

(2008) 08 MAD CK 0050

In the Madras High Court

Case No : C.M.A. (NPD) No. 1564 of 2002

The National Insurance Company Ltd.

APPELLANT

Vs

Nagaraj and Ranagasamy

RESPONDENT

Date of Decision : 14-08-2008

Acts Referred:

Workmens Compensation Act, 1923 — Section 2(1)

Citation : (2009) 2 LW 813 : (2009) 2 MLJ 164

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : Sunilkumar, for K. Kannan, for the Appellant; Godson Swaminath, for Isaac Mohan Lal, for the Respondent

Final Decision : Allowed

Judgement

S. Palanivelu, J.—In the claim petition, following facts have been stated:

1. (i) The petitioner Nagaraj is son of one Rangasamy, a workman employed as Driver in first opposite party's car bearing Registration No.

T.L.B. 549, who received personal injury by an accident arising out of and in the course of his employment resulting in sustaining grievous injuries

on 6.5.2000 in Madurai to Rameswaram Highways Road near Ariyanenthal. He was taken to Paramakudi Government Hosptial and later

admitted at Meenakshi Mission Hospital, Madurai. He suffered fracture. The car was insured with the Second Opposite Party. The monthly wage

of the petitioner was Rs. 4,000/- and he was aged 34 years at the time of accident. Hence compensation of Rs. 4,00,000/- has been prayed for.

2. The allegations in brief, found in the counter of Second Opposite Party are as under:

2.(i) The policy issued for the car is only an Act policy and the occupants of the

car were not offered coverage under the policy of insurance. The applicant was not driving the car as a driver of the owner of the car and in the F.I.R. it is stated that the car was insured in the name of Rangasamy, father of the applicant. Hence it cannot be held that the son was under the employment of the father as a driver. The applicant is a resident of Bangalore. In order to maintain the application he has given false address that he was residing at Tirupur. In the F.I.R. he has mentioned that he is residing in 31, Oakkalipuram, Bangalore, and running a Banian company in the said address. At the time of accident he was not under the employment of the owner of the Car. No injury was caused during the course of employment. It is admitted in the F.I.R. that only due to the fault as he slept while driving the car, the car dashed against the tree and accident took place. The averments in the application are disputed.

3. The Commissioner, after perusing oral evidence on record, has arrived at a conclusion that the applicant/first respondent herein is an employee under the first opposite party and that he received the injuries in the course of the employment and awarded a compensation of Rs. 70,941/-, to be paid by the second respondent/appellant herein.

4. Learned Counsel for the appellant would draw attention of this Court to the allegations in the F.I.R. The F.I.R. was lodged by the first respondent himself, in which it is alleged that he took his wife and two daughters in an Ambassador Car bearing Registration No. TLB 549, he came to Tiruppur and took his elder brother Muthukumar, his wife and daughter and also his sister's daughter Sathya and one Sureshkumar and all of them were (they 9 in all) proceeded to Rameswaram on 5.5.2000. On return from Rameswaram, he was driving the Car. At about 4.45 p.m. near Ariyanenthal, due to tiredness he slept a while and hence the car dashed against a tree on the side of the road and hence himself and other inmates in the car sustained injuries.

5. Learned Counsel for the appellant would also say that in the F.I.R., the first respondent has stated that he is running a banian company. But in the course of examination, he has stated that he does not know that in the F.I.R., whether he has stated that he is running a banian company in Bangalore. After scrutinizing the statement of the first respondent, the Commissioner has observed that the Insurance Company has not established

that the claimant is son of the first opposite party and that he is an employee under first opposite party.

6. Learned Counsel for the first respondent would submit that the allegation is levelled that the first respondent is employed under the second

respondent for which the other side would contend that he was not under his employment. Conversely Mr. Sunilkumar, learned Counsel for the

appellant would say that inasmuch as the first respondent has stated in the F.I.R. that he is running a banian company, he being the son of the

second respondent, it is far fetched to say that he is an employee under the second respondent.

7. It is to be seen in this case whether the first respondent took the car to Rameswaram in view of the trade or business of his employer. It is in the

F.I.R. that he had taken his family members on pilgrimage to Rameswaram and on return the accident took place. He has not denied these

allegations in the evidence. Certainly it is not at all connected to the trade or business of the second respondent. By any stretch of imagination it

cannot be stated that the accident had occurred during the course of the employment.

