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Executive Engineer Vs. Farooq Ahmad Tantray and anr.

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Court : Jammu and Kashmir

Decided On : Feb-21-2005

Reported in : 2006ACJ1929,2005(2)JKJ554

Judge : Mansoor Ahmad Mir, J.

Acts : Workman's Compensation Act, 1923 - Sections 2, 2(1), 10, 10(1) and 30

Appeal No. : CIMA No. 21/2003

Appellant : Executive Engineer

Respondent : Farooq Ahmad Tantray and anr.

Advocate for Def. : H. Furrahi, Adv. for Respondent No. 1

Advocate for Pet/Ap. : M.A. Beigh, Adv.

Disposition : Appeal dismissed

Judgement :

Mansoor Ahmad Mir, J.

1. This appeal stands admitted vide order dated 7th June, 2004 and listed for final hearing in the regular cause list. The appellant has challenged the award passed by Commissioner under Workman's Compensation Act (Assistant Commissioner) District Baramulla dated 01.01.2002 in the claim petition titled as Farooq Ahmad

Tantry v. Executive Engineer and Anr. on the grounds enumerated in the memo of appeal.

2. It appears that respondent Farooq Ahmad Tantry has filed the application on 28th October, 2000 before Commissioner under Workman's Compensation Act (Assistant Commissioner) Baramulla for awarding compensation to the tune of Rs. 2.75 lacs on the grounds that the respondent No. 1/ claimant is an employee in Electric Division Baramulla and was performing his duties on 8th May, 2000 when he sustained injuries arising out of and in the course of his employment. The respondent No. 1 claimant while connecting the H.T. jumper got an electric shock. The claimant sustained injuries which rendered the right hand of the claimant disabled permanently partially. The claimant has incurred huge expenses for his treatment but stands disabled. The claimant/respondent No. 1 being the sole bread earner of his family members who are dependants on him have been deprived of his income, which be was earning from following the different pursuits (domestic) in order to make both ends meets.

3. The respondents have filed objections and have admitted that claimant is the employee of Power Development Department and has sustained injuries during the course of employment, but have resisted the claim on the count that claimant/respondent No. 1 sustained injuries because of his own negligence, because the claimant has not sought proper permission from the concerned authorities to cut down the two lines of electricity of 11000 Volt and without taking due care that whether the third line of electricity is live or dead. Whatever, the respondent No. I/claimant has spent on medicine and treatment, has been paid to him.

4. The following issues have been framed vide order dated 15.02.2001:-

1. Whether the accident has taken place due to the negligence of the petitioner? OPD

2. Whether he is entitled to the compensation that he has claimed or not? OPD

The parties led evidence and after hearing the arguments, the impugned order stands passed.

5. Heard. Leaned counsel for the appellant argued that appellant is not liable and cannot be saddled with liability, because the accident is outcome of negligence of claimant/respondent No. 1; claimant/respondent No. 1 is the permanent employee of the department. Mr. Beigh also argued that notice in terms of Section 10 of Workman's Compensation Act has not been served, thus the claim petition is not maintainable.

6. While rebutting the arguments, Mr. Furrahi argued that claimant/respondent No. 1 is the lineman of the department which stands admitted by the appellant in objections in terms of para-1 of the objections. That the sustaining of injuries by the claimant/respondent No. 1 also stands admitted by the appellant but only point taken is that accident is outcome of negligence of the claimant. That three identical eases were pending in this Hon'ble court, two have been already decided in favour of the claimants and against the appellant. The copy of the judgment of this court passed in the case Executive Engineer v. Mir Zaman Kahn and Anr., CIA NO. 19/2003 is on the file; that lineman is a workman in terms of Section 2(1)(n) and Schedule II, clause 9 and 19; that no substantial question is involved and the appeal merits dismissal; that the department had knowledge of the accident, thus there was no need to serve notice.

Considered.

7. In terms of Section 30 of Workman's Compensation Act, (hereinafter referred to as the Act) the aggrieved party can file an appeal against the award, but the appeal must contain the substantial question of law. It is profitable to reproduce proviso to Section 30 of the Act herein:-

'Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees:'

8. While going through this provision of law, one comes to an inescapable conclusion that substantial question of law must be involved in the appeal and the perusal of the appeal and the file discloses that so far as the substantial question of law has not been framed. But I am of the considered view that the questions raised by the appellant are substantial questions of law. Thus the following substantial questions of law are involved in this appeal:-

(1) Whether for want of notice in terms of Section 10 of the Act, the claim of the respondent No. 1 is liable to be rejected?

