged 35 years was co-owner of tractor No. HP-22-4952 along with respondents No. 5 and 6, he was employed as driver on the tractor by respondents No. 5 and 6 on Rs. 3,000/- per month salary. The deceased was earning Rs. 2000/- per month from allied works. On 9.11.1996 Ram Pal was ploughing field of Mansa Ram and in that process tractor over turned accidentally and Ram Pal received crush injuries in the accident and died. The tractor was insured with appellant at the time of accident, hence respondents No. 1 to 4 filed claim petition claiming Rs. 5,00,000/- compensation.

3. The respondents No. 5 and 6 filed reply and admitted that they had employed Ram Pal as driver on the tractor No. HP-22-4952 on Rs. 3,000/- per month salary and he died in the accident while ploughing field on 9.11.1996. They also admitted that the tractor was insured with the appellant on 26.3.1996. In the reply they pleaded no objection, if the petition is allowed.

4. The insurer contested the petition by filing reply and took preliminary objection that in view of contract of insurance the insurer is not liable to indemnify the insured. The deceased was owner of the tractor and therefore, his legal representatives are not entitled to compensation on account of negligence of the deceased. Ram Pal had no valid licence at the time of accident. On merits, insurer denied the claim. The claimants filed rejoinder to the reply of insurer and reiterated their stand. The following issues were framed:

1. Whether the deceased Sh. Ram Pal died in accident while driving in tractor No. HP-22-4952 on 9.11.1996. ...OPP

2. Whether the petitioners are entitled for compensation claim in the petition, if yes, to what amount and from whom. ...OPP

3. Whether the deceased husband of petitioner No. 1 was the employee of respondent No. 1 and 2. ...OPR 1+2

4. Whether the respondent No. 3 is not liable to indemnify the insured as alleged? ...OPR 3

5. Whether the claim is not maintainable as alleged? ...OPR 3

6. Whether the respondent No. 3 has not received the premium of the tractor as alleged? ...OPR 3

7. Whether the deceased was not having valid driving licence as alleged? ...OPR 3

8. Relief.

The Commissioner allowed the petition on 3.12.2003 as noticed above, hence, this appeal which has been admitted on the following substantial questions of law:

1. Whether the mere fact that the name of one of the owners is not shown in the registration certificate, is sufficient to hold that he is not an owner when there is other evidence such as the sale transaction, loan transaction and contract of insurance to show that he is the owner of the vehicle?

2. Whether a party can be permitted to lead evidence against the pleadings and get out of its admission especially without amending the pleadings?

3. Whether there can be a valid driving licence when it is proved that the fees for issuance of the licence has been deposited after the death of the driver?

4. Whether the insurance company can be ordered to pay statutory interest

under the Workmen Compensation Act?

5. I have heard Mr. K.D. Sood, learned Counsel for the appellant, Mr. R.K. Sharma, learned Counsel for respondents No. 1 to 4, Mr. Ashok Sharma, learned Counsel for respondents No. 5 and 6 and gone through the record. On behalf of the appellant, it has been submitted that the deceased was co-owner of the tractor and therefore, he could not be an employer as well as employee and then a workman under the Act. The deceased was not having valid driving licence at the time of accident. The interest has not been awarded in accordance with the Act. The Commissioner has not properly appreciated the material on record in accordance with law. On the pleaded case of respondents No. 1 to 4, the insurer is not liable to indemnify the respondents No. 5 and 6 for payment of compensation under the Act. The learned Counsel representing claimants and owners have supported the impugned award.

