

(2006) 06 MAD CK 0005

In the Madras High Court

Case No : C.M.A. (NPD-S) No. 176 of 1998

The Commander Head Quarters Coast Guard Region (East),
The Chief Engineer Military Engineering Services and The
Garrison Engineer

APPELLANT

Vs

Vijaya and Paliyan, A.E. MDS (Retd.) Engineer, Contractor
and Suppliers

RESPONDENT

Date of Decision : 21-06-2006

Acts Referred:

Workmens Compensation Act, 1923 — Section 12, 12(4), 2(2), 3

Citation : (2006) 4 ACC 696 : (2008) ACJ 169 : (2006) 3 LW 284 : (2006) 3 MLJ 515

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : R. Raman Lal, ACGSC, for the Appellant; K. Venkatraman, for 2nd Respondent, for the Respondent

Judgement

V. Dhanapalan, J.—The present appeal is directed against the judgment and award passed by the Commissioner-I for Workmen's

Compensation, Chennai - 6 (hereinafter referred to as ""the Commissioner"") made in W.C. No. 245 of 1992 dated 21.08.1996. The respondents

2, 3 and 4 before the Commissioner are the appellants herein. The petitioner before the Commissioner is the first respondent herein and the first

respondent (hereinafter referred to as ""the Engineer/Contractor"") before the Commissioner is the second respondent herein.

2. According to the petitioner, the Engineer/Contractor is the employer of the deceased Chinna Kutty, aged 35 years. The second respondent, the

Commander of Coast Guard is the principal employer. The deceased Chinna Kutty was working as welder/coolie with Engineer/Contractor and

he was receiving Rs.1,000/- as salary per month. On 31.07.1992, the deceased was directed to fix a notice board on the wall of the site belonging to the second respondent. While doing so, the wall collapsed and the deceased fell down in front of the Engineer/Contractor himself and sustained injuries. Then, he was taken in the Naval ambulance to the General Hospital where he died after some time. A complaint has been lodged with police that the Engineer/Contractor, in his capacity as the employer and the second respondent, as principal employer are bound to pay the compensation. A notice was issued on 14.11.1992 praying for compensation and in reply to the same, the Engineer/Contractor has admitted that Chinna Kutty had worked under him. But, there was no reply from the second respondent and that compensation of Rs. 78,824/- has to be paid to her.

3. The Engineer/Contractor has filed counter before the Commissioner and contended that:

a. the Chief Engineer of Military Engineering Services, who is the third respondent before the Commissioner, is also responsible for Civil

Engineering Services and he was impleaded as third respondent,

b. only the fourth respondent namely, Garrison Engineers gave him the contract work and he had paid Earnest Money Deposit for that job to

Garrison Engineers and hence, only the fourth respondent is the principal employer,

c. due to the negligence of the deceased, the wall collapsed while he was fixing the sign board and that had caused him an additional expense and

that he had already spent a sum of Rs.7,000/- to the family of the deceased

d. the deceased Kutty would work under him as a daily coolie, only when necessity arises and he was neither working for monthly salary nor for many years.

e. on 31.07.1992, the work of fixing a tube light in the campus wall of the second respondent was handed over by him to the deceased and when

the deceased was doing that job, the wall collapsed due to his negligence and he was also present in that place at that time and in the said accident,

he also sustained injuries and even then, he took the deceased to the hospital in the ambulance belonging to the second respondent and the

deceased died because of his negligence and fate and moreover his heart was

weak and

f. the age of deceased claimed as 35 is not correct and that the deceased was earning only Rs.35/- per day and as such, the compensation claimed by the petitioner is excessive.

6. The first appellant herein who was the second respondent before the Commissioner, has filed counter and contended that:

a. they were not the principal employer and they did not employ the deceased person and the deceased did not work under the

Engineer/Contractor,

b. the job concerned was granted officially and the contract was handed over to the Military Engineering Services and as per the order of Military

Engineering Services, the deceased being appointed by the Engineer/Contractor, worked in the Head-Office of the East Coast Guard and as there

is no connection between them and the deceased and as such, they are not responsible to pay the compensation.

