

Devarajan Vs. N.Appuswamy.

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Court : Chennai

Decided On : Mar-14-2012

Judge : Aruna Jagadeesan, J.

Acts : Workmen's Compensation Act, 1923 - Section 3, 2(1)(n)

Appeal No. : CMA.No.837 of 2009 MP.No.1 of 2009

Appellant : Dr.Meera Thinakaran

Respondent : The State of Tamil Nadu.

Advocate for Def. : Mr.K.K.Senthilkumar, Adv.

Advocate for Pet/Ap. : Mr.K.Venkatasubramanian, Adv.

Judgement :

Prayer:- This Civil Miscellaneous Appeal is filed against the order dated 7.5.2008 made in WC.No.184/2006 by the learned Deputy Commissioner for Labour-I for Workmen's Compensation, Chennai-6.

JUDGEMENT

1. This Civil Miscellaneous Appeal is filed by the Employer/Proprietor of M/s.Jeyam Stone Works against the order dated 7.5.2008 made in WC.No.184/2006 by the learned Deputy Commissioner for Labour-I for Workmen's

Compensation, Chennai-6, questioning the correctness and legality of the order and award, wherein the claim application filed by the claimant/Respondent herein was allowed in part and a compensation of Rs.91,376/- with interest at 12 per cent has been awarded.

2. For the purpose of convenience, the parties are referred to as they were arrayed before the Deputy Commissioner for Labour. The facts leading to filing of this Appeal are as under:-

The claim petition was filed by the claimant seeking compensation for permanent disability suffered on account of the accident that had occurred on 9.4.2005 at about 2.30 noon, while he was doing polishing cudappa stone, it fell on his leg and caused grievous injuries. According to him, he was immediately admitted in the Government Hospital, Royapettah and thereafter, he took treatment in a private hospital and incurred Rs.30,000/- for medical expenses. Due to the injuries suffered by him, he suffered permanent disability, which has been assessed by the Doctor as 25 per cent partial and permanent. Since the Appellant failed to grant any compensation, he lodged a complaint in Mylapore Police Station on 30.12.2005. Prior to the lodging of the complainant, he had issued a legal notice dated 12.7.2005 to the Appellant, who has sent a reply denying the averments and allegations made by the claimant. Therefore, the Respondent herein/claimant a sum of Rs.2,00,000/- as compensation before the Deputy Labour Commissioner for Workmen's Compensation.

3. The Appellant/Employer appeared before the Deputy Labour Commissioner for Workmen's Compensation and filed a statement of objections denying the averments made in the claim petition. The employee and employer relationship also came to be denied. According to the Appellant/Employer, the claimant worked on daily coolie basis some time during 1990 in his shop, which is run on small turn over and the claimant was not a permanent employee. He stopped working even as a daily coolie from 1999 onwards. In fact, during the year 2002, the Appellant/Employer came to know that the claimant has opened his own shop for similar cudappa stone business at No.232, Tiruvannamalai Main Road, Gingee Taluk. After commencing his own business, the claimant frequently came to

Chennai to the Shop of the Appellant for the purpose of buying stones for his shop at Tiruvannamalai. On the date of the accident i.e. on 9.4.2005, the claimant visited his shop and on his own volition, accompanied a private motorised open fish cart and went to the nearby open space where the Appellant/Employer was keeping some stones, slabs, etc. After some time, he was informed that a stone slipped on his leg who already had an injury and on humanitarian grounds, he was taken to the Government Hospital, Royapettah by the Appellant/ Employer. Therefore, there was no employee and employer relationship between them and the incident had occurred not in the course of employment.

4. On the basis of the pleadings, the parties went for trial and on conclusion of the trial, the Deputy Labour Commissioner, on appreciation of pleadings and the evidence placed on record, allowed the claim petition in part and awarded a sum of Rs.91,376/- as total compensation with interest at 12 per cent p.a. As against the same, this Civil Miscellaneous Appeal has been filed by the Appellant/Employer.

5. This court heard the learned counsel on either side and also perused materials placed on record.

6. Mr.K.Venkatasubramanian, the learned counsel for the Appellant would contend that the Deputy Labour Commissioner failed to notice that there was no employee and employer relationship between the claimant and the Appellant/Employer and there was no material to establish that wages/salary was paid to the claimant by the Appellant. He would contend that the Deputy Labour Commissioner erred in ignoring the specific plea raised by the Appellant that the claimant was employed only during the period from 1990 to 1999, that too, on daily coolie basis and he started similar business from the year 2002 in his own place at Tiruvannamalai. The learned counsel would also contend that the Deputy Labour Commissioner erred in totally ignoring the nature of business of the Appellant of selling of stones, such as cudappa, marbles and granites, which involves activities under Schedule II, Item (iii) read with Section 2 (1)(n) and cannot be saddled with liability when the number of persons was less than 20 under the Workmen's Compensation Act, 1923. He would contend that the conclusion arrived at by the Deputy Labour

Commissioner is erroneous and liable to be set aside.

7. On the other hand, Mr.K.K.Senthilkumar, the learned counsel for the Respondent submitted that the award passed by the Deputy Labour Commissioner is in consonance with the evidence placed on record and there is no material whatsoever to come to the conclusion that there is no employee and employer relationship between the claimant and the Appellant/Employer and would submit that there is no substantial question of law involved in this appeal for being adjudicated. He would further submit that the Appellant/Employer having denied the employee and employer relationship, the burden was cast on him to establish by positive evidence, which the Appellant failed to do so.

