(1984) 03 P&H CK 0086

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Ganesh Foundry Works		APPELLANT
	Vs	
Bhagwanti and Others		RESPONDENT

Date of Decision: March 27, 1984

Acts Referred:

- Employees Compensation Act, 1923 - Section 2, 5

Citation: (1985) 1 LLJ 95

Hon'ble Judges: G.C. Mital, J

Bench: Single Bench

Judgement

G.C. Mital, J.

Kulbhushan Kumar was a regular employee of Sukhjit Starch and Chemicals Ltd., Phagwara, where he was drawing Rs. 173 per month as his salary. On 19th February, 1977, he came back to his residence after his duty was over at 9.00 a.m. At about 10.30 a.m. he was summoned by Ganesh Foundry Works to cure some defect in their factory premises. He went there and while he was doing the required job, he received injury resulting in the amputation of one leg and due to that injury, he subsequently died. His heirs filed an application for the grant of compensation under the Workmen''s Compensation Act (hereinafter called the Act). Therein it was stated that his normal wages were Rs. 173 per month and he used to earn Rs. 7 to Rs. 10 daily for doing extra work. Ganesh Foundry Works and Sukhjit Starch and Chemicals Ltd. were impleaded as respondents. Both the respondents contested the petition. Ganesh Foundry Works pleaded that the deceased was doing job work at his shop in spare time and on 19th February, 1977, he was called to remove some electric defect in their factory for which Rs. 25 were settled. However, the receipt of injury and death while working there was admitted, although the blame was put on the deceased that without informing the management he had come to do the work, thus the concerned person could not stop the working of the shaft, and, therefore, pleaded that it was on account, of the deceased''s own negligence and carelessness

that he met with the accident. The other concern admitted that in their factory the deceased was working as a laboratory worker and was getting Rs. 173 per month. They pleaded that he did not die while working in their factory and that they did not know that he knew the electric work as well. While the second concern disowned the liability because he did not die while working in their factory, the first concern pleaded that he was not their employee and, therefore, the Act was not applicable. The Court below, by order dated 5th February, 1979, held that the deceased was to be considered as a workman of Ganesh Foundry Works and his heirs were entitled to compensation. While assessing compensation, his pay was considered as Rs. 173 per month and since he also used to do repair work in extra time, it was concluded that his monthly income was between Rs. 200 and Rs. 300 and on this basis Rs. 18,000 were awarded to him. Ganesh Foundry Works have come to this Court in this appeal against the aforesaid order.

2. Shri N.K. Sodhi, Advocate, appearing for the appellant, has raised two fundamental points:

(1) that the deceased could not be held to be a "workman" within the meaning of the definition contained in Section 2(1)(n) of the Act as he came within the exception, as his employment was of a casual nature and he was employed for the purpose other than that of the employer''s trade or business; and

(2) even if the first point is decided against him, there was no contract of employment between the deceased and the appellant and, therefore, he was not a workman to whom the Act could apply.

3. After hearing the learned Counsel for the parties on the aforesaid two points, I am of the considered view that the first deserves to be decided against the appellant whereas the second point deserves to be decided in its favour.

4. It is agreed before me that an employee will fall under the exception as contained in the definition of workman only if both the conditions are satisfied, namely, that the employment is of a casual nature and he was employed otherwise than for the purposes of the employer''s trade or business. It is also agreed on both sides that if one of the aforesaid two matters is proved by the appellant, even then the deceased will come within the definition of a workman. It cannot be disputed that the employment of the deceased was of a casual nature as he was called to do some electric job in extra time whereas he was a regular employee of another industrial concern. To this extent, the matter has to be decided in favour of the appellant. I do not agree with the appellant that the purpose for which the deceased was called was not for the employer''s trade or business. If there is a breakdown in the industrial concern, whether electrical or mechanical, unless it is rectified, the work will not go on. Therefore, if the workman is called to remove the breakdown or to rectify the mechanical or electrical defect, it will have to be held that he was employed for the purpose of the employer''s trade or business. For arriving at this

conclusion, reliance is placed on Smt. Raj Rani v. Firm Narsing Das Mela Ram AIR 1964 P&H 315, Vinayaka Mudaliar v. Pottiamma 1953 I L.L.J. 22 Madanlal Vs. Mangali, , Popatlal Mayaram v. Bai Lakhu Jetha AIR 1952 Saurashtra 74, K. Ramaswami Mudaliar Vs. Poongavanam, and Hirjibhai Lakhamsibhai v. Damodar 1958 I L.L.J. 578 A reading of all these judgments show that employment for the purposes of the employer''s trade or business or subsidiary to it, comes within the ambit of the words "for the purpose of the employer''s trade or business". The work of setting the electric defect right in the employer''s industrial concern, therefore, has to be held as connected with or subsidiary to the industrial concern and, therefore, in this case only one of the conditions, i.e., employment of casual nature, is proved. Hence, the first point raised before me on behalf of the appellant is decided against it.

