

(1975) 07 OHC CK 0026
In the Orissa High Court
Case No : M.A. No. 74 of 1973

Srinivas Das

APPELLANT

Vs

Executive Engineer, Transport and Works Department, Talcher
Thermal Power Station and Others

RESPONDENT

Date of Decision : 31-07-1975

Acts Referred:

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

Citation : (1976) 42 CLT 816

Hon'ble Judges : K.B. Panda, J

Bench : Single Bench

Advocate : S. Misra 1, for the Appellant; S. Mohanty, for the Respondent

Judgement

K.B. Panda, J.—This is an appeal filed u/s 30(1)(d) of the Workmen's Compensation Act, 1923 (hereinafter referred to as the Act) against an order dated 9-1-1973 passed by the Sub-divisional Officer and Commissioner under the Act (hereinafter called the Commissioner) directing the Appellant Srinibas Das to indemnify the General Superintendent of the Talcher Thermal Power Station (for brevity referred to as T.T.P.S.). in the following admitted circumstances.

2. The deceased Prasanna Kumar Ray was engaged as a driver under the T.T.P.S. The Appellant also works under the same as an Upper Division Clerk. On 17-1-1971, the Appellant on deposit of the required sum, requisitioned a truck of the Respondent bearing registration No. ORD 762 to bring certain personal effects of his from a place called Khajuria. Prasanna the deceased truck driver took the vehicle and in its return journey slipped into a Sandy Nala and died in the accident. The dependant of the deceased named Pratap Ray laid a claim of Rs. 7,000/- under the Act against the Executive Engineer, Transport and Works Department, T.T.P.S. (Opp. party No. 1) and the General Superintendent, T.T.P.S. (Opp. party No. 2). After the opposite parties entered appearance at their instance the Appellant was made a party on the ground that he would be liable to

indemnify the principal employer T.T.P.S. The learned Commissioner" granted the full compensation but at the same time held that the Appellant should indemnify the principal u/s 12(2) of the Act resulting in the present appeal.

3. The sale point for consideration is, if in the circumstances of the case, the Appellant can at all be made liable u/s 12(2) of the Act. It was contended by Mr. Misra, the learned Counsel for the Appellant that the Appellant was a mere employee under the T.T.P.S. as much as the- deceased; that he had only hired the truck for certain time - a facility which is invariably extended to other employees of the T.T.P.S.; that it was only the services of the deceased as well as the truck that were transferred to him during the period but not the truck or the deceased, that is, during that time, the Appellant did not become the employer of the deceased nor the owner of the truck; that the Appellant was not a contractor as contemplated u/s 12(1) of the Act and necessarily therefore the provisions of Section 12(2) cannot come into play.

4. Mr. Mohanti, learned Counsel for the Respondents urged that the Appellant during the time he had taken the truck on hire was in charge of the truck and the driver of the truck was left to work completely under the direction of the Appellant and as such is liable to indemnify the principal employer T.T.P.S. In support of his contention, Mr. Mohanti relies on the following citations, namely, Resident Engineer, M/s. Patel Engineering Company Ltd. v. Chanda Bewa 1971 (2) C.W.R. 636 Golden Soap Factory (P) Ltd. v. Nakul Chandra Mondal AIR 1964 Cat. 217, and Sri S. Krishna Aiyar v. The Superintending Engineer, P.W.D. East Road Circle, Chepauk, Madras AIR 1949 Mad. 427. So far as the first case is concerned the facts are distinguishable in that it was a case of a contractor wherein "A" had undertaken the contract of construction a building. He employed "B" for collection of building materials such as boulders, chips etc.. One "C" employed as a coolie in one of the transport trucks of "B" met with an accident and died while the truck was engaged in transport of building materials of "A". It was held that "A" is liable to pay compensation u/s 12 of the Act. The point decided there was that the compensation awarded in favour of "C" against "A" does not give "A" an absolute right to claim indemnity against "B" u/s 12(2) of the Act. Hence that case does not help the Respondents in any way. The next case is an authority as to the interpretation of Section 2(1)(n) of the Act, that is, definition of "employer" and "workman". In that context it is said that under the Act, an employer is he, who controls the services 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. This lays down a general proposition over which there is no controversy. The third case is one where the facts are similarly different. There the Government had hired out the, lorries with drivers to their contractor for carrying out road construction work. In course of work a driver met his death in an accident. It was held that Government was a principal and the engineering contractor, a contractor within the meaning of Section 12(2) and as such Government could not be regarded as a Sub-contractor. Hence the application u/s 12(2) of the Act was maintainable.

