
(1960) 08 MP CK 0026

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No's. 59 and 61 of 1958

Subhadrabai Sukhram and Others

APPELLANT

Vs

The Malwa United Mills Ltd.

RESPONDENT

Date of Decision : 30-08-1960

Acts Referred:

Workmens Compensation Act, 1923 — Section 2

Citation : AIR 1961 MP 349 : (1961) ILR (MP) 396 : (1961) 6 MPLJ 80

Hon'ble Judges : V.R. Nevaskar, J

Bench : Single Bench

Advocate : Waghmare, for the Appellant; Chaphekar, for the Respondent

Judgement

V.R. Newaskar, J.

The Commissioner under Workmen's Compensation Act, Indore directed R. 3500/- to be paid by the contractor Nathulal to the heirs of one Sukhram Carpenter who died while working during the construction or repairs of a building used as a canteen for the workers of Malva United Mills Limited. The premises of the canteen which were being constructed or repaired belonged to the Mills and one Nathulal was given a contract for that work. Nathulal engaged Sukhram to do some carpenter's job. On 21-7-1955 while he was engaged in fixing the wooden frame for the roof of the building a parapet fell upon his back and seriously injured him. He was removed to the hospital where he died on 23-7-1955, The heirs of Sukhram submitted a petition for compensation and impleaded both the contractor as well as the Mills.

The claim was opposed by Nathulal on the ground that Sukhram was not a "workman" within the definition of the term as defined in the workmen's Compensation Act and consequently he was not an employer liable to pay the compensation. Quantum of compensation claimed on the basis of assertion that the deceased earned Rs. 5/- per day was also not admitted.

The Mills also contested their liability. It was contended firstly that the heirs could

lay claim under the Employees' State Insurance Act, secondly that deceased Sukhram was not a workman as defined in the Act and thirdly that he was an employee of the contractor and that his employment was of casual nature.

The learned Commissioner held that deceased Sukhram was a workman within the meaning of the term as defined in the Act; his case is covered by Clause (viii) (a) of Schedule II of the Act since the building in question was more than one storey in height above the ground. He further held that the burden of proving that the height of the building sought to be constructed was (sic) (not?) 20 feet or more from the ground level to the apex of the roof, lay upon the contractor as it was a special thing in the knowledge of opponent No. 2 (Nathulal) and he had failed to discharge that burden and that therefore it remained to be established that the building was less than 20 feet above the ground level.

According to him primary liability was that of opponent No. 2 and that therefore it was unnecessary to consider the defence of the Mills that the construction of a canteen Cannot be considered to be a part of their trade or business. He consequently held Nathulal liable to pay compensation. As regards the extent of compensation it was found that the deceased earned Rupees 3 and Annas 8 per day. He therefore awarded Rs. 3500/- to the heirs of the deceased. The claim against the Mills was dismissed.

The heirs filed an appeal against the Mills, this is numbered 59 of 1958.

Nathulal contractor has also filed an appeal. The same is numbered 61 of 1958.

On behalf of Nathulal it was contended by Mr. Thakkar that the Commissioner wrongly assumed jurisdiction in this case on the assumption that the deceased was a "workman" within the meaning of the term as used in the Act. The burden of establishing the fact that the deceased answered the requirements of the term "workman" as defined in Section 2(n) was upon the heirs. They have failed to do so. On the other hand, according to him, the evidence clearly made out that the deceased did not answer those requirements.

The finding of the Commissioner that the building was more than one storey in height above the ground is based on erroneous construction of the expression "more than one storoy in height above the ground". He further contended that there was not an iota of evidence in support of the fact that the building is more than 20 feet in height from the ground level to the apex. There is, on the other hand, overwhelming evidence that the height of the building above the ground level upon the apex is less than 20 feet. The deceased therefore was not a workman and the heirs are not therefore entitled to any compensation.

On behalf of the heirs Mr. Waghmare contended that the finding of the learned Commissioner that the deceased was a workman is a finding of fact based on some evidence. There is therefore no substantial question of law in this case. He also sought to support the reasoning of the learned Commissioner as regards the expression "more that one storey in height".

In the appeal by the heirs against the Mills Mr. Chaphekar for the respondent raised a preliminary objection that the appeal against the Mills under the circumstances of the case is incompetent. He urged that the liability of the Mills in this case would rest upon the applicability of Section 12 of the Act. The Mills, he pointed out, are not primarily liable. Their liability is secondary and they are entitled to be indemnified by the contractor Nathulal in Case they are made to pay.

