Thomas Vs. Babu

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Court : Kerala

Decided On : Sep-24-1994

Reported in : 1995ACJ780; [1995(70)FLR637]; (1995)IILLJ141Ker

Judge : M.M. Pareed Pillay and; V.V. Kamat, JJ.

Acts : Workmen's Compensation Act, 1923 - Sections 2

Appeal No. : M.F.A. No. 27/1992

Appellant : Thomas

Respondent : Babu

Advocate for Def. : K. Divakaran Nair and; K.B. Mohandas, Advs.

Advocate for Pet/Ap. : P.F. Thomas and; Sunil Thomas, Advs.

Judgement :

Kamat, J.

1. This is an appeal under Section 20 of the Workmen's Compensation Act, 1923. It lies on a substantial question of law. Even then, it postulates conclusive findings on evidence with regard to certain jurisdictional facts, with regard to the following aspects:-

A. The personal injury is caused to a workman by accident arising out of and in the course of his employment and only thereafter his employer shall be liable.

B. There has to be Employer and Employee relationship to be established on evidence.

C. The claimant Employee has to be a 'workman' as per the requirements of Section 2(n) of the Act and equally well the Respondent has to be an 'Employer' as per the requirements of Section 2(e) of the Act.

D. A person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business would not get a legal right to a claim under the Act.

2. It is advisable, as it was felt, that the workman need protection as far as possible from hardship arising from accidents due to growing complexity of industry with increasing use of machinery with consequent danger to workmen. The Act provides for cheaper and quicker disposal of disputes relating to compensation through special tribunals than possible under the civil law. The passage of time has paved the way to make the approach of the Courts even widening and has become more and more liberal leaning towards the workmen on considerations of poverty of the workmen on comparative basis. However, there is no substitute for conclusive findings on evidence with reference to the basic jurisdictional facts.

3. The jurisdictional factual conclusions must emerge from the evidence on record and in the process if the material evidence is either wholly ignored or completely misread, the Appellate Court gets duty-bound to examine the evidence itself. Even the erroneous inferences drawn with the liberal attitude adopted by the Trial Authority, such a situation also becomes a cause for interference. It is an error of law apparent on the face of the record of a substantial character as it affects the very nature of liability in law.

4. In this appeal by the original opposite party, on facts, with concern, we were taken through the entire evidence, and as we find that the conclusions on the

jurisdictional questions of factual aspects, are based on ignoring the material evidence and at times misreading thereof, we proceed to examine the aspects.

5. For the sake of convenience and ready application, relevant statutory provisions are reproduced below:

'Employer' is defined in Section 2(e) as follows:

'employer includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him'.

'Workman' is defined in Section 2(n) and relevant portion is reproduced below:

'Workman' means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is-

(i) a railway servant as defined in Section 3 of the Indian Railways Act, 1890 (9 of 1890), not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule ft or

(ii) employed in any such capacity as is specified in Schedule II.

Whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing, but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead includes a reference to his dependents or any of them'.

(underlining Italicizing to the portion in bracket is supplied).

Item No. (xxiii) of Schedule II of the Act (as amended) is reproduced below:

'employed in the tapping of palm trees or the climbing of palm trees or collecting or preserving usufructs or spraying insecticide or the felling or logging of trees, or the transport of timber by inland waters, or the control or extinguishing of forest fires.'

6. On April 3, 1989, the applicant-Babu fell down at 8,30 a.m. from a coconut tree because the third bough (palm leaf) he was holding yielded. Due to fall his vertibra was injured. This was in the land of the appellant. The appellant took him to Thrissur Medical College Hospital. He was in-patient till May 8, 1989, about a month. The appellant again took him on July 24, 1989. On August 1, 1989 he was discharged. The doctors at Sree Chitra Hospital, Thiruvananthapuram on examination opined that there was no treatment or medicine and advised rest. As a result of the incident, he could not stand or do any work. His permanent occupation was of a coconut-tree climber for 10 years prior to the accident.

7. An application for compensation for Rs. 1,47,798/- was filed before the Commissioner for Workmen's Compensation, Trichur, (W.C.C. 67/89) and by the impugned award dated December 30, 1991 against the appellant, an amount of Rs. 1,01,925/- with simple interest at 6% p.a. is passed from August 28, 1989 (the date of the application). The applicant examined three witnesses, namely, A.W.1-himself, A.W.2- a Headload worker and A.W.3-Sri. Rajan, a tea-shop owner of the locality. The appellant also examined three witnesses, namely, M.W.-1 himself, M.W. 2 who introduced the applicant as the tree-climber to the appellant on the previous day of the incident and M.W.3 - the adjacent neighbour present at the time of the incident. The evidence is all oral. The fact that the applicant fell down from the coconut tree standing in the land of the appellant and suffered injury to vertibra rendering him unfit as a tree-climber wholly thereafter for the rest of his life is not in dispute. On going through the evidence of these witnesses, the following factual position neatly emerges and therefore, in our judgment, the liability cannot be fixed at all on the appellant. They are:

A. The applicant was climbing coconut trees of 12 persons. He did not know who was the appellant's earlier tree-climber (in his cross-examination).