7. The Engineer/Contractor has filed a petition to implead the third respondent and Military Engineering Services was impleaded as a party.

According to the third respondent, there is no connection between them and the case and in the affidavit filed by the Engineer/Contractor, it has

been stated that the contract work he had done was given by Garrison Engineering, the fourth respondent and hence, Garrison Engineering only is

the principal employer. Hence, Garrison Engineering was impleaded as the fourth respondent.

8. Garrison Engineering filed their counter and contended that:

a. the Engineer/Contractor is a "D" listed Military Engineering Service Contractor since 1985 who can accept contract work upto worth Rs.7.50

lakhs in his capacity and hence, he is not a small contractor,

b. he was working as Assistant Garrison Engineer in Military Engineering Service and Garrison Engineering does small and big jobs through listed

firms. Likewise, job order No. 3053/56/E3 dated 21.07.1992 was issued to the Engineer/Contractor who quoted the minimum tender and he had

completed the job and received payment for the job,

c. the Engineer/Contractor has not informed them about the accident and as such, they and the third respondent are not involved in the matter,

d. the Engineer/Contractor can hire persons for the work as per his wish and he had unnecessarily impleaded the third and fourth respondents in this case,

e. the petitioner before the Commissioner who is the wife of the deceased did not file the petition as against the third and fourth respondents and

hence, they are not bound to pay the compensation.

9. Before the Commissioner, the petitioner herself was examined as P.W.1 and on the side of the respondents, the Engineer/Contractor himself

was examined as R.W.1 and Ravi and Palanivel who were working in Coast Guard Force were examined as R.W.2 and R.W.3 respectively.

10. The Commissioner, after having concluded that the accident did take place and the deceased did die only in the said accident, held that even

though the deceased was engaged by the Engineer/Contractor, it was for the trade and business purpose of the fourth respondent, the work was

done and therefore, the fourth respondent, namely Garrison Engineers, as principal employer, is liable to pay the compensation to the petitioner as

per Section 12(1) of the Workmen's Compensation Act, 1923 (hereinafter referred to as "the Act").

11. Heard Mr. Raman Lal, learned Additional Central Government Standing Counsel appearing for the appellants and Mr. K. Venkataraman,

learned Counsel for the second respondent herein, i.e. Engineering Contractor.

12. The learned Counsel for the appellants has contended that:

a. being a Government organisation, its activities cannot be treated as part of trade and business and therefore, even the principal employer is not

liable u/s 12 of the Act and unless the activities are termed as part of trade or business, the appellants cannot be made liable.

b. the Commissioner committed a grave error in coming to the conclusion that the Garrison Engineers is the principal employer of the deceased and

failed to note that the Engineer Contractor is the principal employer of the deceased and he is only liable to pay compensation and he has also

spent a sum of Rs.7,000/- at the time of accident only because he is the employer of the deceased.

c. the Commissioner has failed to note that the deceased was not a permanent employee of the Engineer Contractor

d. the Commissioner has not taken note of the fact that the function of the first

appellant is a sovereign function and that the accident occurred due to the negligence of the deceased,

e. the compensation awarded by the Commissioner, without assigning any proper reason, is excessive and the award of the Commissioner is not

sustainable as it is based upon mere surmises and conjectures and the Commissioner ought to have held that the deceased is the employee of the

Engineer/Contractor who is the sole person in charge of the deceased and the appellants have no charge or responsibility of the deceased person.

13. Per contra, the learned Counsel for the second respondent herein, namely the Engineer/Contractor, has contended that:

a. the deceased workman would work under the Engineer/Contractor as a daily coolie only when necessity arises and he was neither working for a monthly salary nor for many years.

b. the deceased died only because of his negligence and fate and moreover his heart was weak.

c. the age of the deceased claimed to be as 35 is not correct.

d. u/s 12 of the Act, the claimant can get compensation from the principal also and it will be open for the principal to go for indemnification proceedings under the provisions of Section 12 of the Act.

