

(1965) 08 BOM CK 0005
In the Bombay High Court
Case No : First Appeal No. 821 of 1963

Employees" State Insurance Corporation	APPELLANT
Vs	
Burmah-shell Oil Storage and Distributing Company of India Ltd.	RESPONDENT

Date of Decision : 26-08-1965

Acts Referred:

Employees State Insurance Act, 1948 — Section 66
Factories Act, 1948 — Section 14(1), 21, 21(1), 66

Citation : (1965) 2 LLJ 472

Hon'ble Judges : H.L. Gokhale, J

Bench : Single Bench

Judgement

1. This is an appeal by the Employees" state Insurance Corporation (hereinafter referred to as the corporation) against the decision of the learned Judge, employees" Insurance Court, Bombay, who dismissed an application made by the Corporation under S. 66 of the Employees" State Insurance Act, 1948 (hereinafter referred to as the Act), for reimbursement by the employer of a sum of Rs. 1,207.69 representing the total of the periodical payments made under the Act by the Corporation to one Mohamed Sayed (hereinafter referred to as the injured person), who was injured. On 2 December, 1960 Mohamed Sayed joined duty at 8 a.m. and was working on a power press. At about 10-45 a.m. he was feeding sheets in the press for giving them the side shape of the kerosene tin. At that time the sheet got stuck up in the die and he was straightening out the sheet. He put his hand from the side through a gap of about 1 inch to manipulate the sheet and accidentally put his leg on the pedal of the press. As a result of this, the punch came down and fell on the right index finger of Mohammed Sayed and cut it. In respect of this disablement the Corporation had paid to the injured person the sum stated above. It was the case of the Corporation that the injury was caused in the course of employment and it was the result of the negligence of the respondent, inasmuch as at the material time the power press on which the injured person sustained the injury was not provided with the safeguards of

substantial construction so as to prevent access of the worker's limbs to the dangerous part in between the die and the press from the sides of the machine. The Corporation contended that the failure to provide the guards was in contravention of the provisions of S. 21(1)(iv)(c) of the Factories Act, 1948, and the rules framed thereunder.

2. In the written statement which was filed by the respondent company it was denied that the accident arose out of and in the course of the employment of the injured person and the reason given was that the injured person exposed himself to the peril which was on account of its own action unconnected with his employment. The company also denied that the injury was caused due to its negligence or that at the material time the power press was not provided with safety guards of substantial construction. In other words, the company denied that there was any contravention of S. 21(1)(iv)(c) of the Factories Act.

3. The Corporation examined P. V. Desai, who was the Senior Inspector of Factories. Mohammed Sayed, the injured person, also gave evidence. On behalf of the company Jacob Fernandez, who was at the relevant time the foreman of the factory, gave evidence. The learned judge arrived at the following finding on this evidence :

"The injured person had put a sheet inside the machine; it got stuck up by some obstruction. To remove the obstruction he put his finger through the cavity on the side. He also pressed the pedal. Thereby the punch of the press came down and his finger was injured. I also believe that at the time of the accident there was no guard on the side of the machine and it was accessible from the side to the worker standing on the platform, which is not possible now. As it is rightly pointed out by Sri Vyavaharkar, if a worker wants to put his hand or finger inside by the side, he has to get down from the platform and go over to the side of the press and in that case his foot cannot touch the pedal and so there is no probability of an accident of a similar nature now."

4. On this finding the learned Judge proceeded to consider whether the risk of such an accident was foreseeable by the company at the time of the accident. He came to the conclusion that even though the obligation of the company to provide a safeguard of the machine was absolute, the danger of the accident was not foreseeable. He therefore dismissed the application of the Corporation and it is against this decision of the learned Judge that the present appeal is filed.

5. I may state at the outside that Sri Bhatkal, who appears for the company, does not now challenge the finding of the Learned Judge that the enquiry was caused in the course of the employment of the injured person. Sri Bhatkal, however, contends that the conclusion of the Learned Judge that the danger was not foreseeable is right and that the accident occurred as a result of the action of the injured person in putting his finger in the open part. In as much as an appeal against the decision of the learned Judge is limited by S. 82(2) of the Act only if involves the substantial question of law, I would proceed to consider whether

the learned Judges view is correct on the findings made by him.

6. Section 21(1)(iv)(c) of the Factories Act is as follows :

"(1) In every factory, the following, namely -

* * * *

(iv) unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced, the following namely -

* * *

(c) every dangerous part of any other machinery shall be securely fenced by safeguards of substantial construction which shall be kept in position while the parts of machinery they are fencing are in motion or in use."

