

* HIGH COURT OF DELHI : NEW DELHI

FAO. No.368/2003

% Judgment reserved on: 15th September, 2009

Judgment delivered on: 30th October, 2009

M/s. Bhasin Petrol Pump/Service Station
Indian Oil Petrol Pump
At N.P.L. Pusa Institute,
New Delhi 110012

....Appellant

Through: Mr. V.K. Sharma, Adv.

Versus

1. Mst. Mughla Khatoon
W/o. Mohd. Hassibuddin Khan
R/o. C/o. Mohd. Parvez
R-175/14-A, Laxmi Nagar, Ramesh Park
Delhi-110092

2. M/s. Vikas Electronics
Through Prop./Partner
40, Sarojini Park, Street No.16,
Shastri Nagar
Delhi110031

Respondents.

Through: Mr. Rajinder Vats, Adv.
for R-1.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment?

Yes

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| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

By way of present appeal, appellant is challenging order dated 20th March, 2003 passed by Commissioner Workmen's Compensation (for short as 'Commissioner'). Vide impugned order, appellant was directed to pay compensation of Rs.1,95,219/- along with interest @ 12% per annum from the date of accident, till the date of payment within thirty days.

2. Following substantial question of law was formulated in this case.

“(1) Whether the deceased Mohd. Shoibudin Khan was an employee under the appellant as per Section 2(e), 2(n) and 12 of the Workmen's Compensation Act 1923? If not so what is its effect?

3. Before dealing with the question of law, it would be fruitful to narrate brief facts of this case. As per respondent No.1 (claimant), her son Mohd. Shoiab-

uddin Khan was working as Electrician with respondent No.2, who are Civil Engineers and Government Contractors. They deal in all kinds of civil and steel structures works, tank installation etc., flame proof wiring, cable laying, switches, panel board, transformers, D.G. sets, H.T and L.T. jobs etc. Last salary drawn by Mohd. Shoiabuddin Khan from respondent No.2, was Rs.1800/- per month.

4. It is alleged that on 4th October, 1995, deceased under the employment, supervision and control of respondent No.2 was entrusted with the installation job of Steel Structure at the Petrol Pump of appellant. While performing his duty, deceased sustained grievous/fatal injuries after falling from a pole existing at Petrol Pump, owned by the appellant. An FIR to this incident was registered with the police.

5. The death of deceased occurred during the course of his employment and benefit of appellant and

respondent No.2, as such both of them are jointly and severely liable to pay compensation.

6. Compensation claim was contested by the appellant, while respondent No.2 failed to appear before the Commissioner and was proceeded ex-parte on 11th March, 1999.

7. In written statement filed by appellant, preliminary objections were taken; that there was no relationship of employer and employee between the appellant and deceased; No such person by the name of deceased was ever in the employment of appellant and neither the appellant was the principal nor the contracting party. There is no cause of action against appellant.

8. Notice of this appeal was issued to the respondents. Counsel for respondent No.1 appeared. Respondent No.2 was served by publication. In spite of publication, there was no appearance on behalf of respondent No.2.

9. It is contended by learned counsel for appellant that deceased was never employed in the trade/business of the appellant. The duty at Petrol Pump was wholly and purely casual and not regular. Deceased was not a Workman working for the appellant as defined under Section 2(1)(n) of Workmen's Compensation Act, 1923 (for short as 'Act'). There existed no relationship of employer and employee between the appellant, on one side and deceased on the other.

10. It is further contended that the deceased was working as Electrician with respondent No.2 and he was not an employee of the appellant. It was respondent No.2, who was paying salary to the deceased.

11. Other contention is that appellant is the dealer of Indian Oil Corporation and site belongs to the Company and appellant is merely their dealer.