Substantial questions of law 1 and 2

6. The substantial questions of law 1 and 2 are interconnected therefore, both of them are being taken up for decision collectively. In the present case RW-3 Amin Chand father of Ram Pal has stated that he and respondent No. 6 were the owners of the tractor and Ram Pal was engaged as driver on the tractor at Rs. 3,000/- per month. The statement of RW-3 regarding ownership of tractor has been belied by the pleadings and other documentary evidence such as Insurance Policy Ex.PH of the tractor in which Ram Pal has been shown along with other owners as one of the insured. The name of deceased Ram Pal has not been recorded in Ex.PW-4/A Registration Certificate of the tractor. The chassis number of the tractor as per Ext.PW-4/A is 100063 and engine number is 111623. RW-1 N.C. Gupta has stated that Amin Chand, Sita Ram and Ram Pal had applied to the bank for obtaining loan which was sanctioned on 13.3.1996 thereafter vide bill No. 087982 dated 30.3.1996 the aforesaid applicants purchased tractor bearing engine No. 111623 and chassis No. 100063. The engine and chassis numbers of the tractor referred in bill No. 087982 dated 30.3.1996 are the same as mentioned in Registration Certificate Ex. PW-4/A, therefore, it can be safely held that Ram Pal deceased was one of the owners of the tractor in question. Simply because his name has not been mentioned in registration certificate Ex.PW-4/A, it cannot be said that he was not actually legal owner of the tractor. It is not the case of the respondents that after purchasing tractor Ram Pal divested his rights or otherwise sold his share in the tractor to respondents No. 5 and 6.

7. The respondents No. 1 to 4 have pleaded in the claim petition that Ram Pal was co-owner of the tractor, he was driving the tractor as driver of respondents No. 5 and 6 at the time of accident in which he sustained multiple injuries and ultimately died. On behalf of appellant it has been submitted that respondents No. 1 to 4 have themselves admitted in the claim petition that deceased was co-owner of the tractor, hence, respondents No. 1 to 4 are bound by their admission and they cannot be heard to say or deviate from their stand that deceased was

not a co-owner of the tractor. The respondents No. 1 to 4 at no stage of the trial amended the petition and withdrew their admission that deceased was a co-owner of the tractor at the time of accident. The Commissioner has ignored this legal aspect in the impugned award. In these circumstances there is no escape but to return a finding that deceased was a co-owner of the tractor at the time of the accident and therefore, it is, held that deceased was a co-owner of the tractor at the time of accident. The connected question is whether respondents No. 5 and 6 could employ Ram Pal a co-owner as driver of the tractor and in these circumstances the deceased was a workman under the Act.

8. In order to appreciate vexed question whether a co-owner can be an employee of another co-owner and a workman under the Act, it is necessary to appreciate some of the provisions of the Act. The term owner has not been defined in the Act, however, the terms employer, workman have been defined in the Act which were as follows on 9.11.1996 when the accident took place:

"employer" includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when 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, means such other person while the workman is working for him.

"workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is:

(i) a railway servant as defined in (clause (34) of Section 2 of the Railway's Act, 1989,(24 of 1989) not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) (ia)(a) a master; seaman or other member of the crew of a ship,

(b) a captain or other member of the crew of an aircraft,

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India, or;

(iii) employed in any such capacity as is specified in Schedule II,

Whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall,

where the workman is dead, include a reference to his dependants or any of them.

Modification

In its application to apprentices under the Apprentices Act, 1961, for Clause (n) substitute the following namely:

(n) "workman" means any person who is engaged as an apprentice as defined in the Apprentices Act, 1961, and who in the course of his apprenticeship training employed in any such capacity as is specified in Schedule II"- Vide Act 52 of 1961, Section 16 and Sch.

(2) The exercise and performance of the powers and duties of a local authority or of any department [acting on behalf of the Government] shall, for the purposes of this Act, unless a contrary intention appears, be deemed to be the trade or business of such authority or department.

(3) The Central Government or the State Government, by notification in the official Gazette, after giving not less than three months' notice of its intention so to do, may, by a like notification, add to Schedule II any class of persons employed in any occupation, and the provisions of this Act shall thereupon apply, in case of a notification by the Central Government, within the territories to which the Act extends, or in the case of a notification by the State Government, within the State, to such classes of persons:

Provided that in making addition, the Central Government or the State Government, as the case may be, may direct that the provisions of this Act shall apply to such classes of persons in respect of specified injuries only.

