

(1932) 08 BOM CK 0015
In the Bombay High Court
Case No : O.C.J. Suit No. 2222 of 1931

Sir Dhunjibhoy Bomanji, Kt.

APPELLANT

Vs

Gunpa Khandu Koli

RESPONDENT

Date of Decision : 01-08-1932

Acts Referred:

Workmens Compensation Act, 1923 — Section 12

Citation : AIR 1933 Bom 338 : (1933) 35 BOMLR 694 : (1933) ILR (Bom) 699

Hon'ble Judges : Wadia, J

Bench : Single Bench

Judgement

Wadia, J.—Plaintiff has filed this suit to recover from the defendants the sum of Rs. 1,225 which he had to pay in the Court of the Commissioner for Workmen's Compensation under the award of the Commissioner dated July 22, 1931. Plaintiff is the sole contractor in Bombay for the coaling of the steamers of the British India Steam Navigation Company, Limited, and does business in the name of Bomanji Dhunjibhoy. In June 1931 the plaintiff had to supply 200 tons of coal to the SS. Hatkhola then lying in the Victoria Dock, Bombay. It is his case that he gave a sub-contract for the purpose to the defendants who are muccadums at the rate of Re. 1 per ton, and that they in turn engaged several workmen on June 11, 1931, one of whom, named Maruti Bala, fell down from the stage on which he was standing at about 9 in the morning by reason of one of the ropes breaking, and sustained fatal injuries of which he died in hospital two days later. On July 8, 1931, his widow filed an application in the Court of the Commissioner claiming Rs. 1,950 as compensation under the Workmen's Compensation Act (VIII of 1923) from Messrs. Mackinnon Mackenzie & Co., the agents of the Steamship Company, for the death of her husband. Messrs. Mackinnon Mackenzie & Co. applied to the Commissioner u/s 12 of the Act, claiming to be indemnified by the plaintiff on the ground that the deceased workman was not employed by them, and on July 13, 1931, the Commissioner served the plaintiff with a notice requiring him either to contest the widow's claim or the claim for the indemnity made against him by Messrs. Mackinnon, Mackenzie & Co. Plaintiff appeared

before the Commissioner on July 22, 1931, to contest the widow's claim, and the Commissioner awarded her Rs. 1,200 as compensation and Rs. 25 for costs. Plaintiff in turn now seeks to recover the sum of Rs. 1,225 from the defendants together with an additional sum of Rs. 160 which were the costs incurred by him in contesting the widow's claim.

2. Defendants allege in the first place that the suit is not maintainable. It is their contention that all claims under the Workmen's Compensation Act must be decided by the Commissioner, and a separate suit cannot lie. Section 12 (I) of the Act provides that where a principal in the course of or for the purposes of his trade or business contracts with a contractor for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to the workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him. Applying this section to the parties concerned in this suit, Messrs. Mackinnon Mackenzie & Co. would be liable to pay compensation as principal, the plaintiff being the contractor. u/s 12 (2) of the Act Messrs. Mackinnon Mackenzie & Co. being liable as principal to pay compensation would be entitled to be indemnified by the plaintiff, and the sub-clause provides that "all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner." The question that arises, therefore, for consideration is : What is the remedy of the contractor if he claims indemnity from a person who he says is his sub-contractor ? Plaintiff has filed this suit against the defendants under the provisions of Section 13 of the Act which provides inter alia that where a workman has recovered compensation in respect of any injury "caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid to pay damages in respect thereof, the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid". The words in the section refer to the legal liability of "some person other than the person by whom the compensation was paid," whereas the marginal note refers to such a person under the term "stranger." The Courts have got to construe the words of a section as they stand, and it has been held by the Privy Council in *Thakurain Balraj Kunwar v. Rae Jagatpal Singh* (1904) L.R. 31 IndAp 132 that a marginal note cannot be referred to in construing the provisions of a section. Do those words, therefore, contemplate a sub-contractor ? And does Section 12 (2) contemplate only one principal and only one contractor, or a series of contractors and subcontractors, each contractor standing to his sub-contractor in the relationship of principal to contractor ?

3. The matter is not entirely free from doubt, as the words of Section 12 (2) refer to "any such" indemnity. A similar contention came up for decision in Calcutta on a reference by the Commissioner made to the High Court of Calcutta u/s 27 of the Act, and is reported in *Machuni Bibi v. Jardiane Menzies & Co.* (1928) 32 C.W.N. 452. It was there held that if A, after undertaking work which is

ordinarily a part of his trade or business, contracts with B for the execution of a part, B similarly contracts with C for the execution of the whole or a part of the work he himself has contracted for, and one of C's workmen is killed by accident, primarily u/s 12 the person who is liable for compensation is A. A is entitled to be indemnified by B, the contractor who dealt directly with him. But the Act does not provide for the contingency of B being indemnified by C; and it was, therefore, held that B must seek his remedy in a civil Court of law. The contractor referred to in Section 12 (2) is the contractor who contracts directly with the principal as defined in Section 12 (1). If, therefore, there is any further sub-Jetting of the contract, an indemnity cannot be obtained under the Act and must be sought by recourse to the civil Court. The Court held that it might be urged that to hold C liable to indemnify A would be the construction most workable in practice and might even avoid litigation, but it also held that it could not read in the Act what was not there. The words "any such" indemnity, therefore, are, according to this decision, restricted only to one indemnity, namely, between the principal and the original contractor. The plaintiff alleges in paragraph 5 of the plaint that he applied to the Commissioner to put in an application u/s 13, but it was disallowed. The defendants who were not represented before the Commissioner do not admit this allegation, and there is nothing on the record to show whether the application was made and disallowed by the Commissioner. Taking the words of Section 12(2) and Section 13 together, I agree with the construction put upon them by the High Court of Calcutta, and I hold, therefore, that this suit is maintainable.