In the instant case, admittedly the Appellant was not a contractor nor a Sub-contractor. He had temporarily got the services of the driver and the truck from the T.T.P.S. on payment of hire charges. Thus, the question is if, as has been held by the Commissioner, he would be liable u/s 12(2) of the Act. Law is now settled that in order to attract the provisions of Section 12(2), it must initially come u/s 12(1) of the Act which provides thus:

12. Contracting. - (1) Where any person hereinafter in this section referred to as the principal) in the course of or for the purpose of his trade or business contracts with any other person (hereinafter in this section referred to as the 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 shall be liable to pay to any 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 and where the compensation is claimed from the principal, this Act shall apply as if reference to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed.

(2) Where the principals liable to pay compensation

under this section, he shall be entitled to be indemnified by the contractor of any other person from whom the workman could have recovered

compensation and where a contractor who is him self a principal is liable to pay compensation or to indemnify a principal under this section he shall be standing to him in the relation of a contractor from whom the workman could have recovered compensation and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.

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If the scheme of the Act is glanced through it would appear that this section is an exception. The principle behind this section can be well gathered from the statement of Objects and Reasons," published in the Gazette of India, dated 16th September, 1922 pp. 314-310 and may be stated as follows:

Where an employer does his work through contractors, special provision is necessary. In some cases the employer can reasonably be held responsible for the conditions of employment; in other cases he cannot. The distinction made here is between contractors who are employed in the course of, or for the purposes of the original employer's trade or business and those who are not. Only in the latter case will the contractor be liable to pay the compensation in all other cases the original employer will be liable. This, for example, if a mine owner engages a labour by means of contractors who supervise these men while at work, the mine owner will be responsible. But if the owner of a cotton mill

employs an engineering firm to erect an extension to his mill, the engineering firm will be liable to pay compensation to the men they employ.

Two exceptions are made. If a contractor does his work elsewhere then in or about the original employer's premises, the latter has no real control over the safety of the workman, and he is therefore relieved from responsibility.

The law report of the Select Committee in this context is thus:

Under this section as originally drafted, the liability to pay compensation was thrown primarily upon the employer. Sub-clause (2) which gave him a statutory right of indemnity against a contractor applied only to contracts made before the commencement of the Act. The effect of this was that, in the case of a contract made after the passing of the Act, the employer would not be entitled to be indemnified by the contractor unless he had inserted in the contract a special stipulation to this effect. In most cases written contracts are not entered into and the employer would have little or no protection against collusion between the contractor and the workman. In other cases, the contractors are themselves men of substance and it would be more convenient for all parties concerned if the workmen were able to recover compensation from the contractor in the first instance. We have accordingly modified this clause to bring it into line with the principle followed in Section 5 of the English Act. The workman is thus enabled to proceed against the contractor or against the employer, and the contractor is liable to indemnify the employer in all cases. We have, at the same time, made the application of the section somewhat clearer by substituting the words which is ordinarily - part of the trade or business of the principal" for the words "which has been or is ordinarily undertaken by the principal in the course of or for the purpose of his trade or business". We have further eliminated the provision in the Bill as introduced, exempted the Government and local authorities from the liability" imposed by this clause. These authorities are liable just in the same manner as private individuals.

The object and the scope of the provision has been discussed in the case of Port Trust, Madras v. Bombay Company A.I.R 1967 Mad. 318 thus:

It will be seen that under the Act, a new liability is created and the employer, even though he may not be in the least culpable, is made liable to pay his contractor's workmen where he employs a contractor for his trade or business. The liability is fastened on the employer vicariously and by Sub-clause (2) he is given an indemnity by the contractor. Obviously, the object behind these provisions of the Act is to secure compensation to the workman who cannot fight out his battle for compensation, by a speedy process. One sees in the provision the view that a person who employs others to advance his own business and interest should be more promising and certain source of recompense to the injured workman than the intermediary who may be a man of straw. May be, this principal liability of the employer may "have an admonitory value in accident prevention, the principal employer being in a strategic position to reduce

accidents by efficient organisation and supervision of his staff. The section, it will be seen provides only for indemnity by the intermediary between the employer and the actual workman. The intermediary also is person who is engaged by the employer himself. The workman may, u/s 12, recover the compensation from the intermediary instead of the employer, referred to as the principal in the section. The section provides not only for the immediate contractor working under the principal, but also a contractor working under the immediate contractor...

In the case of *Bansidhar Munnalal Vs. Ramchandra Bardichand*, , it is said thus:

The scheme of the Act is that "employers" as defined in Section 2(e) should be liable in the manner mentioned in Section 3. Section 12 expressly provides for a case where we have, as it were, several tiers of employers or petty employers. This is common occurrence in big schemes undertaken by a contractor who necessarily has to let different section of his work to petty contractors working under his direction and control. Whenever an employee is working anywhere in the entire systed, he will be an employee of the principal; but he may be working under a subcontractor or a petty contractor.