9. There is no denial of the fact that an employment is given to an employee or a workman by an employer. The employer can be owner himself or his representative. It has been contended on behalf of the appellant that one person cannot have higher status of owner as well as lower status of workman at a given point of time. All co-owners have equal status. One co-owner cannot be a master and another co-owner a servant. One co-owner cannot have control over another co-owner. Legally one co-owner cannot direct another co-owner to perform duty in a particular manner. Assuming but not admitting deceased Ram Pal infact was engaged as driver by other co-owners and it is found that he died in the accident while driving the tractor, in that case also deceased Ram Pal being a co-owner of the tractor would not become a workman of other co-owners of the tractor under the Act. He would continue to remain owner of the tractor and in no case he could be termed as workman on the principle that one person cannot hold simultaneously status of owner as well as workman.

10. The learned Counsel for the appellant has relied In re workmen's compensation of Jaglipathan AIR 1936 Rangoon 89 on the point that a member of partnership under a sub- contract is not a workman within the meaning of the Act. In that case respondent M.E. Jan was to carry out certain stone work for

Burma Oil Company. Jan then entered into an agreement with Biroo and Barathaw, for the performance of the work, the arrangement between Jan and the other party to the sub-contract was that Jan would pay the sub-contractors on a piece-work basis. Biroo and Barathaw along with others carried out work in collaboration and partnership. The system under which the partnership was worked was that any contract obtained on behalf of the partners would be carried out by the members of the gang, the amount received by the partners was to be divided among the members of the partnership in accordance with the amount of labour which the several members of the partnership had expended upon the work. On those facts Commissioner Workmen's Compensation submitted the case u/s 27 of the Act for determination on the point whether in those circumstances deceased Jagalipathan was a workman under the Act. The Special Bench held that the person claiming to be a workman must be under a contract of service with some other person and held that Jagalipathan was not a workman within the meaning of the Act.

11. The term "workman" under Industrial Disputes Act 1947 has been interpreted by the Apex Court in Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, as follows:

The essential condition of a person being a workman within the terms of this definition is that he should be employed to do the work in that industry, that there should be, in other words, an employment of his by the employer and that there should be the relationship between the employer and him as between the employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman within the definition of the term as contained in the Act.

The Supreme Court has further held that:

The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at page 23 in *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.* 1947-1 AC 1, at p.23 (E), "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question.

12. The term "worker" under the Factories Act, 1948 came for consideration before the Supreme Court in *Chintaman Rao and Another Vs. The State of Madhya Pradesh*, wherein it has been observed as follows:

This takes us to the consideration of the definition of the term "worker" under the Act, "Worker" is defined to mean a person employed, directly or through any agency, whether for wages or not, in any manufacturing process. It is and it cannot be disputed that the making of bidis is manufacturing process. But is a Sattendar a person "employed", directly or through agency, within the meaning

of the definition "employed" ? The concept of employment involves three ingredients: (1) employer (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision.

13. The Supreme Court in Chintaman Rao has noticed Dharangadhra Chemical Works Ltd. and observed that there is no reason why the test laid down by the Court in the context of the definition of "workman" under the Industrial Disputes Act of 1947, cannot be invoked or applied for ascertaining whether a person is a "worker" under the Factories Act, 1948.

14. The learned Counsel for the appellant has submitted that respondents No. 5, 6 co-owners of tractor could not have control over equal status co-owner namely deceased Ram Pal. He has relied Shibbu Metal Works, Jagadari v. Regional Director, Employees State Insurance Corporation, Chandigarh and Anr. 1982 LAB.I.C. 755 wherein it has been held as follows:

Another vital aspect of the employer and employee's relationship is the concept of control, which the former must exercise over the latter. The identifying mark of the latter is that he should be under the control and supervision of the employer in respect of the details of the work. This indeed is again a basic factor. Where this control is altogether lacking, then the relationship of the employer and the employee would equally be nonexistent. Now can it be said that a partner is under the supervision and the control of the firm. The answer is obviously in the negative. Indeed it can well be said that the partners control the firm and not in the reverse that the firm (which, as already noticed, has no legal personality) controls its partners. Because of this aspect also it is indeed difficult to hold that a partner can be an employee of his own partnership firm.

