

## IMLAR AND OTHERS

v.

## NAGOOR PITCHAI TRANSPORTERS LIMITED

COURT OF APPEAL.

G. P. S. DE SILVA, J. AND BANDARANAYAKE, J.

C. A. 195/78(F).

D. C. COLOMBO 1/927/M.

JANUARY 22, 1986 (Submissions filed on 17.2.86 and 10.3.86).

*Delict—Negligence—Workman while working for defendant at premises of another firm killed by poonac bags falling on him when he was removing them—Duty of care.*

The plaintiffs were the widow and children of the deceased labourer working for Nagoor Pitchai Transport Services, the defendant. The deceased had been sent to the B.C.C. by his employer to work according to the instructions given by the officers of the B.C.C. This work included stacking of bags of poonac in the stores and bringing bags from the stores and loading them into lorries. The deceased was injured when carrying a bag to be loaded into a lorry when owing to poonac bags falling on him he suffered the injuries of which he died. On the instructions of the store-keeper of the B.C.C. the bags were being removed lengthwise which was dangerous. This was because the store-keeper wanted a part of the stores cleared for the purpose of re-arranging the stores.

Held—

(1) Although the defendant was not contracted by the B.C.C. to clear the stores or to re-arrange the stores this work was reasonably incidental to the employment of the deceased under the defendant and not independent of it. When the accident occurred the deceased was working within the scope of his employment under the defendant.

(2) The two questions arising for decision were:

(a) was there a duty of care owed by the defendant to the deceased?

(b) was there a breach of that duty?

(3) The master who sends his workmen to the premises of another is still subject to his common law obligation to take reasonable care for their safety by providing a safe system of work on those premises. The defendant, as the employer was clearly under a duty of care to ensure that the premises where the labourers were required to work were a reasonably safe place of work and that they were not exposed to unnecessary risks. An employer on whom the law casts a duty of care towards the employees cannot escape liability by entrusting the fulfilment of that duty to someone else who has failed to discharge the duty. The fact that it was the store-keeper of the B.C.C. who was negligent does not relieve the defendant of liability. The duty of care is the employer's personal duty whether he performs or can perform it himself or whether he does not perform it or cannot perform it save by servants or agents. The defendant was in breach of the duty of care he owed the deceased and was accordingly liable in damages.

Cases referred to:

- (1) *Smith v. Charles Baker & Sons* - [1891] A.C. 325, 362.
- (2) *General Cleaning Contractors Ltd. v. Christmas* - [1953] A.C. 180.
- (3) *Wilson & Clyde Coal Co. v. English* - [1938] A.C. 57
- (4) *Rose v. Plenty* - [1976] 1 WLR 141.

APPEAL from judgment of the District Court of Colombo.

*Chula de Silva* with *Miss S. Mivanapalana*, and *P. N. Casie Chetty* for plaintiffs-appellants.

*Mahes Kanagasunderam* with *Rohan Fernando* for defendant-respondent.

*Cur. adv. vult.*

April 4, 1986.

**G. P. S. DE SILVA (President; C/A)**

The plaintiffs who are the minor children and the widow of the deceased, Abdeen, filed this action against the defendant for the recovery of damages in a sum of Rs. 100,000 sustained by way of the loss of maintenance and support which the deceased had given them during his lifetime. At the time of his death Abdeen was 32 years of age, his widow was 26 years, and the two minor children were 7 and 5 years of age.

It was averred in the plaint: that the deceased was employed as a labourer by the defendant and that he was required by the defendant to work at the premises of British Ceylon Corporation Limited (hereinafter referred to as BCC); that on 15th October 1974, while the deceased was working as a labourer under the defendant at the premises of the BCC, several bags containing poonac fell on the deceased causing serious injuries to him; that in consequence of these injuries he died on 8th May 1975; that the defendant as the employer was under a duty to provide a safe place of work which the defendant wrongfully failed to do.

