

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on :10.02.2017

Judgment Pronounced on : 03.11.2017

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

C.M.A.No.1075 of 2001

1.S.Gopal Selvamani (Died)

2.S.Kavitha

3.S.Saumia

4.S.Sakthivel

.... Appellants

[Appellants 2 to 4 are brought on record as L.Rs of the deceased sole appellant Vide order dated 24.6.2016 made in CMP.No.3272 of 2016 in CMA.No.1075 of 2001]

-Vs-

1.The Shipping Corporation of India Ltd.,
Rep. by its Assistant General Manager,
Shipping House, 245, Madane Cane Road,
Mumbai.

2.The Shipping Master,
Government Shipping Office,
Mumbai

... Respondents

Prayer:- Civil Miscellaneous Appeal under Section 30 of Workmen's Compensation Act as against the order in W.C. Case No.71/99 dated 06.11.2000 and the erratum dated 25.07.2001 on the file of the Commissioner for Workmen's Compensation-II, Chennai-6.

For Appellants : Mr.S.Krishnasamy

For Respondents : Ms.Ezhilarasi [No appearance]

JUDGMENT

The appellants herein are the legal heirs of certain Gopal Selvamani, a seaman, who claims to have suffered permanent disability in an accident that arose in the course of his employment, have approached this Court challenging the inadequacy of compensation awarded by the Commissioner under Workmen's Compensation Act.

2.1 The facts are: Gopal Selvamani was trained as a seaman in the ship M.V.Mekhala wherein after he was employed in the Ship

M.V.Walchand. On 28.3.1977, he was employed by the first respondent to work under the second respondent as Engine Room Rattling-III (ERR-III). In this post, he worked till 1992. The nature of job is such that he should work for eight to twelve months in the ship and thereafter, there would be a temporary lay-off/sign-off for three to four months. During this period, he would not be entitled to salary, but still, would be entitled to Provident Fund and the period would also be reckoned for payment of gratuity.

2.2 On 02.02.1993, he was appointed as Engine Room Petty Officer (ERPO) and the nature of job may be stated as that of a Fitter. Ever since, he became a permanent employee of the first opposite party and he was also entitled to regular monthly salary. On an average, he was paid a salary of Rs.11,750/- per month inclusive of allowances.

2.3 Be that as it may, on 25.12.1993, while he was working in the Ship M.V.Diglipur at Chennai Port, a moving funnel shaft hit him in the course of his employment. Consequent to this accident, Gopal Selvamani suffered injuries to his chest, lower abdomen and groin regions. He felt unconscious and was removed to Wellington Hospital, Chennai and was treated there. Even after his treatment, he experienced numbness and stiffness of his right hand and right leg. As advised by the neurologist, scan was taken and on 17.01.1994, a surgical attempt to treat him was done. There however was no improvement. Thereafter, radiotherapy was given for 30 alternate days from 08.2.1994 to 22.3.1994 and again on 07.6.94 a scan was taken after perusing which the physician recommended chemotherapy for 5 sittings. After this five recommended sittings of chemotherapy, Gopal Selvamani suffered paralysis of both his legs. On 11.7.1995, Gopal Selvamani was discharged. On the very next day i.e., 12.7.1995, Gopal Selvamani was relieved of his service by the first opposite party on the ground that he was suffering from cancer, as a consequence of which he was not fit for sea service. The order terminating his services was passed on 11.3.1996. This retrospective termination of service is illegal, and, but for the accident and the injury he suffered in the course of his employment, he would have continued in service. Hence, he was absolutely hale and healthy and there was no indication of any symptoms of cancer. The cancer that was diagnosed should, under the circumstances, only be considered as an occupational disease.

2.4 Gopal Selvamani suffered total disablement. Further he was aged 40 years and if he had continued in the service of the respondents, he would have had a service of 16 years. However, he was relieved from service w.e.f. 12.7.1995 by an order dated 11.3.1996. The order relieving the services of Gopal Selvamani

with retrospective effect is illegal. In fitness of things, the respondents should have given Gopal Selvamani some alternate employment. For the total permanent disability that Gopal Selvamani had suffered, the respondents have not paid any compensation. They merely sent Rs.8,474/- towards gratuity and Rs.46,580/- as full and final settlement. Gopal Selvamani responded to this Vide his letter 18.11.1997 seeking the break-up for Rs.46,580/-, but he did not receive any reply. Alleging the above facts, Gopal Selvamani approached the Commissioner under Workmen's Compensation Act with a claim of Rs.22,56,000/- as compensation.

