

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYAISHTA, 1937

MFA.(W.C.C.) No. 116 of 2012 ()

AGAINST THE ORDER DATED 19-02-2010 IN WCC 13/1998 OF WORKMEN'S
COMPENSATION (DEPUTY LABOUR COMMISSIONER), KOTTAYAM

APPELLANTS/OPPOSITE PARTIES 4 TO 11:

1. JILMON JOHN
S/O.JOHN MADATHIL HOUSE, MANAKAD KARA, MANAKAD VILLAGE,
THODUPUZZHA TALUK
2. ANICE JOHN,
W/O.JOHN, MADATHIL HOUSE, MANAKAD KARA, MANAKAD VILLAGE,
THODUPUZZHA.
3. DAISY,
D/O.JOHN, MADATHIL HOUSE, MANAKAD KARA, MANAKAD VILLAGE,
THODUPUZZHA.
4. LAISA,
D/O.JOHN, MADATHIL HOUSE, MANAKAD KARA, MANAKAD VILLAGE,
THODUPUZZHA.
5. TESSY,
D/O.JOHN, MADATHIL HOUSE, MANAKAD KARA, MANAKAD VILLAGE,
THODUPUZZHA.
6. MINI
D/O.JOHN, MADATHIL HOUSE, MANAKAD KARA, MANAKAD VILLAGE,
THODUPUZZHA.
7. BIJUMON@BAIJU,
S/O.JOHN, MADATHIL HOUSE, MANAKAD KARA, MANAKAD VILLAGE,
THODUPUZZHA.
8. JINO,
S/O.JOHN, MADATHIL HOUSE, MANAKAD KARA, MANAKAD VILLAGE,
THODUPUZZHA.

BY ADVS.SRI.T.J.MICHAEL
SRI.JOSEPH JOHN
SRI.JOHN VIPIN

RESPONDENTS:

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1. MALLIKA,
W/O.LATE DIVAKARAN, CHOLLAMACKAL HOUSE, MULLARINGAD KARA,
VANNAPURAM VILLAGE, THODUPUZHA TALUK 685 582.
 2. EBINLAL,
S/O.LATE DIVAKARAN CHOLLAMACKAL HOUSE, MULLARINGAD KARA,
VANNAPURAM VILLAGE, THODUPUZHA TALUK 685 582.
 3. ARYA, D/O. LATE DIVAKARAN, CHOLLAMACKAL HOUSE,
MULLARINGAD KARA, VANNAPURAM VILLAGE,
THODUPUZHA TALUK - 685 582.
 4. SURYA, D/O. LATE DIVAKARAN, CHOLLAMACKAL HOUSE,
MULLARINGAD KARA, VANNAPURAM VILLAGE,
THODUPUZHA TALUK - 685 582.
 5. J. RAJU, S/O. P.C. JOHN, PUTHIYEDATHU HOUSE, KURUMANNU,
VELOOR, KOTTAYAM DISTRICT - 686 501. (DELETED)

RESPONDENT NO.5 IS DELETED FROM THE PARTY ARRAY AT THE RISK OF
APPELLANTS AS PER ORDER DATED 03.02.2015 IN I.A. NO. 404/2015 IN
MFA 116/2012)

6. K.B JITH, S/O. BALAKRISHNAN, KALAPPURAYIL HOUSE,
OORAKAM, KARUVANOOR P.O., THRISSUR DISTRICT - 680 711.

R1 TO 4 BY ADV. SRI.K.S.HARIHARAPUTHRAN
R1 TO 4 BY ADV. SRI.GEORGE MATHEW

THIS MISC. FIRST APPEAL HAVING COME UP FOR ADMISSION ON
18-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

**P.N.RAVINDRAN &
ANU SIVARAMAN, JJ.**
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M.F.A(WCC).No.116 of 2012
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Dated this the 18th day of June, 2015

JUDGMENT

Ravindran, J.

The appellants are opposite parties 4 to 11 in W.C.C.No.13 of 1998 on the file of the Court of the Commissioner for Workmen's Compensation (Deputy Labour Commissioner), Kottayam. Respondents 1 to 4, the applicants therein, who are the wife and minor children of a toddy tapper by name Divakaran, moved the Workmen's Compensation Commissioner claiming a lumpsum amount of Rs.2,50,00/- as compensation from the predecessor-in-interest of the appellant and two others. The applicants contended that in the course of the employment under the opposite parties, late Divakaran fell from a palm tree standing in the property of one Narayanan and succumbed to the injuries sustained by him on the way to the hospital. The applicants contended that the deceased was a permanent toddy tapper of the opposite parties, a member of the Toddy Worker's Welfare Fund, that he was aged 33 years at the time of his death and was earning monthly income of Rs.4,000/-.

2. After preliminary examination the case was admitted to file and notice was issued to the opposite parties. Despite several postings the opposite parties did not turn up with the result, they were set ex-parte by order passed on 08.08.2000. Thereafter, ex-parte evidence on the side of the applicants was recorded and Exts.A1 to A3 were marked on their side. After considering the materials on record, the Court of the Commissioner for Workmen's Compensation awarded the sum of Rs.2,01,660/- as compensation, by order passed on 30.01.2001 and directed the opposite parties to deposit the said amount together with interest @ 12% per annum from the date of the accident till the date of deposit. More than a year later, to be exact on 19.02.2002, the first opposite party namely the predecessor-in-interest of the appellants herein filed a review petition seeking a review of the order passed by the Court of the Workmen's Compensation Commissioner on 30.01.2001, accompanied by a written statement. While the said application for review was pending, he passed away on 08.03.2002. Thereupon, the appellants herein filed an application to get themselves impleaded in the petition as additional opposite parties 4 to 11. Thereafter the review petition was allowed, the order passed on 30.01.2001 was set aside and the

appellants herein were impleaded as opposite parties 4 to 11.