14. In the light of the rival submissions made by the learned Counsel on either side and in view of the fact that no one has appeared on behalf of the

claimant/first respondent herein, it is not disputed that the accident had taken place in which the deceased had died. Thus, the only question for

consideration now is whether the deceased had died due to the accident which occurred due to the work and in the course of his employment and

if so, who has to pay the compensation and which respondent is the principal employer.

15. Before considering the above points, it would be useful to refer to certain salient features in regard to the question which arises for

consideration as stated above under the provisions of the Act. I am more concerned with Section 12 of the Act as to whether the compensation

can be claimed either from the contractor or from the principal or from both. In this connection, it is worthwhile to refer to Section 12(1) to 12(4)

which read as under:

12(1) Where any person (hereinafter in this Section referred to as the principal) in the course of or for the purposes 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, 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 compensation is claimed from the principal, this Act shall apply as if references 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 principal is liable to pay compensation under this Section, he shall be entitled to be indemnified by the contractor [or any other

person from whom the workman could have recovered compensation and where a contractor who is himself a principal is liable to pay

compensation or to indemnify a principal under this Section, he shall be entitled to be indemnified by any person 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.

(3) Nothing in this Section shall be construed as preventing a workman from recovering compensation from the contractor instead of the principal.

(4) This Section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on which the principal has

undertaken or usually undertakes, as the case may be, to execute the work or which are otherwise under his control or management.

16. In order to hold the principal liable for payment of compensation, u/s 12 of the Act, the following conditions are required to be satisfied:

a. that the principal is carrying on trade or business and in the course of or for the purpose of that trade or business, engages a contractor,

b. that the work in question is ordinarily a part of trade or business of the principal,

c. that the accident had occurred in or about the premises the principal has

undertaken or usually undertakes to execute the work or which is in his control or management, and

d. the accident occurred while the workman was in the course of his employment in executing the said work. If all the aforesaid essential conditions

are satisfied, then the principal can be made liable u/s 12 of the Act for payment of compensation u/s 3 of the Act.

17. A careful reading of the above makes it clear that the principal employer is made liable even in respect of the worker engaged under a

contractor if the work entrusted with the contractor is connected with trade or business of the principal employer.

18. It was argued on the side of the appellants that the work which the deceased was doing does not come under the scope of this Act as it is a

work relating to a Government undertaking, is not liable to be accepted. But, it is mentioned as ordinarily a part of the trade or business of the

principal employer, but, this, as accepted at the time of the argument by the counsel for the appellant that this point has neither been raised in their

counter statement nor subsequently to that. It is also argued by the learned Counsel for the appellants that the job relating to the accident is

concerned with the sovereign function, not being mentioned by them prior to this (not raised such a plea at any stage before arguments) and

therefore, the Commissioner, in the absence of pleadings, had come to the conclusion that the petitioner and the Engineer/Contractor lost the

opportunity to examine the witness or to file documents to contest the contention that the work related to the accident is sovereign. It is seen that

the Commissioner has discussed this point in his order which is extracted as under:

Besides, it is not mentioned in this Act that, compensation need not be paid as per this Act if the job is concerned with the sovereign. Further,

fixing tubelight in the signboard viz. Coast Guard, is not a sovereign job. It is an ordinary civil job. If the accident had taken place in the course of

the work relating to the Coast Guard security duty, then the aforesaid argument would have been liable for consideration. The judgment reported in

156 1987 I M.L.N. pointed out on behalf of the petitioner, mentioning that electricity distribution is not a sovereign job is worth mentioning here.