12. In support of its contention, learned counsel for appellant cited following judgments;

(i) ***Central Mine Planning and Design Institute Ltd. v. Ramu Pasi and Anr., JT 2005 (10)481;***

(ii) ***R.L. Bhalla v. Poonam Devi & Anr., 130 (2006) DLT444.***

13. On the other hand, it is argued by learned counsel for respondent No.1 that, Section 2(1)(e) of the Act, defines the term “employer” according to which, even those persons are covered under the definition of employer who avail the services of employee of contractor for their trade or business. As per appellant’s case, he was merely a dealer of Indian Oil Corporation and he had no role in the maintenance work at Petrol Pump. However, appellant failed to show any proof regarding request made by him to Indian Oil Corporation to get the tube light fittings changed. Deceased had died while changing the tube light fittings on the instructions of respondent No.2, at

the business premises of the appellant and fell down and died. Appellant failed to produce any witness from Indian Oil Corporation to show that respondent No.2 was a contractor appointed by Indian Oil Corporation and as such Commissioner rightly considered appellant as a principal employer.

14. Other contention is that Section 12 of the Act, clearly casts the liability of making payment of compensation upon the Principal Employer, in case the employee of the contractor suffers an accident while performing the work of principal employer. It has been clarified in the said Section, that where the compensation has been claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer which again goes to show that principal employer has to be treated as an immediate employer in case of injury/death of workman which occurs while he is performing his duties for the principal employer at the behest of or for his immediate employer. Moreover, as per agreement,

Exb.M2/W2, executed between appellant and Indian Oil Corporation, the dealer i.e. appellant, has to indemnify all the claims of third party as a result of consequence of any act or omission whatsoever.

15. In the present case, incident took place on 4th October, 1995 and in order to appreciate the rival submissions, it is necessary to take note of Section 2(1)(e) of the Act, which defines “Employer”, Section 2(1)(n) which defines “Workman” and Section 12 which defines “Contracting”, as it stood at the relevant point of time. These provisions read as under;

“Section-2. (1)(e) “employer” includes anybody of persons whether incorporated or no 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.

Section-2. (1)(n) “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 [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

(ii) employed on monthly wages not exceeding (one thousand rupees) 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 include a reference to his dependents or any of them.

Section-12. Contracting-(1) Were 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 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. A bare reading of Section 2(1)(n) shows that the expression “Workman” as defined in the Act does not cover a casual worker.

17. With regard to the issue as to whether there existed the relationship of employee and employer on the date of accident, between deceased and appellant or Respondent No.2, the Commissioner observed in impugned order that;

“Though, both the respondents denied the fact of employer-employee relationship as well as the fact of accident. However, respondent No.1 did not chose to appear before this court after filing its written statement and thus was proceeded ex-parte on 11.3.99 and therefore failed to prove its contentions/defences. On the other hand respondent No.2 also denied the fact of accident and employer-employee relationship. However, Sh. Pramod Bhasin appeared in person before this Court on 22.2.99 and made statement on oath and admitted that respondent No.1

was doing the maintenance work of respondent No.2. He further admitted that an accident occurred at the premises of respondent No.2 on 4.10.95 and as a result of the same fatal injury of one of the workers resulted. He further stated the electrical fitting work was undertaken by respondent No.1. Further, during his cross examination also Sh. Pramod Bhasin admitted that a workman employed with respondent No.1 died due to an accident on 4.10.95 while repairing/replacing the tube lights installed at the premises of respondent No.2 who was responsible for maintenance of the said premises.

In view of the above discussion I am of the considered opinion that the relationship of employer and employee existed between the respondent No.1 and the deceased workman on the date and time of accident and the respondent No.2 in whose premises the deceased workman was working under the control and administration of respondent No.1 is the Principal employer. Further, in view of the statement made by Sh. Pramod Bhasin the partner of respondent No.2 the accident arose out of and in the course of employment."