3.1 In its counter, the first respondent, M/s. Shipping Corporation of India Ltd., has admitted the accident that took place on 25-12-1993 as alleged by Gopal Selvamani, but attributed the said accident to the fault of the victim himself. It is further alleged that on the victim suffering injury, he was removed to Wellington Hospital and towards the treatment, the first respondent had spent Rs.3,11,899.47. As Gopal Selvamani was permanently unfit for sea services he was paid a sum of Rs.46,580/- towards full and final settlement of his dues. It is also alleged that all aspects pertaining to the service conditions, financial aspects like allowances, expenses as well as compensation etc., of the foreign going officers are governed by an agreement entered into Maritime Union of India (MUI) and Indian National Ship Owners Association (INSA). On the very date of accident, Gopal Selvamani was signed off his services. He was treated by best of Neurologists and Neurosurgeons, whose investigations revealed that Gopal Selvamani was suffering from intra-medullary astrocytoma, which in simple terms means that he was suffering from a certain type of cancer. As the cancerous tumour could not be surgically removed, he was administered radiotherapy and also chemotherapy. He indeed was admitted at M/s.Apollo Cancer Hospital, Chennai. His entire medical expenses were borne by the Shipping Corporation of India, the first respondent. He was discharged from Apollo Cancer Hospital on 01.12.1994, but was again admitted at Wellington Hospital. The medical opinion on the health status of Gopal Selvamani was that his disease was continuously progressing and was worsening. Hence, he was advised to return to his home as he was not more fit for travel. For the period from 01.04.1994 to 28.07.1995 Gopal Selvamani was given his food allowances of Rs.25,000/-. He also requested that he might be paid his dues on final settlement. On 12.7.1995, first respondent was constrained to relieve Gopal Selvamani of his services. His total services was less than 11 months of active service on board, and medical leave, if taken together, the duration of service was 2 years 5 months and 10 days. His ailment was in no way connected to the injury he suffered in a freek accident while in service. In order, Gopal

Selvamani might entitle to any compensation in terms of the agreement between MUI and INSA, then as per clause 29 thereof he should have served in the ship for a period of 2 ½ years. Since his service was terminated a few days short of completion of 2 ½ years, he is not entitled to any compensation in terms of the agreement. Contrary to Gopal Selvamani's contention that he received a monthly salary of Rs.11,750/-, he received a salary of 3,335/- with allowances payable as per INSA-MUI agreement.

3.2 It is apparent that Gopal Selvamani was afflicted of cancer and it could well be possible that the accident might have happened due to his undetected cancer at the time when it took place. By no stretch of imagination, could it be said that cancer is an occupational disease of a seaman. Given the fact that he was suffering from cancer there is also no possibility for providing an alternate employment to Gopal Selvamani. The compensation sought is excessive and fanciful. Consequently, there is no merit in this application and the same is liable to be rejected.

4.1 Before the Commissioner, during enquiry it was filed on the side of the claimant/Gopal Selvamani Ext.A5, a communication of the first respondent dated 11.3.1996, whereunder Gopal was relieved retrospectively from service on 12.07.1995. On the side of the respondents Ext.R1 to Ext.R7 were produced, of which, Ext.R7, the agreement between INSA -MUI (for Petty Officers) was relevant.

4.2 During the pendency of this appeal, claimant Gopal Selvamani died. The Tribunal under the Workmen Compensation has however rejected the claim of the victim for being compensated in the manner the victim required. The Commissioner reckoned the percentage of disability at 60% and has determined the compensation amount at Rs.1,10,502/-. This is now in challenge. This how, his legal representatives happened to come on record to prosecute this appeal.

5. The learned counsel for the appellants argued that under Ext.R-7 agreement between INSA and MUI intended for Petty Officers, as per clause 29 every Petty Officer, who have worked for 2½ years, is entitled to a compensation of Rs.8,12,500/- if suffered injury; and Rs.6,87,500/- if an employee dies. However, just to defeat his entitlement, the respondent has issued Ext.A-5, letter dated 11.3.1996 relieving Gopal Selvamani from his services, retrospectively from 12.07.1995. If 11.3.1996 is reckoned as the date of relieving from services, then Gopal Selvamani would be entitled to compensation in terms of Clause 29 of Ext.R7. If the date as indicated in Ext.A-5 is reckoned, it is 10 days short of completing the qualifying 2 ½ years of service. The action of first respondent in

retrospectively relieving Gopal Selvamani in the manner it has done is malafide, illegal and contrary to the ratio of the Supreme Court rendered in R.Jeevaratnam V. State of Madras [AIR 1966 SCC 951].

6. Per contra, the learned counsel for the respondent argued that Gopal Selvamani's health issues are chiefly induced by cancer which is neither an occupational hazard, nor has it anything to do with the injuries that he has suffered. In fact, cancer was accidentally detected when Gopal Selvamani was taken for treatment for the injuries he suffered in the on board accident. Therefore, it is not appropriate to treat the case of Gopal Selvamani as one falling under the category of injuries suffered by a Petty Officer within the ambit of Ext.R7 agreement. At any rate, Vide Ext.A5 he has been relieved, and the order relieving him of his services was in order and was also in conformity with law. Notwithstanding that the first respondent has spent Rs.3,11,889/- towards the treatment of Gopal Selvamani, essentially for his cancer and this would be borne out by Ext.R-3 medical expenditure bills. This expenses, the first respondent is under no obligation to meet, yet it has met. It was only after considering the relevant facts, the Commissioner of Workmen Compensation-II has passed the order and the same cannot be faulted.