7. On a plain reading of the Section, there are two obligations arising, namely every dangerous part of machinery -

(1) shall be securely fenced by safeguards of substantial construction, and

(2) which shall be kept in position while the parts of machinery they are fencing are in motion or in use.

8. It was not disputed before the learned judge, nor is it disputed before me, that the machinery was dangerous. The findings of the learned Judge is that at the time of the accident there was no guard on the side of the machine and it was accessible, from the side, to the workers standing on the platform. The finding also is that the guard has subsequently been provided and it is not possible for the worker now to do so. Sri Bhatkal contends that this was a machine of the usual type manufactured by a manufacturer. No part of the machine was defective. There was a guard in front and at the rear also. Although there was no guard on the sides where there was a cavity, the factory inspector who had visited the factory three times before had not noticed it and had not warned the company that the guard should be provided. The obvious reason, according to Sri Bhatkal, why the inspector had not drawn attention to the absence of the guard was that he had not considered the power press to be a dangerous machine from the sides and he had not thought that an additional safeguard for safety on that side was necessary. He very strongly contends that if the machine used was of the routine type and if it was adequately guarded and if it was not necessary for the worker on the machine to put his hand or finger in to the machine by the side and when it was not necessary for him to press the pedal by his foot, it could not be held that a danger arising out of the absence of guards on the open cavity on the sides of the machine could raise a foreseeable danger. In other words, it was contended that in these circumstances the company could not foresee that worker would go out of his way on the side of the machine, put his hand and an accident would be caused. It was, therefore, his contention that in the absence of the danger being capable of being forcing,

no liability can arise for payment so far as the company is concerned. The learned Judge has more or less based his judgment on these considerations since they found favour with him. He also relied on a decision of this court in *State Vs. L.C. Patel*, . The question, therefore, which arises whether the absence of the provision of guards on a part of the machine, even though it was dangerous, cannot give rise to liability on the company because the danger could not be foreseen.

9. Sri Jayakar, who appeared for the Corporation, contends that the worker put his finger in order to release the sheet which had got stuck up because of some obstruction. If the part was open and if it was dangerous, Sri Jayakar says, the obligation arising under S. 21 is absolute and any question as to whether the accident could have been foreseen is irrelevant. He contends that the doctrine of foresee ability can arise only if a guard is provided and when the only question to be determined is whether the guard was securely fenced or was adequate. The argument is that it might be a possible defence for an employer to say that after the guard was provided an accident could not be foreseen and the employer should therefore be absorbed of the liability inasmuch as the absolute requirement arising under S. 21 had been complied with. Fortunately this question has recently been dealt with by the Supreme Court in *State of Gujarat V. Jethalal Ghelabhai Patel* [1964 - I L.L.J. 389]. At p. 391 of the report the Supreme Court has observed as follows :

"It has to be observed that S. 21(1)(iv)(c) requires not only that the dangerous part of a machine shall be securely fenced by safeguard but also that the safeguards "shall be kept in position while the parts of the machinery they are fencing are in motion or in use". We should have thought that the words "shall be securely fenced" suggest that the fencing should always be there. The statute has however put the matter beyond doubt by expressly saying that the fencing shall be kept in position while the machine is working. That is the default that has happened here; the fencing was not there when the machine had been made to work."

10. In the case before their lordships it was not disputed that the fencing had been originally put up but had subsequently been removed, but it was not known as to who had removed it. The Gujarat High Court had taken the view that inasmuch as the employer could not have foreseen that a guard which had admittedly been put up was removed there was no liability on the employer. The Supreme Court did not accept this position and held that inasmuch as the liability under S. 21(1)(iv)(c) is absolute, it was up to the employer to see that the dangerous part of the machine was fenced and further that it was kept in position while the parts of the machinery, which was fenced, are in motion or in use. In this case, undoubtedly some parts of the machine had been fenced by a guard. But equally undoubtedly some parts of the machine on the sides were not so fenced. There was a cavity and the cavity exposed a dangerous part of the machine. Section 21(1)(iv)(c) in fact requires two obligations to be complied

with. One is that if the machine is dangerous, it shall be securely fenced by safeguards of substantial construction and the other is that the fencing shall be kept in position while the parts of the machinery they are fencing are in motion or in use. I should have thought that the obligation that a dangerous machine shall be securely fenced by safeguards of substantial construction is absolute and the question whether or not the machine was in motion is irrelevant. The question whether the machine is in motion is relevant only for the purpose of finding out whether the safeguards of substantial construction which had been provided had been kept in position. In this case it is not necessary to deal with this aspect of the matter, because undoubtedly the machine was in motion and on the sides of the machine there were no safeguards, much less of substantial construction, provided as required by S. 21(1)(iv)(c). Sri Bhatkal relies on a judgment of this court in *State Vs. L.C. Patel*, and argues that this absolute obligation is subject to the test of foreseeability. Justice Sri Mody, who delivered the judgment of the Division Bench, observed as follows :

"Under S. 21(1)(iv)(c) of the Factories Act the safety contemplated either by securely fencing the transmission machinery or by its position or by its construction is absolute safety, but such absolute safety must be only against reasonably foreseeable risks and dangers of coming in to contact with the transmission machinery."

