

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 06.09.2018

CORAM

THE HON'BLE MRS. JUSTICE V. BHAVANI SUBBAROYAN

C.M.A.No.2665 of 2009

1. Vembeeswari
2. Minor Baskar

... Appellants

Vs.

1. Ramasamy Gounder
2. Thavasiyappan

... Respondents

Prayer: Civil Miscellaneous Appeal filed against judgment and award passed in W.C.No.617 of 2002, dated 30.03.2009 on the file of the Workmen Compensation Court, Salem and to set aside the same.

For Appellants : Mr.V.S. Kesavan

For Respondent-1 : Mr.R. Ganesan

For Respondent-2 : No Appearance

J U D G M E N T

The appellants have filed this Civil Miscellaneous Appeal against judgment and award in W.C.No.617 of 2002, dated 30.03.2009 passed by the Deputy Commissioner of Labour, Salem and set aside the same and to enhance the award with interest and to direct the respondents to pay the compensation jointly and severally.

2. The case of the appellants is that the appellants are the wife and the son of the deceased Dharmalingam. The appellants have filed claim petition seeking for compensation for the death of the deceased Dharmalingam, while he was working with the respondents 1 & 2 as per the Workmen's Compensation Act.

3. The case of the appellants is that the well where the accident took place belongs to the first respondent situated in survey number and re-survey No.273/2 used for agricultural purposes, since there was no sufficient water and in order to deepen the Well, he had requested the second respondent to execute the said work. On the midnight of 27.06.2002, the

deceased person viz., Dharmalingam, was working at the said place and deepening the said Well under the supervision of the second respondent. While he was executing the work, the rock stones which were kept on the side of the Well fell on the deceased Dharmalingam's head and he died on the spot, succumbing to head injuries. Thereafter, an First Information Report was registered by the Arachalur Police Officials, Erode District. The deceased Dharmalingam, was aged 24 years at the time of death and he was earning a sum of Rs.3,090/- as daily wages. The appellants, the wife and minor son claimed a compensation of Rs.3,35,126/- for the death of the said Dharmalingam before the Deputy Commissioner of Labour under Workmen Compensation Act.

4. The first respondent had filed a counter affidavit stating that there was no employer-employee relationship between the deceased Dharmalingam and the first respondent and the first respondent did not engage any person for the said work directly and the deceased person worked under the supervision of the 2nd respondent who being a contractor had employed him. The first respondent would submit that he is not a necessary party to the proceedings. The first respondent has also contended that deepening of the Well has been done only by the persons, who are specially skilled men for doing such job and as such the 2nd respondent being a contractor only under his guidance the said job was undertaken. On 27.06.2002, the first respondent was not available at the site and he cannot be held responsible for the said accident. The said deepening of Well was entrusted as contract work for a specified amount to the 2nd respondent who was doing the said work and the first respondent need not pay any compensation to the deceased Dharmalingam. A case was registered against the 2nd respondent and it was taken on file in the Court of Judicial Magistrate-II in C.C.No.110 of 2002 and the Court has held that the 2nd respondent as the accused and convicted the second respondent. In view of the same, the first respondent is not liable to pay any compensation and only the second respondent ought to have paid the compensation to the deceased Dharmalingam and he is liable to pay the compensation. Hence in the light of the above facts, the first respondent is not liable to pay any compensation and prayed for dismissal of the claim petition.

5. The 2nd respondent, in his counter submitted, that he has denied the said averments of the first respondent and he has been engaged as a contractor and he was not aware of the said incident itself and due to certain facts and vengeance, the 1st respondent has given a complaint against the 2nd respondent and he sought for dismissal of the said claim petition.