18. The above findings given by Commissioner are against the admitted facts. As stated above, respondent No.1-claimant, in her claim petition herself

has stated that, deceased was working as Electrician with respondent No.2, who are Civil Engineers and Government Contractors and deceased was drawing his salary of Rs.1,800/- per month from respondent No.2. As per further averments made in the claim petition, on the date of incident deceased was under the employment, supervision and control of respondent No.2 and was entrusted with the installation job of steel structure work at Petrol Pump of appellant. While performing his duty, deceased sustained fatal injuries after falling from a pole existing at the Petrol Pump owned by appellant.

19. In view of these averments made by claimant in the claim petition, by no stretch of imagination it can be said that deceased was employed with the appellant or there was any relationship of employer and employee between the deceased and the appellant.

20. In ***Municipal Board v. Jasod Singh and Ors., AIR 1960 Allahabad 468***, it was observed;

“Where the State was executing electrification project of a town on behalf of the Municipal Board and during the construction a workman who was an employee of the State, suffers a permanent partial injury and is awarded compensation under the Act it is the State which is liable to pay the compensation, it is immaterial whether the State was working for itself or on behalf of the Municipal Board. Even if it was constructing the project as the agent of the Board, it would be liable to the injured workman. Whether it is entitled to reimburse itself from the principal is another matter.

It is not the ordinary trade or business of Municipal Board to execute electrical projects. There is a distinction between lighting public streets and places or providing a water supply on the one hand and on the other the construction of projects which when ready will enable the Board to perform those functions. The Board, therefore, is not liable under Section 12 of the Act if it entrusts the construction to the Government”

21. A somewhat similar point arose before the Bombay High Court in ***Rabia Mohomed Tahir v. G.I.P. Rly., AIR 1929 Bom 179***. In that case, the G.I.P. Railway had entrusted the work of constructing a transmission line to a contractor. The over-head cable had to be carried over steel towers. A workman

who had been engaged for the constructions in one of these towers was knocked down by an approaching train and killed. The tower was to be used for carrying the cable from the Kalyan Power station to various substations on the railway and the cable line was to be used for supplying power to sub-stations. The question arose whether the railway was liable to pay the compensation under the Section 12 of the Compensation Act. The Court held;

“That though the construction of the towers would be necessary to convey electric power to the locomotives, it was not a part of the ordinary trade or business of the G.I.P. Railway to carry out works of construction.”

22. Similar view was taken by Calcutta High Court in ***Karnani Industrial Bank v. Ranjan, AIR 1933 Cal 63.*** In that case, a bank had entrusted the construction of a building required by it to a contractor. A workman was injured in the course of this work by a joist falling on his leg and the

Commissioner fixed the compensation payable to him at Rs.450/-. The question arose whether the Bank was liable under Section 12 of the Act to pay this compensation. It was held;

“that it was not within the ordinary trade or business of a Bank to build houses.”

23. In **Central Mine Planning and Design Institute (Supra)**, it was observed;

“The expression “Workman” as defined in the Act does not cover a casual worker and hence not entitled to make an application for compensation.”

24. As already stated above, as per claimant’s own case on the date of accident, deceased was under the employment, supervision and control of respondent No.2 and it was respondent No.2, who was entrusted with the installation job of steel structure work at the Petrol Pump of appellant. The deceased while performing his duty being under the employment of respondent No.2, sustained fatal injuries after falling

from a pole at the Petrol Pump owned by the appellant. Thus, there was no privity of contract between the appellant and deceased. By no stretch of imagination, it can be said that the deceased was employed with the appellant or there was any relationship of employer and employee, between the deceased and the appellant.

25. The substantial question of law is, therefore, answered in negative. The impugned order is set aside and appeal filed by appellant stands allowed.

26. Appellant before filing this appeal had deposited compensation amount with the Commissioner. Amount deposited by the appellant and lying with the Commissioner, shall be paid to the appellant only, after expiry of the period of appeal.

27. Parties shall bear their own costs.

28. Trial court record be sent back.

30th October, 2009
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V.B.GUPTA, J.