(2) Whether the appellant is liable to pay the amount when the plea of negligence of the claimant is raised.

(3) Whether the claimant is workman in terms of Section 2(n) of the Act.

9. Now, I deem it proper to dwell on these points one by one. This provision of law mandates that notice is must, but defect or irregularity in a notice shall not be a bar. If the employer had the knowledge of the accident in terms of provisio 4 to Section 10 clause (a) and (b), then there is no need to comply with the mandate of Section 10 of the Act.

10. In the instant case, it is admitted by the appellant that they have paid under rules all the expenses which claimant/respondent No. 1 has spent for his treatment. The said objections have been filed on 15th Feb, 2001 and accident has occurred on 8th May, 2000. Thus the appellant has the knowledge of the said accident and there was no need to serve notice in terms of Section 10 of the Act.

11. I have laid my hands on a judgment reported in : AIR1959 All586 Makhan Lal Marwari, appellant v. Audh Behari Lal, respondent. It is profitable to reproduce para-10 of the said judgment herein, which reads as under:-

'10. To my mind, therefore, the present case firstly feel within the exception which provided that want of notice shall not be a bar to the entertainment of a claim where the employer had knowledge of the accident etc. Secondly since all the relevant information had been given to the appellant otherwise, the sending of a written notice letter, (later?) would have had no larger effect than compliance of a

formality. The Commissioner was not unjustified in holding that there was not sufficient cause for not sending notice. The appellant's contention with regard to Section 10 either cannot prevail.'

12. The Hon'ble High Court of Bombay in case Deep Metal Industries v. B.D. Gaikward, reported in 1996 ACJ page 78 has also returned the same finding. The same ratio has been laid down by Hon'ble Orissa High Court in 1995 LAB.I.C 2750. It is also worthwhile to mention herein that the appellant has not raised this plea in the objections. Thus cannot raise this plea at his stage. The plea which has not been raised before the Commissioner cannot be raised for the first time in the appeal. My this view is fortified by the judgment reported in 1995 LAB.I.C. 2750. It is profitable to reproduce relevant portion of para 4 of the said judgment, which reads as under; -

'4...No dispute appears to have been raised before the Commissioner that before presenting claim petition, requisite notice under Section 10 of the Act on the insurer was not served. This defence having not been taken before the Commissioner, as evident from his order and not been stated in the written statement filed by the insurer that claim petition was liable to be rejected because of lack of notice, that question cannot be raised for the first time in this appeal. Fourth proviso to Sub-section (1) of Section 10 of the Act applies in full force to the facts of this case. According to the said provision want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which injured workman was employed had knowledge of accident from any other source at or about the time when it occurred.'

Thus this argument fails.

13. Now coming to the question of negligence, the onus of which was on the appellant. The witnesses examined by the appellants have deposed in one voice that they heard about the accident on next date of the occurrence. Thus they have no knowledge, how the accident has taken place. It was for the appellants to prove by leading evidence that the claimant/respondent No. 1 has not taken extra care in

order to cut third line of electricity which according to the appellant was live at the time of accident. No such evidence has been adduced.

14. The appellant has failed to discharge onus and the Commissioner has passed well reasoned order while holding that appellant has failed to lead evidence in order to prove that accident was outcome of the negligence of the claimant No. 1.

Thus this ground also fails.

Now question is whether the respondent No. I/claimant is a workman. The appellant have admitted in para 1 of the objections that respondent No. 1 is lineman of Power Development Department.

Section 2(1)(n) defines the workman. Serial (ix) and (xix) of Schedule II reads as under:-

'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-

'(ix) employed in setting up, maintaining repairing or taking down any telegraph or telephone line or post or any overhead electric line or cable or standard or fittings and fixtures for the same;

(xix) employed, otherwise than in a clerical capacity, in the generating, transforming transmitting or distribution of electrical energy or in generation or supply of gas;'

15. While reading the sr. No. ix and xix of the Schedule (2) of the Act, the lineman is an employee of the appellants .The Section 2(1)(n) and Schedule II of the Act nowhere mandates that lineman who is a permanent government employee is not a workman. The onus of issue No. 2 was also on respondents. It was their duty to discharge the onus.

16. The argument of learned counsel for the appellant that the claimant/respondent No. 1 being permanent employee of the Government of Jammu & Kashmir and a member of services of Jammu & Kashmir Power Development Department does not fall within the definition of workman fails.

17. Viewed thus the appeal is dismissed. Impugned award is upheld. Send down the record.

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