7. The Commissioner in the impugned order has reckoned the disability of the workman at 60% based on the medical evidence but has held that he was not entitled to compensation in terms of agreement between INSA and MUI.

8. There are a set of unassailable facts on which the points of difference have to be narrowed first and dealt with thereafter:

- That Gopal Selvamani was employed and had he became disabled due to an injury that he suffered in the course of his employment, and he were in service for two and half years then as per the contract of his service he was entitled to a compensation of Rs.8,12,500/-.
- That on 25.12.1993, Gopal Selvamani suffered an accident in the course of his employment. He had suffered injuries to his chest, abdomen, groin and testicles.
- That while treating the said injuries, he was detected of suffering from cancer as well, for treating which the respondent had spent little over Rs.3.0 lakhs.
- That Gopal Selvamani was terminated from service Vide notice of termination dated 11.03.1996 which was to take effect retrospectively from 12.07.1995. This is few days short of he completing two and half years service with the

respondent, which would have entitled him to claim compensation in terms of the contract of his service.

9. Two points can be straight away eliminated now: That cancer, given the nature of the employment, cannot be termed as an occupational disease, or at least there is no evidence offered by the appellants to establish that it was so. Secondly, the contract of service that binds both the parties to this litigation did not appear to indicate that an employee would be entitled to be treated for his cancer by the employer. The claimant, while alive and when petitioned the Commissioner for compensation, did not assert anything to the contrary. Still, the employer met the medical expenses for treating cancer. Is it a charity of a good Samaritan, or should it be let to have a bearing on the outcome of the case, can be considered in a short while.

10. Are the appellants entitled to claim compensation in terms of INS-MUI agreement for the disability that Gopal Selvamani had suffered in terms of his contract of employment with the respondents? If cancer is taken out the list, then it is possible to hold that Gopal Selvamani would have become entitled to compensation. However, there is a rider clause in the agreement that insists that an employee should have been in the service of the respondent for a minimum of two and half years. The other point is, from the stand point of an employer, would it have spent for the treatment of Gopal Selvamani's cancer but for the fact he was his employee? After all it is a company engaged in commercial activity for making profits and is not registered for doing charity unless contributions to charity are deductible in its Income tax returns. The only other head where charitable consideration might prevail is that when an employer feels a moral obligation to its employee. In fitness of things, it should be said that the respondent met the medical expenditure for Gopal Selvamani for treating latter's cancer, not because there was contractual obligation to do it, not because the same was deductible on the heads of charity, but because it felt a moral obligation to one of its employees.

11. The problem has come, because, if Gopal Selvamani had been terminated from service soon after he was found unfit for employment, and thereafter the expenditure for his treatment were met, then Gopal Selvamani might not have had a locus standi to invoke the compensation Clause in the contract. But he was treated as an employee till 11.03.1996 and was issued a notice of termination only on 11.03.1996. And, it had terminated his service retrospectively on 12.07.1995, which implies till 11-03-1996 he was treated as an employee of the respondent, notwithstanding the fact that he was not effectively working.

12. This boils down to addressing a solitary issue: Can contract of employment be retrospectively terminated? The answer is No. A bilateral contract of private employment shall have to be performed in terms of the contract, and not otherwise. No party to a contract can alter, modify a term of contract of employment to the disadvantage of the other. Every term of a contract carries a promise that a party who binds himself thereby will perform it in the manner contemplated. That can never be let to be defeated. This Court therefore, has little hesitation to hold that the notice dated 11.3.1996 terminating the contract of employment of Gopal Selvamani retrospectively from 12-07-1995 is invalid, and it can take effect only from the date it bears. And, given the circumstances in which it was issued, it is apparent that it was designed and timed only to defeat Gopal Selvamani's anticipated or possible claim of compensation for his disability in terms of INS-MUI contract.

13. One plea taken up by the respondent is that the very accident was induced by the cancer that Gopal Selvamani was afflicted of. But there is no material on record to subscribe to the said statement in the pleading.

14. On the one hand Gopal Selvamani was entitled to compensation for his disability, but on the other it must also be borne in mind that he was treated for his cancer by his employer, even though the latter was under no contractual obligation to do it. If Gopal Selvamani had received the compensation and then was required to meet the expenditure for treatment of cancer, he would have spent it only from this amount. Necessarily Gopal Selvamani was entitled to only the net sum arrivable upon deducting the sum of Rs.3,11,899.47 from the compensation amount of Rs.8,12,500/-

15. In the result, this appeal is partly allowed the respondents are directed to pay a sum of (Rs.8,12,500 - 3,11,900) Rs.5,00,600/- with interest at 12% payable from the 31st day of the employee becoming entitled to obtain compensation within 30 days from the date of the receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

To:

1.The Commissioner for Workmen's Compensation-II,
Chennai-6.

2.The Section Officer

VR Section

High Court Madras.(2 COPIES)

+2cc to Mr.S.KRISHNASAMY, Advocate, S.R.No. 78078

Pre-delivery Judgment in
C.M.A.No.1075 of 2001

GP(CO)
TR(19/02/2018)



WEB COPY