6. The first appellant in her evidence has submitted that on 27.06.2002, around midnight, her husband deceased

Dharmalingam worked under the supervision of the second respondent for deepening the Well and at that time, boulders fell down on him and caused head injury and he died on the spot. The second respondent has taken the said contract from the first respondent for deepening the Well. At that point of time, after hearing the news, she immediately went to the spot and she found both the respondents available at the scene of occurrence. She would reiterate that her husband while he was working under the first and second respondents, her husband died. She further submitted that the police, after post-mortem, has initiated the proceedings against the second respondent and accordingly the second respondent has been convicted and he has been imposed with a punishment of three months rigorous imprisonment and to pay a fine of Rs.5,000/-.

7. Eventhough, the respondents 1 & 2 received Advocate notice and replied that they need not pay any compensation, but they have agreed that the said incident occurred due to which her husband died.

8. The said evidence of the petitioner, the first appellant herein corroborated with the FIR wherein the said Loganathan has submitted that the deceased Dharmalingam's contractor alone has taken all the four persons for doing the said work with the first respondent.

9. The first respondent had stated in his evidence that he enjoyed the 2nd respondent alone deepening of Well, and there was no relationship of employer and employee i.e., between the first respondent and the second respondent and the deceased Dharmalingam and deceased died only due to the said accident and the first respondent has not engaged the deceased Dharmalingam and only the second respondent had employed him, and the said job was done by the second respondent as a contractor and he alone is responsible for the death of the deceased Dharmalingam. Accordingly, one on the above facts the Deputy Commissioner of Labour had awarded a sum of Rs.3,35,126/-, fixing the salary as Rs.3,090/- per month. The Commissioner has also given a finding that between the first respondent and deceased no relationship. The Criminal Court has convicted the second respondent under Section 304(A) IPC for which, the second respondent has been imposed with a punishment of rigorous imprisonment with a fine of Rs.5,000/-. The first respondent's in doing agriculture and only the second respondent is doing his job of digging the Well or deepening the Well and it is his profession and hence the first respondent is not liable to pay any compensation to the appellants. However, the second respondent is liable to pay the compensation amount for the death of the deceased Dharmalingam, who was a workman and he was employed under the supervision of the second respondent. The learned counsel appearing for the appellants submitted that the appellants have filed this appeal

for enhancement of the compensation amount and the same has to be dismissed.

10. Heard the learned counsel appearing for the appellants and the first respondent. It could be seen from the records that the first respondent has engaged the second respondent for deepening the Well in the agricultural land of 1st respondent.

11. There was no dispute regarding the accident and the death of the deceased person is admitted. The complaint/FIR has been filed against the contractor and he was also convicted for the said offence. Based on the evidence, the Commissioner has given a finding that the only the second respondent is liable to pay the compensation. The Deputy Commissioner of Labour has given a finding wherein it is stated that the first respondent has engaged the second respondent and he is not vicariously liable for the act of the respondents.

12. The 1st respondent has denied that there was no relationship of an employer and employee but he has not produced any evidence to show that he engaged the 2nd respondent as a contractor. The 2nd respondent has submitted that he is also a worker who does these types of job along with other workman and there was no employer and employee relationship between him and the deceased. When the 1st respondent requested him to engage workers for the said job, he took the deceased along with him and the 1st respondent alone is liable to pay as the 2nd respondent is also a worker and gets only wages. The finding is that these works are small and it has to be carried out once. Hence there will not be any written agreements or contracts being executed by the parties are not accepted. When there was no denial that there was no contract executed or agreement executed merely based on Criminal Courts conviction of 2nd respondent, the liability of the 1st respondent does not get extinguished. Hence the above finding is not accepted and this Court is of the view that the landowner, 1st respondent is also equally liable to pay the compensation to the deceased.

13. As incident took place only when the first respondent has called for deepening the Well the cause of action has arisen in course of employment, the death has occurred. So, the 1st respondent cannot justify that only the second respondent is liable to pay the compensation.