11. He later explained this test elaborately in the following words :

"Section 21 of the Factories Act, 1948, gives protection not merely to the careful, the vigilant and the conscientious workmen, but to the careless, the indolent, the inadvertent, the weary, and even perhaps in some cases, the disobedient. But the carelessness, the indolence, the inadvertence, the weariness and even the disobedience of a workmen are things which an occupier of a factory can and is expected to reasonably foresee and should, therefore, provide against. Such risks and dangers are foreseeable and must, under S. 21 of the Act, be provided against, but S. 21 cannot be given the meaning that it imposes a duty upon an occupier of a factory to provide for safety against even unforeseeable risks and dangers."

12. On the evidence there is no doubt that the worker voluntarily put his finger in the open cavity on the sides. He did so when he found that a sheet had got stuck up on account of some obstruction in the machine and pressed the pedal to release it as a result of which the injury was caused. It was attempted to be shown by the company in the evidence of Fernandez that the proper way for the worker was to have stopped the machine and then loosened the sheet which had got stuck up. There was nothing suggested in the evidence that the part which left open with a cavity was not dangerous or was not capable of causing injury to a person who acted inadvertently, inefficiently or under special circumstances such as in the present case where the worker, in order to remove the sheet, withdrew it by putting his finger in the open cavity. It is difficult to accept the view of the learned Judge that such possibility of a workman acting inefficiently

or inadvertently could not be foreseen by the company. In *John Summers & Sons, Ltd. v. Frost* (1955) 1 All E.R. 870. The house of Lord's held;

"As the grinding wheel was a dangerous part of machinery within S. 14(1) of the Factories Act, 1937, there was an absolute obligation under that sub-section that the grinding wheel should be securely fenced; a dangerous part of machinery is securely fenced only if the presence of the fence makes it no longer dangerous in the sense that there is no longer a reasonably foreseeable risk of injury to the workman using the machine, even though he is careless or inattentive; ".

13. Lord Viscount Simonds quoted with approval the observations from to other English cases. In *Walker v. Bletchley Flettons, Ltd.* (1937) 1 All E.R. 170 it was observed as follows :

"If it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."

Lord Justice Clerk (Lord Cooper) in *Mitchell v. North British Rubber Company, Ltd.* 1945 S.C. 69 said that if machine is dangerous if ...

"In the ordinary course of human affairs danger may reasonable anticipated from its use unfenced, not only to the prudent, alert and skilled operative intend upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part."

14. The position, therefore, is well-settled that the protection is available to the workman who not only performs his job strictly according to instruction or strictly in accordance with the usual mode of the performance of the job but also to a workman who is inefficient or who inadvertently comes in contact with the exposed part of the machine which is unfenced. The injured person in the present case was on his job and was performing his routine work when the accident occurred. In order to get out of a difficulty created by the sticking up of the sheet on account of an obstruction, he put his finger in the open cavity to release the sheet. At the highest, this can be due to an inadvertent act or this can be due to the injured person having followed an unusual method for releasing the stuck-up sheet. At the highest, it might even be said that he was inefficient, inasmuch as he did not follow the method of stopping the machine before the part was released, as was sought to be shown by the evidence of Fernandez. That workmen would behave in this way in jobs of this nature should be foreseeable and as laid down by this Court in *State Vs. L.C. Patel*, , quoted above, even such acts on the part of workmen who may be indolent, inefficient, unwary or inadvertent are protected because all these behaviors or mis behaviors on the part of workmen should be foreseen by the employer. Inasmuch as the obligation under S. 21(1)(iv)(c) is absolute, it cannot be held that because this particular act on the part of the workmen was unforeseeable, there was no obligation on them to provide a guard on the exposed part of the machine. If the

exposed part was dangerous, the absolute requirement of providing a guard demanded compliance with that requirement and failure to comply with that absolute requirement can lead to the only conclusion that there was a breach on the part of the company in observing the requirement of the Factories Act. I am unable to agree with the conclusion arrived at by the learned Judge who took the view that this was an unforeseeable accident. In this view which I take, I would allow the appeal and set aside the order of the learned Judge. The application of the Corporation under S. 66 of the Act shall be allowed and a decree for the sum of Rs. 1,207.69 shall be made in favour of the Corporation the appellant - Corporation will be entitled to its costs throughout.