19. One more point for consideration raised by the learned Counsel for the

appellants is that the job relating to the accident is ordinarily a part of trade or business of the principal employer. It is seen that the Commissioner has considered this point. The third appellant Garrison Engineer admits that the Engineer/Contractor is a scheduled contractor and he only gave the Engineer/Contractor the work of fixing the signboard as per the minimum tender contract and only when the deceased was doing the aforesaid work, the wall collapsed and the deceased sustained injuries died subsequently. Therefore, it is clear that the third appellant Garrison Engineer is the prime employer and the Engineer/Contractor who is the second respondent herein was a contractor under him. The work of the third appellant Garrison Engineer is not fighting in the borders or any other sort of military work in the coast guard wing. It is a firm which does the civil works in the Military Department through contractors. The job of fixing the signboard concerned in the accident is a job which has been handed over properly by Garrison Engineer to the Engineer/Contractor. If it is not concerned with the usual job of the third appellant Garrison Engineer, they need not do that work and they need not offer the job authoritatively through tender to the Engineer/Contractor, like all other civil works. The work of the third appellant Garrison Engineer is to let the work given by the military and the coastal guard wing to the contractors through tender and to complete the same. Therefore, on the consideration of the above facts, the Commissioner has concluded that the third appellant herein is the principal employer under whom the second respondent herein was a contractor. Accordingly, the Commissioner concluded that the job was one ordinary part of trade or business and therefore, the statement of the third appellant that it is a sovereign job was not accepted by the Commissioner and therefore, he decided that the third appellant Garrison Engineer, in its capacity as the principal employer, is bound to pay compensation to the first respondent herein as per Section 12(1) of the Act.

20. Now, I shall consider the decisions referred to by the learned Counsel for both sides.

21. The learned Counsel for the appellants has placed reliance on a decision of the Bombay High Court reported in 1979 55 FJR 348 9 (Garrison

Engineer [Projects] v. Guttamma Hanmantdas) and the relevant paragraphs read as under:

10. As I have already stated, there is no dispute that the Navy Department wanted to get its barracks pulled down and the land cleared; may be for the purpose of erecting some other buildings which is not clear. For that purpose, they appointed M/s. Gandhi & Co. as the auctioneers. They entered into an agreement with the said auctioneers. That agreement provides as to what precautions the auctioneers are to take in auctioning out the right to demolish the buildings. It is not disputed before me that one Padmanabhan being the highest bidder it was that contractor who started pulling down the buildings and it was he who had employed the deceased worker Hanmantdas and it was undoubtedly while performing his duties as a workman employed by Padmanabhan that the deceased sustained injuries as a result of an accident and he died. In fact, the evidence of Chinnayya, the brother of the deceased, shows that the deceased was not employed by the Garrison Engineer. In order, therefore, the opponent-appellant may be held responsible that could be only by invoking the provisions of Section 12(1) of the Act. Mr. Solkar has laid considerable stress on Section 2(2) of the Act which reads as under:

(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 contrary intention appears, be deemed to be the trade or business of such authority or department.

12. There is no denying that having regard to the deeming provision of Section 2(2), it may be held that there is force in the submission of Mr.

Solkar, that even the work of pulling down the buildings may be said to be the business of the department of the Government. But the important

question to be considered is whether that could be said to be "ordinarily part of the trade or business of the department of Government" as that

expression is used in Section 12(1) of the Act. Apart from authorities, it appears to me that it could not be said to be ordinarily part of the trade or

business of the Government to pull down buildings or to erect buildings though incidentally and necessarily the defence department may be required

to undertake these jobs for the defence of the country. The main business of the defence department of the Government is to defend the country.