The defendant in its answer pleaded:

- (a) that at the material time the deceased was not under the control of the defendant and was not acting within the scope of any employment under the defendant, (b) that with the consent and acquiescence of the deceased he was engaged at the material time in work upon the directions of the BCC and its officers.

After trial the learned District Judge held, *inter alia*, that at the time the deceased met with his death he was not an employee of the defendant; that the injuries were not caused as a result of the negligence of the defendant and accordingly dismissed the plaintiffs' action. The plaintiffs have now appealed.

It was not denied by the defendant that the deceased while engaged in the removal of bags of poonac at the stores of the BCC received injuries by reason of some bags falling on him. He sustained severe spinal injury and after lying in a paralysed condition from 15.10.74 died on 8.5.1975.

One of the witnesses called by the plaintiffs was Hassan who was a labourer working at the stores of the BCC along with the deceased on the day in question. The trial judge has accepted Hassan's evidence. According to Hassan this particular stores known as "Hanger Site Stores" was 200 feet long and 70 feet wide. On this day bags of poonac were stacked to a height of about 28 feet but there were no pillars or other devices to prevent the bags toppling over. The Store-keeper of the BCC, Rajapandian, had directed them to remove the bags from the portion of the stores so as to enable the stacking of a new lot of bags and in accordance with the instruction given by Rajapandian the deceased was removing the bags lengthwise when he came by these injuries. The evidence showed that the manner of removing the bags lengthwise was dangerous and the bags fell on the deceased owing to the dangerous manner in which the bags were being removed.

On the issue as to whether the deceased was an employee of the defendant, it is very relevant to note that when the widow was giving evidence an admission was recorded that it was the defendant who made the payments for the bags carried by the labourers including the deceased. The defendant's witness, Rajapandian, in the course of his evidence stated that the deceased worked as an employee of the defendant. The defendant's manager, Jabbar, admitted that the defendant was a contractor of the BCC and that he was aware that the defendant's employees were working at the premises of the BCC. At no stage of his evidence did Jabbar state that the deceased was not an employee of the defendant. Jabbar's position was that when the defendant wanted labourers, the defendant informed one Jailan who in turn obtained them for the defendant. The evidence of the two fellow workers called by the plaintiffs, namely Ahamed and Hassan

was that they and the deceased were employed under the defendant; that their wages were paid directly by the defendant. According to the accident report, P5, prepared by the storekeeper of the BCC there is an endorsement to the effect that the labourers were N.P.T. labourers which means "Nagoor Pitchai Transport Services" labourers, i.e. labourers of the defendant-Company.

On a consideration of the totality of the evidence on record, it seems to me that the trial judge was in error when he held that at the material time the deceased was not an employee under the defendant. The evidence, properly evaluated, clearly points to the deceased being an employee of the defendant at all material times.

Since this was an action based on negligence, the two questions that arose for decision were:

(a) Was there a duty of care owed by the defendant to the deceased? and (b) Was there a breach of that duty?

There is no doubt that under the English Common Law, the master is under a duty to take reasonable care for his servants' safety. The nature of the duty was well explained by Lord Herschell in *Smith v. Charles Baker & Sons* (1):

"It is quite clear that the contract between the employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

Commenting on the above dicta Salmond and Heuston on the Law of Torts (18th Ed.) states:

".....the duty is imposed upon the master himself and if he entrusts the performance of it to another instead of performing it himself he is liable for the negligence of that other. The duty remains personal to the master.....".

The master who sent his workmen to the premises of another was still subject to his common law obligation to take reasonable care for their safety by providing a safe system of work on these premises. (*Vide General Cleaning Contractors Ltd. v. Christmas* (2)).

Fleming on the Law of Torts, 5th Ed., dealing with the employers' common law duties states:—

“Today it is well settled that an employer . . . owes to his men an over-riding managerial responsibility to safeguard them from unreasonable risks in regard to the fundamental conditions of employment—the safety of plant, premises and method of work *Wilson & Clyde Coal Co. v. English* (3).