8. When the allegation is made by a party, it is incumbent on him to establish, irrespective of the weakness on the part of the other side. In this

context learned Counsel for the appellant would garner support from a decision of the Honourable Supreme Court reported in 2007 (1) TN MAC

583 (Gottumukkala Appala Narasimha Raju and Ors. v. National Insurance Co. Ltd. and Anr.) wherein Their Lordships have held as follows:

26. No documentary proof to establish the contract of employment was produced. No independent witness was examined. Even as to for what

purpose the tractor was being used had not been disclosed. How the accident had taken place is also known borne out from the records of the

case. If the deceased, with all intent and purport, was the owner of the tractor, the Claim Petition under the 1988 Act might not have been

maintainable. A petition under 1932 Act certainly would not lie. Only because Sections 143 and 167 of the 1988 Act refer to the provisions of the

1923 Act, the same by itself would not mean that the provisions of the 1988 Act, proprio vigore would apply in regard to a proceeding for

payment under the 1923 Act. The limited applicability of the provisions of the 1988 Act, in relation to the proceedings under the 1923 Act has

been discussed by this Court in the aforementioned judgment. It is, thus, not possible to extend the scope and ambit of the provisions of 1988 Act

to the provisions of 1923 Act save and except to the extent noticed hereinbefore.

9. In the above said case the appellant was employee under employer. Since there was a documentary proof to establish the contract of the

employment and no independent witness was examined, the Supreme Court has decided against the version of the appellant who pleades that he is

an employee. In this case also there is no material to show that the 1st respondent was employed by the second respondent.

10. Learned Counsel for the respondent placed reliance upon a decision of the High Court of Madhya Pradesh (Indore Bench) reported in

Mangala Ben Vs. Dilip Motwani and Another, wherein it is held as follows:

It is settled that the onus is upon the employer to prove the conditions necessary for excluding a person from the category of workman. From the

definition of "workman" given in Section 2(1)(a) of the Act, it is clear that for not treating a person as workman, two conditions are required to be

proved, namely, that his employment is of casual nature and he is not employed for the purpose of employer's trade or business and the onus is on

the employer to prove these conditions.

11. u/s 2(1)(n) of the Workmen Compensation Act, the plea of the opposite party has to pass two tests and if they were proved then there is no

obstacle for the Court to accept the contention of the opposite party. While the principles laid down in the above said ruling are considered with

reference to the facts of the present case, firstly there is no evidence to show that the first respondent was under employment and that he did not

take the car to Rameswaram on account of trade or business of the second respondent.

12. Learned Counsel for the respondent also draws attention of this Court to a decision of the High Court of Jammu and Kashmir reported in New

India Assurance Company Vs. Santosh Kumari and Others, wherein it is observed as under:

It is common knowledge that a daily wager is being paid only for those days on which he works. In the absence of any evidence having been

produced by the appellant, this Court has to believe the wife of the deceased driver that her husband was working only as a daily wager with the

Public Works Department. A daily wager as such is not a Government employee.

In the present case, there is no circumstance to show that the first respondent was a daily wager or workman. Hence, principles found in the above

said decision are not applicable.

13. To sum-up, the first respondent took his wife and daughters and his other family members and friend to Rameswaram as personal trip of

pilgrimage and on return he met with an accident. It could not be stated that the accident took place in the course of the employment, nor he was

an employee under the second respondent. It is to be observed that there is no evidence to show that the respondent is an employee under the

second respondent. Ignoring the material facts available in this case, the Workmen Compensation Commissioner has mechanically passed the

order by observing that the relationship between the appellant and the first respondent could not be accepted, and come to the conclusion that the

first respondent is the employee of the second respondent. The said finding is not at all sustainable.

14. In view of the above said discussion, the first respondent could not get the workmen compensation. The observations and findings of the

Workmen's Compensation Coimbatore, need interference of this Court which have to be reversed. The impugned order suffers from infirmity,

which is liable to be set aside and accordingly, the same is set aside.

15. In fine, the appeal is allowed, setting aside the Order dated 30.11.2001 in W.C. No. 173 of 2000 on the file of the Commissioner for

Workmen's Compensation, Deputy Commissioner of Labour, Coimbatore. No costs.

16. It is represented by the learned Counsel for the appellant that the entire amount of compensation was deposited before the Workmen's

Compensation Commissioner, Coimbatore. Only 50% compensation has been withdrawn by the claimant. The appellant is permitted to withdraw

the balance available with interest. The learned Workmen's Compensation, Commisioner, Coimbatore is directed to take necessary action

separately to realise the amount withdrawn by the claimant.