8. Having heard the learned counsel on either side, the following substantial question of law arise for consideration:-

1. Whether there exists the employee and employer relationship between the claimant and the Appellant/Employer?

2. Whether the claimant is entitled for compensation?

9. The Appellant/Employer had filed statement of objections before the Deputy Labour Commissioner and it has been specifically denied that the claimant was working under him on the date of the accident. Section 3 of the Workmen's Compensation Act mandates that the employer has to pay compensation, in case of injury caused to a workman by accident arising out of and in the course of employment. An employee has to cross the threshold bar by tendering evidence and establishing the fact that he was employed by his employer in the event of there being a denial by the employer. In the instant case, as noticed herein above, there is total denial of employee and employer relationship. When such being the case, the contention of the learned counsel for the Appellant that self-serving testimony of the employee was not sufficient to accept that there exists employee and employer relationship between the parties especially on account of non-examination of any other co-employee in support of the claimant, it has to be inferred that no employee and employer relationship existed between the parties requires active consideration. As stated above, the initial burden is to be

discharged by the employee by producing prima facie material/evidence to demonstrate that the Respondent was working under the Appellant either by examining any other co-employee or any other independent witness. In the instant case, there is no material whatsoever produced to show that the said relationship exists. A self-serving testimony would not be safe to rely upon particularly in view of the fact that the employer denied the relationship by not only filing statement of objections, but also entered into the witness box and denied the said relationship.

10. The claimant has relied upon Ex.A1 the complaint given by him to the Mylapore Police Station against the Appellant. Ex.A1 is the acknowledgment given by the concerned Police that a case has been registered in CSR.No.507/2005. Admittedly, the said complaint has been given only on 30.12.2005 whereas the incident has occurred on 9.4.2005. Indisputably, the complaint has been lodged after nearly eight months. On behalf of the claimant, Ex.A2 and Ex.A7 sale receipts filed by the claimant namely Appuswamy on behalf of the Jeyam Stone Works to show sale of cudappa stones by the said shop are dated 4.6.2002 and 29.4.2002. That apart, the claimant has also relied upon Ex.A6 salary certificate dated 19.11.2003 issued by the Appellant/Employer. Those are the documents relied upon by the claimant to show that he was employed under the Appellant. Those documents would only show that he was employed in the said shop till 2003.

11. The employer Devarajan was examined as RW.1 and he has stated that the claimant worked under him from 1990 to 1999 on a daily coolie basis at Rs.60/- per day and after 1999, he was irregular and did not work after 2002. He had disputed the document Ex.A6 in his cross examination and has stated that the said certificate was not issued by him. Though there are some documents to show that the employee worked till 2002-2003, but however, there is no document to show that the claimant worked under the Appellant/Employer after 2003. The accident had occurred in the year 2005. It is the specific case of the Appellant/Employer that the claimant was having his own shop at Tiruvannamalai and he used to get cudappa stones from the Appellant and on 9.4.2005, he came to his shop and voluntarily helped the cart man in removing the cudappa stone. While doing so, the cudappa stone fell on his leg and he was taken to the Government Hospital,

Royapettah for treatment.

12. Even assuming that the claimant worked under the Appellant for some period that is till 2003, the same would not answer the description of a workman as contained in the provisions of the Workmen's Compensation Act.

13. It is pertinent to refer to the definition of 'workman' and Section 2(1)(n) of the Workmen's Compensation Act reads as under:-

(n) workman means any person who is

(i) a railway servant as defined in Clause 34 of Section 2 of the Railways Act, 1989 (24 of 1989) 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 II or

(i-a)(a) a master, seaman or other member of the crew of a ship.

(b) a captain or other member of the crew of an aircraft

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle.

(d) a person recruited for work abroad by a company and who is employed outside in India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India, 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 dependants or any of them.

14. There must be a relationship of an employer and an employee before a person can be said to be a workman vis-a-vis his employer. Further under the same

definition, in order that a person may be considered to be a workman within the meaning of the Workmen's Compensation Act, he must be employed in such capacity as is mentioned in any of the items included in Schedule II.

15. Schedule II of the Workmen's Compensation Act gives the list and it has to be seen whether the claimant comes under any of the clauses set out in Schedule II. Clause (iii) of Schedule II deals with sale of any article and it reads as follows:- iii. Employed for the purpose of making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport or sale of any article or part of an article in any premises wherein or within the precincts whereof twenty or more persons are so employed.

16. According to item (iii), a person employed for the purpose of transport or sale of any article in any premises wherein or within the precincts whereof, twenty or more persons are so employed is included in the definition of workman. Therefore, in order to come within the definition of workman as per Schedule of Section 2(1)(n), twenty or more persons should have been in employment.

17. In the instant case, there is no material/evidence to show that twenty or more persons were working. In fact, PW.1's evidence indicated that there was no other worker in the shop. According to RW.1, usually only two persons were working on daily cooly. There is absolutely no evidence to show that the claimant was working at the time of accident i.e. in the year 2005 and was receiving wages as claimed by him.

18. Having regard to the facts and circumstances of the case, I am of the considered view that there is no employer and employee

ARUNA JAGADEESAN, J.

Srcm relationship between the Appellant and the Respondent and the Respondent does not fall within the definition of 'workman' under the Workmen's Compensation Act. The Deputy Labour Commissioner while dealing with the issue not only misread, but also misappreciated the evidence and therefore, his findings are perverse, contrary to record and law and hence, need to be set aside. In view of

the aforesaid finding, I am of the considered view that the claimant failed to prove that the injuries sustained by him was out of employment and in the course of employment with the Appellant/Employer and therefore, he is not entitled for compensation. Accordingly, the substantial questions of law are answered in favour of the Appellant.

19. In the result, this Civil Miscellaneous Appeal is allowed and the impugned award is set aside. The amount deposited by the Appellant shall be refunded to the Appellant with interest. No costs. Consequently, the connected MP is closed.

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