... In a big scheme or system there may be several of them and at times, there may be over-lapping also, so that the employee may not be able to put his finger on a particular name as the petty contractor under whom he was employed. It might also happen that even when this is possible, the petty contractor

may not have the means to pay the compensation. That is why Section 12 enacts that the principal contractor of the whole can be compelled to compensate the workman who works in his scheme or systed.

In *S.M. Ghose Vs. National Sheet and Metal Works Ltd. and Another*, it is said thus:

Normally, a workman can only recover compensation from his employer, but this Sub-section is an exception and gives the workman a right to proceed against the person who has entered into a contract with the workman's immediate employer by which the latter was to do certain work. If the workman has a right to recover from the person who has employed the workman's employer to do certain work then Sub-section (2) comes into play and the person who is known as the principal who has employed the contractor can recover from the contractor by way of indemnity. The question of indemnifying however only arises if the case falls within Sub-section (1).

To bring the case within Sub-section (1) it must be shown that the person known as the principal has in the course of or for the purpose of his trade or business contracted with another person for the execution by the contract of certain work and further that the work which the contractor has undertaken to perform his work which is ordinarily part of the trade or business of the principal. In other words, the section contemplates a person Sub-contracting for work which he himself normally does and which is part of his business. For example if "A"

engages a contractor "B" to paint his house and "B" enter into a contract with "C" by which the latter is to do the work for "B", a workman of "c" who is injured can recover from "B" as the case clearly falls within the section because "B" had in the course and for the purpose of his business entered into contract with "c" by which "C" was to perform part of the work or trade or business carried on "B". However, if the subject-matter of the contract is not work ordinarily or normally carried on by the principal then Section 12 can have no application at all.

In this context, the case of *Rabia Mahomed Tahir v. Agent, G.I.P. Railway* AIR 1029 Bom. 170, was referred to with approval and it was pointed out that the painting of the factory shed was not part of the business or trade of the Respondent, and as such Section 12(2) could not have any play.

To sum up, it would appear that the principle underlying this provision of Section 12(1) and (2) of the Act is that when the work is entrusted to an independent contractor the link between the workman and the principal is broken, and the section would not have any play in those circumstances.

5. Mr. Misra, learned Counsel for the Appellant cited some English cases such as *Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool), Ltd.* and *Mc. Farlane* (1946) 2 All E.R 345, *Chowdhary and Anr. v. Gillot and Ors.* (1974) 2 All. E.R. 541, *Shivnandan Sharma Vs. The Punjab National Bank Ltd.*, wherein the principle enunciated above has been followed and as such it is not necessary to refer to them in detail. In the case of *Kokilabai v. Keshavlal Managaldas Company* A.I.R 1941 Bom. 18, it has been held that

... the Commissioner has found as a fact that the accident arose out of and in the course of the employment. But the selling agents would not be liable to pay compensation, unless the case can be brought within Section 12 of the Act, which deals with work done on behalf of the employer by a contractor.

In *S.M. Ghosh v. National Sheet Metal Works, Ltd.* 2 F.J.R. 237, it has been held thus:

The question of indemnifying the principal under Sub-section (2) of Section 12 arises only where the case falls within Sub-section (1). Where the work done by the workman is not the work which ordinarily forms the whole or part of the work of the principal, the case is not governed by Section 12(1) and right to claim indemnity does not arise.

In an ultimate analysis therefore, it is apparent that the Appellant No. 1 was not a contractor doing any work under the principal employer the T.T.P.S. and the work of the T.T.P.S. is not to give trucks on hire. The T.T.P.S. all along remained the owner of the truck as well as the employer of the deceased. It is only the services of the truck as well as the driver that had been placed for some time to do the job of the Appellant who had deposited the requisite hire charges. During the time the truck and the driver were engaged in the job of the Appellant, it

cannot with any stretch of imagination be held that he had become either the owner of the truck or the employer of the driver. That apart, there is no contract as envisaged u/s 12(1) of the Act to attract the provisions of Section 12(2).

6. To sum up, therefore letting out trucks on hire not being the ordinary part of the trade or business of T.T.P.S. nor the Appellant having been employed as a contractor under the T.T.P.S. for doing any work on their behalf, the question of indemnifying the T.T.P.S. does not arise. The learned Commissioner has misconceived the scope of Section 12(2) of the Act and has made the Appellant liable.

In the result, therefore, the appeal succeeds and the order of the Commissioner directing the Appellant to indemnify the T.T.P.S. is struck down. Parties, in the circumstances, to bear their own costs.