14. In support of his above contentions, the learned counsel appearing for the appellants has relied upon the judgment of this Court reported in Bishop CSI Diocese of Vellore v. Mariappan and Ors, 2011 (2) TN MAC 112, wherein it has been held that as per the special enactment of Tamil Nadu Building and Construction Workers (Conditions of Employment and

Miscellaneous Provisions) Act, 1984 (T.N. Act 29 of 1986), and it was made clear that the building/Construction Workers engaged in building new Church. In that case, roof was under construction and it fell down on the Respondents/Construction Workers causing injuries and the accident arose in the course of employment and the compensation was awarded by WC Commissioner holding that the appellant/Bishop and Presbyter Incharge/Principal Employer is liable to pay Compensation. Appeal was filed therein and the appellants contended that they are not employers in terms of Section 2(I)(e) of the said Act and there was no privity of contract between the respondents 1 & 2. Eventhough, he was only a contractor and he has engaged other workers and the liability falls on the persons who have been engaged them.

15. The learned counsel for the appellant has relied upon another judgment of this Court reported in 2006 (2) TN MAC 323, The Superintending Engineer, Cuddalore Electricity Distribution Circle, Tamil Nadu Electricity Board, Cuddalore and Ors v. Pavunammal and Ors, wherein it has been held as per Section 12 of the Act, any person working in respect of affairs or business, would correct receive in terms of Section 12 includes the decision ultimately of contract or employer who engaged the workmen between the concerned is entitled to recover the same from the principal employer. Hence, he is entitled from the principal employer, statutory right in due course himself by recovering the same from the employer. The employer is liable to pay compensation if it is trade or business.

16. The learned counsel for the appellant has relied upon the judgment of this Court reported in 2001 (2) CTC 527, J.D.P. Associate v. K. Malarkodi and Ors, wherein, it has been held as Section 12 of the Workmen's Compensation Act, 1923, parents of the deceased son filing application for grant of compensation arising on account of the death of their son who fell down from 4th floor while fixing fibre glass. Respondent pleaded that he was only principal employer and application was not maintainable in view of non-joinder of contractor. Workmen can proceed against the principal employer and contractor is bound to indemnify in all cases. Section 12 contemplates that though liability for compensation is that of contractor, workmen is entitled to receive compensation from principal employer and principal has right of indemnity. Construction of Section 12(2) shows that the Act intends to secure the workmen for payment of compensation from principal employer, who may have employed the contractors to do certain work, which ordinarily principal employer would have done through his servants. The Act does not require the claimant to prove that there was also contractor above employer. Only principal employer will have to prove that particular worker was working under contractor. Principal

employer is bound to pay compensation to worker and since liability is ultimately that of contractor, principal employer can recover it from the contractor on the basis of statutory right to be indemnified by the contractor. Non joinder of contractor cannot result in dismissal of application for compensation.

17. The learned counsel for the appellant also relied upon the judgment of this Court reported in 1997 (II) CTC 166, M/s. Century Chemicals & Oils Private Ltd., v. Esther Maragatham and Ors, wherein, it has been held that regarding the liability of principal employer, and the right of contract labour. The workmen employed through contractor died in the course of employment due to electrocution in the premises of principal employer. Plea of casual labour and absence of employer and employee relationship as raised by the principal employer, was negatived.

18. The learned counsel appearing for the appellants has further relied upon the judgment of this Court reported in 2004 (1) TN MAC (DB) 271, The Dean, Agricultural College and Research Institute v. S. Sakilabanu and Ors, and also refers to Section 12 of the Act and liable for compensation.

19. There is a vicariously liability enforceable against the respondents 1 and 2 herein who are jointly and vicariously liable to pay compensation to the petitioners herein. The other factors regarding the fixing of authority has not been modified and the same is confirmed as satisfactory. Since there was no evidence produced regarding the age and also the summary wages received by him, the amount fixed by the Commissioner is confirmed therein and the respondents herein are equally liable to pay the compensation.

20. In the result, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

msm

To

The Deputy Commissioner of Labour, Salem.

+1cc to Mr.V.S.Kesavan, Advocate, S.R.No. 61875

C.M.A.No.2665 of 2009

SAI (CO)

GN(28/02/2019)