FLORENCE FERNANDO
v.
ANDREWS TRAVEL SERVICE LTD.

SUPREME COURT
FERNANDO, J.
DHEERARATNE, J. AND
GOONEWARDENA, J.
SC APPEAL NO. 2/94
HC (WP) APPEAL NO. 4/92
WORKMEN'S COMPENSATION TRIBUNAL
NO. C3/P/50/90 (2)
JUNE 13, 1994

Workmen's Compensation – "Workman" – Control by employer unnecessary – Definition of "workman" under section 2 of Workmen's Compensation Ordinance as amended by Act, No. 15 of 1990 – Workman may have more than one employer.

The deceased workman was a permanent employee of the Tyre Corporation. He was also a licensed tour guide. The respondent (a travel agency) engaged his services to conduct tourists to visit places of interest in Sri Lanka at the rate of Rs. 275 per day. One such tour included a boat ride in the course of which the deceased drowned. The Commissioner of Workmen's Compensation awarded compensation to the appellant who was the widow of the deceased.

Held:

(1) Even if employer control is a requisite, the deceased was controlled by the respondent by the detailed itinerary for each tour.

(2) However, the deceased's status as "workman" had to be decided in terms of the new definition of "workman" under section 2 of the Workmen's Compensation Ordinance as amended by Act No. 15 of 1990. The definition now includes a person who works "in any capacity". It is sufficient if it is a contract "personally to execute any work or labour" and this would include the work of guiding tourists.

(3) The fact that the deceased had other permanent employment was irrelevant because the law does not prohibit a man to serve two masters.

Cases referred to :

1. *De Silva v. Premawathie* – (1948) 50 NLR 306.
2. *S. W. Omnibus Co. v. James Silva* – (1954) 56 NLR 330.
3. *Don Aslin v. Samarakoone Bros.* – (1938) 39 NLR 390.
4. *Baby Nona v. Arthur Silva* – (1952) 54 NLR 166.
5. *Senaratne v. Maggie Nona* – (1953) 54 NLR 575.

APPEAL against the judgment of the High Court.

R. K. W. Goonesekera with *L. C. M. Swamadhipathi* and *Neville Abeyratne* for appellant.

P. Somatilakam with *M. D. K. Kulatunga* and *Leon Fernando* for respondent.

Cur. adv. vult.

July 07, 1994

FERNANDO, J.

The appellant's deceased husband was a permanent employee of the Tyre Corporation. He was also a licensed tour guide. On three or four occasions he had been engaged by the respondent Company (a travel agency) to conduct groups of tourists on short tours to various places of interest in Sri Lanka. He was last engaged for such a tour. scheduled for 15 days, commencing on 29. 09. 1990; this included a boat ride on 10. 10. 1990, in the course of which the deceased was drowned. He was paid at the rate of Rs. 275 per day. The appellant applied to the Commissioner of Workmen's Compensation, who awarded her compensation in a sum of Rs. 250,000 in respect of the death of her husband. The respondent has expressly conceded that if the deceased was a "workman" within the meaning of the

Workmen's Compensation Ordinance, his death was in consequence of an accident arising out of and in the course of his employment.

That order was set aside on appeal. The learned High Court Judge took the view that the issue for determination was "whether the deceased was employed by (the respondent), or was a casual employee/ independent contractor". Having referred to the four *indicia* of a contract of service – namely, the employer's power of selection of the employee, the payment of remuneration by the employer, the employer's right to control the method of doing the work, and the employer's right to dismiss the employee – the learned High Court Judge took the view that the respondent did not control the manner in which the work was done. Despite the detailed itinerary for each day of the tour, the learned High Court Judge held that the deceased had considerable freedom to determine the precise time at which the group would visit a scheduled place of interest; to lecture to them about such places as he thought best; to take the group to visit other attractions and shops, and generally to entertain them; and to decide whose boat he should hire for the boat trip. She held that the deceased was working under a contract for services, and was therefore not an employee of the respondent.

However, this view that the itinerary contained only some broad guidelines and that the deceased had a large measure of discretion, is mistaken. An examination of the itinerary shows that the deceased had to keep to a very detailed schedule; every important aspect of the tour had been predetermined (and was paid for) by the respondent, and could not be varied by the deceased; in relation to the tour as a whole, the deceased had only a limited discretion. It is true that the respondent did not attempt to control the exercise of his skill as a guide – what precisely he would emphasise at each place, and what he would say about it, etc. – but that is a discretion not at all

inconsistent with the position of any employee whose work involves some degree of skill. By no means was he an independent contractor, engaged to produce the desired result of a successful tour, and having a wide discretion as to how he would achieve that objective. On the contrary, specific directions were given to him as to what he should do; having done what he was told to do, if the tour was not a success, that was not his responsibility.