3. After the review petition was allowed, the applicants examined a co-worker of the deceased as AW2. On the side of the opposite parties, the fourth opposite party was examined as RW1 and the additional fourth opposite party (the first appellant herein) was examined as RW1 and two other witnesses were examined as RW2 and RW3. The appellants also produced and marked Exhibits R1 and R2. The contention raised by the first opposite party namely the predecessor-in-interest of the appellants was that the deceased workman was disobedient, that he did not care for the lawful directions issued by the opposite party, that he was often drunk and unable to control himself and that he used to climb trees for tapping in a drunken condition. It was contended that the opposite parties had quite often directed him not to climb trees in a drunken state but he did not pay heed to the direction and on the fateful day as he was under influence of the alcohol, he could not control himself and fell down from the tree. The first opposite party however admitted the fact that the deceased was his workman. After considering the rival contentions and the materials on record, the Court of the Commissioner for Workmen's Compensation held that the deceased

workman met with the accident in the course of his employment. The Commissioner for Workmen's Compensation also awarded the sum of Rs.2,01,660/- as compensation taking the monthly wages of the deceased employee as Rs.2000/- The appellants herein were directed to deposit the said amount together with interest @ 12% per annum from 30.06.1997 till the date of deposit. Opposite parties 4 to 11 have aggrieved thereby filed this appeal.

4. We heard Sri.T.J.Michael, learned counsel appearing for the appellants and Sri.George Mathew, learned counsel appearing for respondents 1 to 4. Sri.T.J.Michael, learned counsel appearing for the appellants contended that apart from the fact that the deceased had climbed the palm tree in a drunken state, contrary to the directions issued by the employer, the applicants have also not proved that the the palm tree from which he fell down was a licensed palm tree and therefore, the opposite parties are not liable to pay compensation. The learned counsel contended that the applicants have not produced any documentary evidence to show that the deceased sustained fatal injuries as a result of a fall from a palm tree and therefore for that reason also, the impugned order is liable to be set aside.

5. Per contra, Sri.George Mathew, learned counsel appearing for respondents 1 to 4 contended that status of the deceased was not in dispute, that the tone and tenor of the written statement filed by the first opposite party on 19.02.2002 would disclose that the deceased sustained injuries in the course of his employment and therefore, the contention now put forward that no evidence has been adduced to show that the deceased sustained injuries in the course of his employment is plainly untenable. Learned counsel contended that the case set out by the predecessor-in-interest of the appellants was that on the fateful day the deceased climbed the palm tree in a drunken state and was himself responsible for the accident, that he had flouted the direction issued by him and other opposite parties not to do tapping work in a drunken condition and in such circumstances as the incident is admitted and the appellants have not proved the case pleaded by them, no interference is called for with the impugned judgment.

6. We have considered the submissions made at the Bar by the learned counsel appearing on either side. We have also gone through the pleadings and the materials on record. The fact that the deceased employee was a toddy tapper employed by opposite parties 1 to 3 is

not in dispute. This fact is specifically admitted in paragraph 2 of the written statement filed by the predecessor-in-interest of the appellants on 19.02.2002. He has in his said written statement, inter alia, averred as follows:-

“It is true that the late Divakaran was a workman under the opposite party”.

He had further averred as follows:-

“In the drunken stage the deceased climb the palm tree and the accident occurred”.

7. The substance of the averments in the written statement filed by the predecessor-in-interest of the appellants is to the effect that the deceased employee used to climb palm trees in a drunken state and on the fateful day also it happened. In the light of the admission made by the predecessor-in-interest of the appellants in their written statement, we are of the opinion that the appellants cannot be heard to contend that the applicants have not proved the status of the workman or the fact that he suffered injuries in the course of his employment or that the cause of the injuries has not been proved. The appellants are bound by the averments in the written statement filed by their predecessor and cannot, as held by

this court in **Krishnan Sathyadas v. Lakshmikutty Amma** (1990(2) KLT 795) deviate from the said stand or adopt a stand contrary to the stand taken by their predecessor-in-interest in his written statement.

8. The appellants have now put forward a new case that the deceased had climbed a tree which was not licensed to be tapped. Apart from the fact that there was no material before the Workmen's Compensation Commissioner to show that the deceased had climbed a tree which was not licensed to be tapped, as such a case has not been pleaded in the written statement filed by the first opposite party, the appellants, who had no involvement in the business run by their predecessor-in-interest, cannot in our opinion raise such a plea. In any case, the burden was on them to prove the said fact and they have not discharged that burden. Even assuming that the toddy tapper had climbed a tree which was not licenced to be tapped, that by itself will not in our opinion absolve the employer of his liability under the Workmen's Compensation Act, 1923, as the accident had happened in the course of his employment.

We accordingly hold that there is no merit in the instant appeal. The appeal fails and it is dismissed. The Commissioner for Workmen's Compensation (Deputy Labour Commissioner), Kottayam shall forthwith release the balance amount lying in deposit to the applicants. No costs.

P.N.Ravindran,Judge

Anu Sivaraman, Judge

sj