Counsel for the defendant-respondent stressed: (i) that the deceased was working not at the premises of the defendant but at the stores of the BCC at the time he met with his death; (ii) that at the stores of the BCC he worked under the directions of the storekeeper of the BCC; (iii) that the bags toppled over and injured the deceased because the bags were being removed *lengthwise on the directions of the storekeeper of the BCC*: in other words a dangerous manner of removal of bags was adopted by reason of the request of the storekeeper; (iv) the bags were being removed in this manner because the storekeeper wanted a part of the stores cleared for the purpose of re-arranging the stores; (v) the defendant was not contracted by BCC to clear the stores or to re-arrange the stores.

Counsel therefore contended that the deceased ventured beyond the scope of his employment under the defendant into the employment and control of the BCC and its storekeeper in providing his labour for the clearing and re-arranging of the stores. It was the submission of counsel that the District Judge rightly held that at the relevant time of the ‘accident’ the deceased was not under the employment of the defendant and that he was not engaged in work within the scope of his employment under the defendant.

On the other hand, the evidence of Ahamed was that it was the defendant who sent the labourers to work at the stores of the BCC; they were told by the defendant to work according to the instructions given by the officers of the BCC; that their work included stacking of bags of poonac in the stores and bringing bags from the stores and loading them into the lorry; that at the time the deceased was injured he was carrying a bag to be loaded into the lorry. Jabbar who was called by the defendant admitted that the deceased was engaged in work in accordance with the contract between the defendant and the BCC.

On a careful consideration of the entirety of the evidence on record, I find myself unable to agree with the submission that at the time of the 'accident' the deceased had strayed out of his employment under the defendant. It seems to me that the 'clearing of the stores' referred to by counsel for the defendant-respondent is work which is reasonably incidental to the employment of the deceased under the defendant and is not independent of it. Moreover, today courts are reluctant to dissect employment into its component parts such as loading, unloading, clearing etc. A broad approach is now preferred—(*Rose v. Plenty* (4)).

The defendant, as the employer, was clearly under a duty of care to ensure that the premises where the labourers were required to work were a reasonably safe place of work and that they were not exposed to unnecessary risks. The evidence disclosed that on the day in question the bags of poonac were stacked to a height of 28 feet *but there were no pillars or other devices to prevent the bags from toppling over*. An employer on whom the law casts a duty of care towards the employees cannot escape liability by entrusting the fulfilment of that duty to someone else who has failed to discharge the duty. The fact that the trial judge found that it was the storekeeper of the BCC who was negligent does not relieve the defendant of liability. The true position was admirably explained by Lord Wright in *Wilson & Clyde Coal Co. v. English* (*supra*). In the following terms:

"There is perhaps a risk of confusion if we speak of the duty as one which can, or cannot, be delegated. The true question is, what is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer's personal negligence... I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm or a company, and whether or not the employer takes any share in the conduct of the operations".

I am satisfied that, had the District Judge correctly addressed his mind to the relevant issues arising in this action—an action in tort based on negligence—he could not have failed to hold that the defendant owed a duty of care to the deceased, that the defendant was in breach of that duty and was accordingly liable in damages.

On the quantum of damages, the District Judge himself has assessed the damages at Rs. 28,800 in the event of the appellate court holding that the defendant is liable in damages. The District Judge has given cogent reasons for his assessment and I am of the view that the award of a total sum of Rs. 28,800 is fair and reasonable in all the circumstances.

For these reasons, the appeal is allowed, the judgment and decree of the District Court are set aside, and we direct that decree be entered in favour of the plaintiffs in a sum of Rs. 28,800. The plaintiffs are entitled to costs of action in the District Court fixed at Rs. 525 and costs of appeal fixed at Rs. 315.

**BANDARANAYAKE, J.**—I agree.

*Appeal allowed.*

*Damages awarded.*

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