In fact, this expression in Section 12(1) was considered by a Division Bench of this Court consisting of Marten, C.J. And Murphy, J. in the case

reported in *Rabia Mahomed Tahir v. G.I.P. Railway*, AIR 1929 Bom 179. In that case, the Commissioner had decided in favour of the

representative of the workman on the basis that G.I.P. Railway being a State railway, the definition of Section 2(2) was attracted. Dealing with that

question, it was observed by Marten, C.J, as under:

The object of this definition, Section 2(2), however was to prevent any contention to the effect that a Government department does not carry on a

trade or business. But I am quite unable to accept the deduction which the Commissioner draw from those premises. In my judgment, the word

"ordinarily" in Section 12 applies just as much to Government department as it does to any other principal. Consequently, assuming that the running

of the G.I.P. Railway and the construction of these steel towers are part of the trade or business of the Government department in question, yet it

still remains to be considered whether the particular work contracted out to these contractors is ordinarily part of the trade or business of the

principal. For the reasons already given, in my judgment, it is not ordinarily part of their trade or business. Consequently, in this respect, the

decision of the Commissioner cannot, I think, be upheld.

22. Further reliance has been placed by the learned Counsel for the appellants on a Division Bench judgment of the Kerala High Court reported in

K. Koodalingam Vs. Supt. Engineer and Others, in which paragraph 10 reads as under:

10. Section 12(2) in unambiguous terms confers a right on the principal who is made liable to pay compensation under the said Section to get

himself indemnified by the contractor. As such, we would hold that the first opposite party as principal will be entitled to be indemnified by the

contractor by virtue of Section 12(2) of the Act and to recover the amount of compensation, if any paid to the workmen, from the second opposite

party in execution of the orders passed in the two cases itself. We say so because in this case, the first opposite party has specifically contended

that as per Clause 15 of the agreement entered into between the department and the contractor, the contractor has expressly undertaken the

responsibility for payment of compensation under the Act and the Court as per the impugned order has accepted the above contention and held

the second opposite party exclusively liable to pay the compensation found due.

Though notice was issued to the second opposite party, he has remained ex parte before the Court below and in this Court. In the circumstances, we would hold that the first opposite party is entitled to recover the amounts, if any, paid to the appellants in the two cases from opposite party No. 2 by way of indemnity.

23. Learned counsel for the appellants has placed further reliance on a Division Bench judgment of this Court reported in Executive Engineer, Public Works Department, Dindigul Vs. V. Subbiah Naicker and Another, in which paragraph 4 which is relevant for our consideration reads as under:

4. In this appeal, the award passed as against the Department, i.e. 2/3 of the compensation granted alone has been challenged on the ground that

since a right of reimbursement has been given to the Department u/s 12(2) of the Act, the Additional Commissioner should have passed an award

directing the Contractor to pay the entire amount. We are at a loss to understand the contention advanced by the appellant. Merely because

Section 12(2) of the Act contemplates the contractor giving an indemnity to the principal employer, in case the principal employer is made liable in

respect of a compensation, the appellant cannot say that the Additional Commissioner cannot pass an award as against the principal employer. If

the argument advanced by the appellant is accepted, then, in no case, a direct award can be passed as against the principal employer. That will run

counter to Section 12 of the Workmen's Compensation Act. When the Legislature has specifically provided that an award for compensation is to

be passed directly against the principal employer and the principal employer is given a right of indemnification as against the contractor, the

Additional Commissioner is entitled to pass an award granting compensation either in full or in part directly against the principal employer, on

condition that the principal employer will get indemnified by the contractor. In this case, therefore, we do not see any error in the order of the

Additional Commissioner directing the appellant, the principal employer to pay 2/3 of the compensation. Of course, the award of the

Commissioner does not say anything about the right of the appellant to get indemnified by the contractor, as provided in Section 12(2) of the

Workmen's Compensation Act. This appears to be either a mistake or

inadvertence in the order challenged in this appeal.

24. With reference to the Bombay High Court's decision in the Garrison Engineer case, the question arises for consideration before this Court is

whether the work of pulling down the buildings may be said to be the business of the department of the Government and whether that could be

said to be ordinarily part of the trade or business of the department of the Government.