5. Adverting to the second point, the argument of Shri N.K. Sodhi was that unless there was a "contract of employment" between the deceased and the appellant, he could not come within the definition of a workman because, even if he did not fall within the exception as contained in the first part of the definition of workman, he could be termed as such only if there was a "contract of employment". His submission is that there was ho relationship of master and servant, which could be created if there was a "contract of employment". The deceased was called for a specified job and Rs. 25 were settled with him for doing that job. He was a regular employee of the other industrial concern and in extra time, he used to do the contract jobs as was given to him by the appellant in this case. Therefore, it was a contracted job but not a "contract of employment". In this behalf, he has placed reliance on (1) Chintaman Rao v. State of Madhya Pradesh 1958 I L.L.J. 2521 , (2) Shankar Balaji Waje Vs. State of Maharashtra, and (3) Mt. Hasbannessa Vs. Quazi Zahiruddin Mohammad Babar, . The two Supreme Court decisions are under the Factories Act, whereas the Calcutta decision is under the Workmen''s Compensation Act. After going through the aforesaid decisions, I am of the view that they are fully applicable to the facts of the present case. The definition of workman contained in the Factories Act can be said to be in pari materia with the definition contained in the Act because in both the definitions it is provided that there has to be a "contract of employment". The scope of "contract of employment" was considered by the Supreme Court in both the aforesaid decisions and in Shankar Balaji Waje ''s case (supra), the following rule was laid down (at Page 124).

It is true, as contended for the State, that persons engaged to roll bidis on job work basis could be workers, but only such persons would be workers who work regularly at the factory and are paid for the work turned out during their regular employment on the basis of the work done. Piece-rate workers can be workers within the definition of ''worker'' in the Act, but they must be regular workers and not workers who come and work, according to their sweet will. It is also true, as urged for the State, that a worker, within the definition of that expression in the Act, need not be a whole-time worker. But, even then, the worker must have, under his contract of service, an obligation to work either for a fixed period or between fixed hours. The

whole conception of service does not fit in well with a servant who has full liberty to attend to his work according to his pleasure and not according to the orders of his master.

6. We may say that this opinion further finds support from what we hold on the second contention. If Pandurang was a worker, the provisions about leave and leave wages should apply to him. We are of opinion that they do not and what we say in that connection reinforces our view that Pandurang was not a worker as the three criteria and conditions laid down in Chintaman Rao''s case (supra) for constituting him as such are not fulfilled in the present case.

In Chintaman Rao''s case (supra), the concept of employment was held to include three ingredients. The following finding was recorded in that case:

...The concept of employment involves three ingredients: (1) employer, (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision. Can it be said that a Sattedar is employed by the management of the factory to serve under it? There is a well understood distinction between a contractor and a workman and between contract for service and contract of service....

The meaning of "contractor" was also considered in the aforesaid decision as follows:

A ''contractor'' is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control in respect of the details of the work.

On consideration of the entire matter, it was thus concluded:

There is, therefore, a clear-cut distinction between a contractor and a workman. The identifying mark of the latter is that he should be under the control and supervision of the employer in respect of the details of the work.

The rule laid down by the Supreme Court in the aforesaid decision was extended by the Calcutta High Court while considering the definition of workman within the meaning of the Act. I have gone through the decision of the Calcutta High Court in Mt. Hasbamessa''s case (supra) and I am in full agreement with the view taken therein that there has to be a "contract of employment" before a person can be called a workman within the meaning of the Act failing which he would not be a workman. The Supreme Court also noticed a thin line between a "contract of service" and "contract for service". The "contract of service" was considered to bring the employee within the definition of workman whereas "contract for service" was considered to be a contract with a contractor who was not under the control of the

employer.

7. Keeping in view the aforesaid law, I am of the considered opinion that the deceased, who was called to the factory premises by the appellant to rectify some electric defect on payment of Rs. 25, was not on a "contract of service" but was "contract for service", i.e., contract between the employer and an independent contractor. Accordingly, I hold that he did not come within the definition of "workman" as contained in Section 2(1)(n) of the Act and, consequently, the Act would not be applicable to him.

8. To support the second point, another ancillary point was raised by Shri N.K. Sodhi, Advocate, that the Act could be applicable to a workman if his wages can be calculated within the meaning of Section 5 of the Act. A reading of Section 5 of the Act shows that the expression "monthly wages" means the amount of wages deemed to be payable for a month''s service (whether the wages are payable by the month or by whatever other period or at piece-rates) in the manner given under the Act. In highlighting the argument, it is urged that, if for a specified job Rs. 25 were payable to the deceased, his wages u/s 5 of the Act could not be calculated so far as the appellant-company is concerned. Of course, we can find out as to how much approximately the deceased was capable of earning, but the argument is that the wages which the deceased was earning from the other industrial concern, cannot be treated as wages for finding out whether he was a workman of the appellant or not. On this basis, it is argued that if Rs. 25 payable to the deceased would not fall within the term "wages", equally he cannot be considered to be a workman of the appellant. Since I am in agreement with the counsel on the preceding argument, I do not think it necessary to consider this argument in any further detail. The finding of the Court below is reversed and it is held that the deceased was not a workman as there was no "contract of employment" and he was engaged as a contractor to do a specified job at a fixed remuneration to be paid to him.

9. For the reasons recorded above, this appeal is allowed and the claim petition filed by the heirs of the deceased is dismissed. However, this will not stand in the way of the claimants if they are entitled to claim compensation under any other law. The parties are left to bear their own costs.