In any event, the matter should have been determined by reference to the definition of "workman" in the Workmen's Compensation Ordinance, as amended by Act, No. 15 of 1990 :

> " . . . any person who has entered into or works under, a contract with an employer for the purposes of his trade or business in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship or a contract personally to execute any work or labour, and whether the remuneration payable thereunder is calculated by time, or by work done or otherwise, and whether such contract was made before or after the coming into force of this definition . . ."

Learned counsel for the respondent submitted that a "workman" included only persons engaged in work over which the employer had complete control. In reply to a question from the Court, he said that a legal officer employed in a company or corporation would not be included, because the employer had no control over aspects of his professional work, such as making submissions to a court and giving advice. This is untenable. The previous definition was undoubtedly restrictive, because it included only persons employed in a capacity specified in Schedule II; thus, a school teacher was excluded *(De Silva v. Premawathie.*[1] Although it is true that Gratiaen, J. observed in that case that the definition only covered what is popularly described

as "the working classes" engaged in manual labour and earning "wages" as distinct from "salaries", that was *obiter.* As pointed out by Pulle, J. in *S. W. Omnibus Co. v. James Silva,*[2] the *ratio decidendi* was that "an employee could not qualify for any statutory benefit unless he came within one of the occupations specified in Schedule II". Hence, if Schedule II had been amended to include the work of a lawyer, the definition would then have included a lawyer even if his employer lacked control over his work. Thus, the term "workman" was not, even then, restricted to those persons over whose work the employer had full control. And the new definition (which is similar in important respects to that contained in the Industrial Disputes Act) removed the reference to 'wages' as well as other pre-existing restrictions; it now includes a person who works "in *any* capacity", provided (*a*) he had a contract, howsoever arising, with the employer, and (*b*) his employment was for the purpose of the employer's trade or business; it is sufficient if it is a contract "personally to execute any work or labour", and this would include the work of guiding tourists; and it does not matter how the "remuneration" is calculated.

Casual employees are not excluded from the definition. Even before the 1990 amendment, casual employees were included, unless they were employed otherwise than for the purposes of the employer's trade or business (*Don Aslin v. Samarakone Bros,*[3] *Baby Nona v. Arthur Silva,*[4] and *Senaratne v. Maggie Nona.)*[5] Although differently worded, the new definition made no change. The fact that the deceased had other permanent employment was irrelevant because the law does not provide that a man may not serve two masters. The deceased, therefore, was a "workman" as defined.

Learned counsel for the respondent further submitted that the Commissioner had erred in computing compensation on the basis of section 7 (1) (*c*), and argued that it was section 7 (1) (*b*) which was applicable. Although this submission was not made at the inquiry. section 7 (1) provides :

"(*b*) where the whole of the continuous period of service immediately preceding the accident during which the workman was in the service of the employer who is liable to pay the compensation was less than one month, the monthly wages of the workman shall be deemed to be the average monthly amount which, during the twelve months immediately preceding the accident, was being earned by a workman employed on the same work by the same employer, or, if there was no workman so employed, by a workman employed on similar work in the same locality;

(c) in other cases, the monthly wages shall be thirty times the total wages earned in respect of the last continuous period of service immediately preceding the accident from the employer who is liable to pay compensation, divided by the number of days comprising such period."

The General Manager of the respondent stated in evidence-in-chief that salaries of tour guides were determined by the Tourist Board, and that the deceased was paid Rs. 275 per day, thus implying that what the deceased was receiving was the rate fixed by the Board. His evidence was that there was a list of registered tour guides from which the respondent made its selection. There was no evidence before the Commissioner as to the actual monthly earnings of other tour guides employed by the respondent, or of tour guides in the locality. Accordingly, it was not possible for the Commissioner to have calculated the monthly wages of the deceased in terms of section 7 (1) (*b*), and he fell back on the residual provision in section 7 (1) (*c*) on the basis of which he assessed the monthly wages of the deceased at Rs. 8,250 (and the appellant's entitlement under section 6 (1) (A) at Rs. 250,000). Counsel for the respondent conceded that if the Court were now to attempt to apply section 7 (1) (*b*), despite the lack of evidence, it would not be unreasonable to compute monthly

wages on the basis of 22 working days; the monthly wages of the deceased would be Rs. 6,050 and the appellant's entitlement would be Rs. 249,498. In those circumstances there was no reason to interfere with the Commissioner's assessment of compensation.

It was for these reasons that, at the conclusion of the hearing the appeal was allowed, and the Commissioner's order restored, with costs in both Courts in a sum of Rs. 15,000 payable by the 14(respondent.

DHEERARATNE, J. – I agree.

GOONEWARDENE, J. – I agree.

Appeal allowed.