25. From the above decision of the Bombay High Court in the Garrison Engineer case, it appears to me that it could not be said to be ordinarily

part of the trade or business of the Government to pull down buildings or to erect buildings though incidentally and necessarily the Defence

Department may be required to undertake these jobs for the defence of the country. The main business of the Defence Department of the

Government is to defend the country.

26. Further to decide the question whether the job of this kind falls under u/s 12(2) of the Act, it is useful to refer to a Division Bench judgment of

the Kerala High Court reported in Vijayaraghavan Vs. Velu and Another, wherein similar view of interpretation of the words "ordinarily part of the

trade or business" according to Section 12(1) of the Act has been ruled and the above interpretations also have been taken into consideration by

the Commissioner. The decision held in Garrison Engineer case was that simply because the contractor, according to the terms of the auction, had

kept by way of deposit with the Government some monies and undertaken to indemnify the Government in case of loss sustained by the

Government, he cannot be said to be a sub-contractor and much less the deceased who was a workman engaged by him could hold the

department responsible by relying on Section 12(1) of the Act. The facts of the Garrison Engineer case as well as the case on hand are more or

less similar in nature and in view of the above decision, I am not inclined to accept the above proposition of law that in the case of the Defence

Department, it cannot be said to be ordinarily part of a trade or business and thereby holding that the principal employer is responsible to make

good the loss sustained by the claimant can be compensated by the Government and particularly in the Defence Department.

27. A careful reading of the judgment in the case of The Executive Engineer,

Public Works Department, Dindigul v. V. Subbiah Naicker and Anr.

stated supra would reveal that when the Legislature has specifically provided that an award for compensation is to be passed directly against the

principal employer and the principal employer is given the right to indemnification as against the contractor, the Additional Commissioner is entitled

to pass an award granting compensation, either in full or in part, directly against the principal employer, on condition that the principal employer will

get indemnified by the contractor.

28. The case cited in the above paragraph and Koodalingam case relate to public sector departments. Therefore, the expression u/s 12(2)

ordinarily part of the trade or business"" will have application to these cases. Whereas in the case of the defence department, the object of applying

ordinarily part of a trade or business cannot have consideration and the Commissioner's finding in that respect holding that it is ordinarily part of

trade or business is found to be unreasonable and with total non-application of mind. In view of the fact that the facts and circumstances in

Garrison Engineer case and the case on hand are similar, more particularly pertaining to the Defence Department, I am of the view that the

compensation awarded by the Commissioner has to be paid not by the principal employer, the third appellant herein as the relief is claimed against

the Defence Department which does not come under the expression ""ordinarily part of a trade or business"" of the Government department, more

particularly, the Defence Department.

29. In that view of the matter, the decision of the Commissioner is bad and therefore, it is set aside. The learned Counsel for the

Engineer/Contractor, the second respondent herein, has relied on a decision of this Court reported in Thiruvalluvar Transport Corporation Limited

Vs. K.P. Ganesan, and also a decision of the Gujarat High Court reported in 1995 3 LLJ 669 (Koli Mansukh Rana v. Patel Natha Ramji). In

these two cases, the parties are individuals and civil department of the State Government and not Defence Department. Therefore, the proposition

laid down in these cases will not be applicable to the Defence Department as in the Garrison Engineer case and in view of my decision holding that

the Commissioner's order is bad in law, I am not inclined to accept the reliance placed by the learned Counsel for the second respondent herein.

30. In view of the above discussion, it is open to the first respondent herein to recover the award amount of Rs.78,824/- awarded by the Commissioner from the second respondent herein, namely the Engineer/ Contractor and accordingly, as already held in one of the foregoing paragraphs, the award of the Commissioner, fixing the liability against the principal employer is set aside. Instead, the liability is fastened against the contractor under whom the deceased was working since the object of the Legislature specifically provides that an award for compensation has to be passed against the principal employer or the contractor. In the instant case, it is only the contractor who has to pay the compensation. The appeal is ordered in the above terms.