15. The respondents No. 1 to 4 have brought no material on record so as to indicate how, the other co-owners of the tractor were supervising the "employment" of the deceased Ram Pal. The tests of employment laid down by the Supreme Court in the context of definition of workman under the Industrial Disputes Act, 1947 can be safely applied for determining whether a person is a workman within the meaning of the Act. While construing term workman under the Act, not only relationship of employer and employee is essential but the control over the employee by the master is also necessary. In M/s. Shibbu Metal Works, Jagadari (supra) while dealing with the concept of control, it has been held that where the control is altogether lacking then the relationship of the employer and employee would equally be non-existent and therefore, partner cannot be under the supervision and control of the firm for the purposes of employment and partner cannot be an employee of his own partnership firm. The respondents 1 to 4 have led no evidence and proved master and servant relationship between respondents 5, 6 and deceased Ram Pal nor they have proved their control over his "employment".

16. The respondents No. 1 to 4 have also not proved that deceased Ram Pal was engaged by respondents No. 5 and 6 for the purpose of their trade or business. There is no evidence on record that tractor in question at the time of accident was being used by respondents No. 5 and 6 for the purpose of their trade or business. PW-3 Mansa Ram has not stated on what terms he had engaged the tractor for ploughing on 9.11.1996, nor RW-3 Amin Chand has stated on what terms he had sent the tractor for ploughing the field of Mansa Ram. It has come on record that Ram Pal was ploughing the field of Mansa Ram through tractor when accident took place and he died. The ploughing of field of Mansa Ram by Ram Pal at the time of accident has not been connected with the trade or business of respondents No. 5 and 6. It has been held in *Rebati Gantayat v. Haguru Sethi and Ors.* 1986 LAB.I.C. 1511 that it is for the claimant to prove that the deceased was a workman employed in the trade or business of his employer. The Commissioner has not properly appreciated the basic legal position. In these circumstances it cannot be said that deceased Ram Pal was an employee or workman within the meaning of the Act under respondents 5 and 6. Hence, substantial questions of law 1 and 2 are decided against the respondents and in favour of the appellant.

Substantial question of law No. 3

17. The driving licence Ex. PG was issued in favour of Ram Pal on 8.11.1996. RW-2 Rup Chand, Licence Clerk, Licensing Authority, Hamirpur has stated that he has not brought the file regarding licence of Ram Pal. He has stated that licence fee is taken on or before the date of issuing licence, according to cash book of the year 1996 an amount of Rs. 35/- stand deposited in the name of Ram Pal vide receipt No. 364957 dated 13.11.1996. One more licence was issued on 8.11.1996 and amount of that licence was deposited under receipt No. 364243 dated 8.11.1996. The fact remains the licence Ex.PG was issued in favour of Ram Pal on 8.11.1996. The deposit of money on 13.11.1996 in light of statement of RW-2 that another amount was deposited on 8.11.1996 loses significance. There is presumption in favour of official work, unless contrary is proved. The licence Ex.PG was issued on 8.11.1996, the accident took place on 9.11.1996, the licence is valid for driving tractor, therefore, in these circumstances substantial question of law No. 3 is decided against the appellant and in favour of the respondents.

Substantial question of law No. 4

18. In light of findings recorded on substantial questions of law

1 and 2, the insurance company is not liable to pay interest and therefore, substantial question of law No. 4 is decided in favour of the insurance company.

19. The commissioner has not properly appreciated the legal position. In view of findings recorded on substantial questions of law 1,

2 and 4 the respondents No. 1 to 4 are not entitled to compensation and interest

as deceased Ram Pal was not found to be a workman within the meaning of Act under respondents No. 5 and 6 at the time of accident and therefore, respondents No. 5 and 6 and appellant are not liable to pay any compensation to respondents No. 1 to 4. In view of findings recorded above, appeal deserves to be allowed and impugned order is liable to be set aside.

20. No other point was urged.

21. The result of above discussion, the appeal is allowed, award dated 3.12.2003 is set aside and petition filed by respondents No. 1 to 4 is dismissed with no order as to costs.