Their position it is urged is not that of principal and surety. The heirs having obtained an order for compensation against the contractor they cannot, according to him, prefer appeal against the Mills whose liability was merely alternative and not co-extensive with that of the contractor. They had got what they wanted and could no longer complain. He relied upon the decision reported in *Meier v. Dublin Corporation* (1912) 2 IR 129.

It will be logical first to consider the appeal preferred by the contractor. For if he succeeds and it is held that the deceased was not a "Workman." within the Act the claim would totally fail. It would in that case be unnecessary to consider the appeal against the Mills, or the preliminary objection raised by Mr. Chaphekar.

Now as regards the appeal of Nathulal we must first see what is the effect of the evidence adduced regarding the height of building. The evidence in the case shows that the canteen is of one storey with a parapet about 2 or 3 feet in height above the roof. As regards the height from the ground level upto the apex the evidence of the applicants (heirs) indicated that it was 15 feet but Nathulal himself admitted that it was at one point 16 or 17 feet and that was the maximum height. There is no evidence whatever to show that it was more than 20 feet from the ground level to the apex. That being the state of evidence the only question of law which arises is whether the building has been rightly held to be "more than one storey in height "above the ground".

The contention of Mr. Waghmare is that where there is even slight construction above the roof of a one storied building it is more than one storey in height above the ground. It is Contended that it is not necessary that there should be minimum of two storeys.

In my opinion the contention is not correct. Clause (viii) (a) of Schedule II is worded thus:-

"The following persons are workmen within the meaning of Section 2(1)(n) and subject to the provisions of that section, that is to say, any person who is -

(viii) employed in the construction, repair or demolition of -

(a) any building which is designed to be, or is, or has been more than one storey in height above the ground or twenty feet or more from the ground level to the apex of the roof.

....

....

It seems from this provision that in order that a person may be a workman within the definition of the term for the purpose of this Act he should be employed in the construction, repair or demolition of a building of a certain height. This height is mentioned in two kinds of measure and where the height of such a building satisfies either of the two measures then it falls under Clause (viii) (a) of the second Schedule. One kind of measure out of these two is the number of storeys which the building as it exists or is designed to be has.

The other kind of measure is in feet. If the number of storeys is more than one then a person engaged in its construction, demolition or repairs becomes a workman for the purpose of the Act. If the height in feet is 20 or more then also the same result follows. Now if the number of storeys is to be more than one it must be at least two if measured in number apart from the height of each of the storeys. It may be that the first storey is 12 feet and the second is 6 feet.

Yet it would constitute a building of two storeys. If it is said that where there is some little construction, may be in the form of a parapet to the roof of a one storeyed building, the height of it is more than one storey I would hold it to be not a right construction. So also if the building, whatever be the number of storeys it may constitute, whether one, two or more, in case it is more than 20 feet in height it is sufficient for the purpose of Clause (viii) (a). The learned Commissioner took the parapet above the roof to be wall and proceeded to hold that the building was more than one storey in height. On the construction that I put upon Clause (viii) (a) of Schedule II this view is not correct and involves an error of law.

It also appears that he has erred in holding that the burden lay upon the contractor to prove that a building in question was less than 20 feet in height because what is the height of that building was a matter within his special knowledge. The burden lies upon the person who seeks to make a claim that the deceased person was a workman under the Act. Since the height of the building in the present case could be found out by measurement by any person, the burden does not shift upon the contractor on the ground that it is a matter within his special knowledge.

Moreover both parties led evidence regarding the height of the building. The evidence of the witnesses examined on behalf of the heirs of the deceased namely Mahabir Prasad and Kasiram indicated that the height of the building from the ground to the apex is 15 feet. The evidence led by the contractor on the other hand is more liberal and puts it at 16 or 17 feet. Reading the evidence as a whole there is not the slightest evidence to indicate that the height is 20 feet or more.

Thus either of the two kinds of measure are not satisfied in this case. The deceased therefore cannot be a workman within the meaning of the Act. .

The result is that the appeal preferred by Nathulal succeeds and the claim of the heirs is held incompetent on the ground that the deceased was not proved to be a workman as defined in the Act. Since the claim is held incompetent appeal preferred by the heirs of the deceased against the Mills automatically fails.

For this reason it is unnecessary to consider the preliminary objection raised by Mr. Chaphekar on behalf of the Mills.

ORDER

Appeal Number 59 of 1958 is dismissed with costs. Appeal Number 61 of 1958 is allowed with costs and the claim of the heirs of the deceased-worker Sukhram is held incompetent.