4. If this suit is maintainable, as I have held it is, u/s 13, the next question for determination of the Court is whether the injury to the deceased workman was "caused under circumstances creating a legal liability of some person to pay damages in respect thereof other than the person by whom the compensation was paid," the compensation in this case having been paid by the plaintiff. The circumstances which would create a legal liability on the part of the defendants would arise out of the relationship between them and the original contractor the plaintiff. Were the defendants sub-contractors, or rather independent contractors? An independent contractor, generally speaking, is one who undertakes to produce a given result or to do a certain work without being controlled by the person for whom he does the work. A contractor executing an independent employment is not the servant of the person who engages his services, and he does not make such person liable for any torts he or his servants have committed, nor is a sub-contractor the servant of the contractor who has employed him. To put it shortly, the question for the consideration of the Court is : Was the deceased workman at the time he received his injuries on June 11, 1931, a workman under the control of the plaintiff or of the defendants ?

5. Defendants deny that they were sub-contractors or that the deceased workman was in their direct employment when he received the injuries or was in any way employed by them. They say that as muccadams they were asked to engage workmen for the plaintiff, that all the staging, ropes and necessary

implements for the work were supplied by the plaintiff", and that the workmen used to work directly under the control of supervisors appointed by the plaintiff. The plaintiff called his manager and constituted attorney Rustomji Kumana to give evidence on his behalf. He stated to the Court that it was he who engaged the defendants as muccadams for the work of coaling the SS. Hatkhola at Re. 1 per ton, and that the defendants as muccadams employed the workmen and settled their wages. Defendants, on the other hand, say that they were engaged by one Jamsetji Darukhanawalla who was at the time a foreman in the plaintiff's service, and that it was he who engaged them separately on the morning of June 11, 1931, and asked them to get 50 to 55 men each in order that 100 tons of coal may be bunkered by defendant No. 1 and another 100 tons by defendant No. 2. The plaintiff called another witness Mahomed Piren who is also a foreman in the plaintiff's service, and he said that the defendants were engaged by Mr. Darukhanavalla, though he was not aware of the terms of engagement. It is really immaterial for the purposes of this suit by whom the defendants were engaged. There is the word of Rustomji Kumana against the word of each of the defendants and the word of Mahomed Piren, and it certainly seems to me to be more probable that Mr. Darukhanavalla who was on the spot engaged the muccadams for the purpose for which their services were required. What is really material is in what capacity the defendants were engaged, or what was their relationship to the plaintiff. [His Lordship then dealt with matter not material to this report and continued.]

6. The deceased was one of the workmen engaged by the defendants, but the question still remains whether he was exclusively subject to the defendants' orders and control in his work. The plaintiff's case is that he had no control over the work of the deceased, that his agents abstained from personal interference, and that the defendants had the entire control of the work of coaling 200 tons of coal, the mode and the manner of doing it being left entirely to their judgment and their discretion. Both sides have led evidence in order to show the nature and the measure of the control exercised over the defendants' workmen, and I must here observe that the evidence that has been led by the plaintiff is incomplete, and such as has been recorded before me is unsatisfactory. The whole evidence on either side, however, read together shows that the entire control of the work had not been abandoned to the defendants, and the work done by the defendants' workmen was done not only under the supervision of the plaintiff or his agents and for his benefit but also to a large extent under his superintendence and control. A mere supervision or a right to inspect the work in progress or to stop it at any stage or at any time of the day would not be enough to show that the plaintiff had the control, It has been laid down in *Reedie v. London and North Western Railway Co.* (1849) 4 Ex. 244 that even if the employer had the right to dismiss an incompetent workman employed by his contractor, that right would not make the employer liable. It was also contended that the workmen in this case were not engaged directly by the plaintiff", but through the defendants who settled their wages and paid them. [His Lordship

then dealt with the evidence and continued.] From all this evidence it appears to me that the defendants as muccadams had not the right to do the whole of the work on their own initiative, but that the workmen engaged by them were under the plaintiff's control. On this point also I believe the defendants' evidence in preference to the plaintiff's witnesses.

7. There is another point to be considered in this case. Plaintiff says that on June 11, 1931, defendants not only supplied the labour but also the staging, ropes, shovels, planks and other implements necessary for the work. Defendants have denied it in their written statement, though they have not done so in the reply given by their advocate to the plaintiff's notice of demand. [His Lordship then dealt with other matters not material to this report and concluded.]

8. I believe the defendants when they say that the materials were on that day supplied by the plaintiff including the rope that snapped and which was the direct cause of the accident. If that is so, then even if the defendants were in the position of sub-contractors, the deceased workman was engaged in a work in the performance of which the plaintiff was interested, and the plaintiff was under an obligation under the law to take reasonable care that at the time he supplied the staging and the ropes they were in a state of reasonable fitness and safety for the work for which they were used. See *Heaven v. Pender* (1883) 11 Q.B.D. 503 He cannot by employing a contractor get rid of his duty which he owed to the workman, and for the neglect of such a duty he is liable for the injury sustained. Having neglected to use ordinary care, and the injury having ensued by reason of the neglect, he is, in my opinion, liable, and the duty which he owed to the workman extends to a danger which is the result of negligence even without any intention on the part of the plaintiff. I am also satisfied on the evidence that the defendants were not independent contractors, and, therefore, coming back to Section 13 again, the injury that was sustained by the deceased was not caused under circumstances creating a legal liability on the part of the defendants. In that view of the case the plaintiff cannot claim to recover from them the compensation which he had to pay to the widow.

9. In the result the suit will be dismissed, but as I have held on two important issues in favour of the plaintiff, I order the plaintiff to pay two-thirds of the defendants' costs of the suit.