B. The applicant got remuneration according to the number of trees, one rupee per tree, not only from the appellant but also from other persons.

C. The applicant claimed to be with the appellant for about a year prior to the incident in question.

D. The applicant pleaded ignorance as to whether the appellant is a clerk and his wife, a teacher in the school.

E. The applicant was unable to tell particulars such as boundaries and other details of the property of the appellant.

F. Prior to applicant-Babu, one Velayudhan was the tree-climber of the appellant. He died of heart-attack in December 1988. The incident occurred on April 3, 1989 - three months thereafter.

G. The two witnesses of the applicant: Raphy-the INTUC member (AW 2) and Rajan (AW.3) make it clear that the applicant was climbing the coconut trees of others also. They did not even care to call on the applicant when he was lying in the hospital after the fall. They also pleaded ignorance as to whether the appellant is a clerk and his wife, a teacher, in the same school.

H. The appellant is a clerk in Kanimangalam School and his wife is a school teacher there. Both are employees in this aided school.

I. Previous climber-Velayudhan-died of heart attack in December 1988. It was on the day of incident that applicant climbed trees for the first time and he fell down while climbing fourth tree on that day.

J. The appellant has 81 cents of land-paramba and has 40 yielding coconut trees. In his land at Kudiyerippa admeasuring 1 acre and 6 cents, there are 4 yielding coconut trees. Coconut trees are not planted because there is no irrigation facility. The appellant is not doing coconut cultivation as a profession or trade. In the cross-examination of the appellant it has come-on record that after the death of Velayduhan, two persons climbed trees when asked.

K. The coconuts are required to be plucked after about every 45 days or thereabout.

8. These above aspects that appear on the evidence on record are ignored by the Trial Authority in reaching the conclusion as regards the liability of the appellant. The applicant was working for 12 other persons and would have to be held as a self-employed person not attached to anyone but plucking coconuts after climbing coconut trees of persons who send for him at the rate of one rupee per tree. The appellant and his wife are fully employed as clerk and school teacher respectively in Kanimangalam School and are not engaged in the trade or business of coconut products. There is no evidence of the relationship of the Employer and the Employee between the parties even of a causal character, when the applicant worked for 12 such persons atleast on payment of one rupee per tree. On facts he would have to be held as an independent self-employed tree-climber. These facts go a long way in reaching the inevitable conclusion that no liability can be fastened on the appellant under the Workmen's Compensation Act, 1923.

9. The learned counsel for the respondent-applicant with vehemence attempted to make us aware of the element of finality of the fact-finding Trial Authority. In support he also relied on reported decisions.

(a) Kochu Velu v. Josehp (1980-II-LLJ-220) (Ker).

(b) Kochappan v. Krishnan relating to a coconut-climber (1987-II-LLJ-174) (Ker).

(c) Pushpan v. Manager, Benami Estate 1988 ILR 472.

He contended that the casual nature relates to the nature of employment and coconut plucking is a regular and periodical activity and therefore a coconut-climber cannot be considered as a casual employee when his employment is regular and periodical. On facts, as we have observed, the applicant from his nature of occupation is a self-employed tree-climber working with atleast 12 such persons. On the other hand, the learned counsel for the appellant also relied on reported decisions, (a) (1955-II-LLJ-768) (Mds) Reddiar v. Gounder, (b) 1987-II-LLJ-174) Kochappan v. Krishan (also relied upon by the respondent), (c) (1967-II-LLJ-95) (Cal.) Nandy v. Alladi Bibee.) He contended that in view of the fact that the appellant and his wife are a clerk and a school teacher in Kanimangalam aided school and lack of evidence coupled with their definite case, they are not engaged

in the trade or business dealing in coconut products. It is contended that on facts the self-employed tree-climber with atleast 12 other persons cannot in law foist liability on the appellant as his employer on any count.

10. We are fully aware that the Act is a welfare legislation and no technicality should be allowed to stand in the way of administration of the Act for the benefit of the injured. However, it is not possible to be strangers to the factual aspects staring in the face of the record enumerated hereinabove and not at all considered by the Trial Authority.

11. In the result, appeal stands allowed. The impugned award/order dated December 30, 1991 in W.C.C. 67/1989 of the Commissioner for Workmen's Compensation, Trichur gets quashed and set aside and consequently, the application dated August 29, 1989 of the respondent/applicant stands dismissed. However, in the circumstances of the case there shall be no order as to costs throughout.