
(1965) 10 BOM CK 0006
In the Bombay High Court
Case No : First Appeal No. 409 of 1964

Employees" State Insurance Corporation	APPELLANT
Vs	
Hindustan Sheet Metal Works	RESPONDENT

Date of Decision : 06-10-1965

Acts Referred:

Employees State Insurance Act, 1948 — Section 66
Factories Act, 1948 — Section 21, 21(1), 23, 23(1), 24

Citation : (1967) MhLj 211

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

Bench : Single Bench

Judgement

1. This is an appeal against the order of the learned Judge, Employees" Insurance Court, Bombay, dismissing the application of the Employees" State Insurance Corporation (hereinafter referred to as the Corporation) seeking to recover Rs. 1,631.56 from the respondent metal works by way of reimbursement under S. 66 of the Employees" State Insurance Act (hereinafter referred to as the Act). The application was in respect of an accident which occurred in the factory of the respondent metal works, on 24 February 1962. One Laxman Ramji (hereinafter referred to as the injured person) who has been insured under the Employees" Insurance Scheme, was employed by the respondent metal works as a semi-skilled worker and was assigned the work of pressing sheets into the Ghamela on a power press. At about 3-20 p.m. on that day the injured person put his right hand, in order to clean the die, in between the die and the punch. His right hand was then crushed between the moving die and the steady Ghamela ring. His index and middle fingers were partly amputated in the Sion Hospital. It was the case of the Corporation that temporary disablement benefits were paid to the injured person, but the accident having been caused by the negligence of the respondent metal works to observe the safety rules laid down by or under the Factories Act the respondent metal works were liable to reimburse the Corporation under S. 66 of the Act. The Corporation stated in the application that the injured person was assigned the work of pressing sheets into

the Ghamela on a 100-ton Ghamela press run by power and there was no guard fitted on the press to prevent access of the worker's limbs to the danger zone between the die and punch of the press on the day of the accident. On account of the absence of a guard the right hand of the injured person was trapped in between the die and the steady Ghamela ring, causing serious injuries to the injured person. The Corporation claimed a sum of Rs. 1,631.56 from the respondent metal works by way of reimbursement.

2. In the written statement which was filed on behalf of the metal works it was not disputed that no safeguard was provided for the danger zone of the press at any time. It was contended by the metal works that even though a guard was not provided over the dangerous part it was not their negligence which was the cause of the accident. It was substantially their case that on this machine no guard was capable of being provided and their failure therefore to provide a guard cannot amount to negligence on their part and if no negligence on their part was established, the Corporation would not be entitled to be reimbursed under S. 66 of the Act.

3. The learned Judge accepted the respondent metal works' defence that the injury to injured person was not caused by the negligence of the respondent metal works. The learned Judge, therefore, rejected the application of the Corporation for reimbursement. It is against this order of the learned Judge rejecting the application of the Corporation that the Corporation has preferred this appeal.

4. Before the learned Judge it was not disputed that no safeguard was provided for the dangerous parts of the machine. It was also not disputed that this machine required to be securely fenced by safeguards of substantial construction as required by Clause (iv)(c) of Sub-section (1) of S. 21 of the Factories Act. It was further not disputed that the manager of the respondent metal works was prosecuted for contravention of S. 21 of the Factories Act and was convicted and sentenced on his plea of guilty. What was, however, contended was that even if the respondents were guilty of contravention of S. 21, the consequent liability for reimbursement under S. 66 of the Act cannot arise unless the respondents' negligence in failure to comply with the requirements of S. 21 is established. The learned Judge considered the evidence led by the Corporation and the respondents. He considered, in the first instance, certain copies of letters received by the respondent metal works from various companies, which were produced, with a view to showing that the guard were not capable of being erected on the dangerous parts of the machine. He considered the evidence of the manager of the metal works and observed as follows :

"So though the copies of letters are not admitted in evidence, there is no reason to disbelieve opposite party's story that he was attempting to find out a proper guard for this machine."

5. In fact the learned Judge came to the conclusion that a proper guard for this

machine could not be devised and therefore it was incapable of being erected and the respondent-company was therefore not liable to reimburse the Corporation.

6. Sri Jayakar for the Corporation contends that the negligence of the respondents consists in their failure to comply with the absolute requirement of S. 21 of the Factories Act and, to the extent that non-compliance with the provisions of that section is admitted, the conclusion that the respondents were negligent must follow. It was his case that even if the respondents found that guards were incapable of being erected on this type of machine, the duty of the respondents was not to work the machine at all and inasmuch as they worked the machine with the knowledge that it could not be worked without the erection of proper guards, this conduct of the respondents amounted to negligence. The third argument advanced by him was that the finding of the learned Judge that no guards could be devised or erected on this type of the machine is unsupported by evidence and therefore should not be upheld. Since the main question which was argued before the learned Judge was that guards were incapable of being erected or devised, I consider the last argument of Sri Jayakar first.

7. The evidence consists of the depositions of the injured person, Laxman Ramji, and of Vasant Kholkote, Junior Inspector of Factories, on behalf of the Corporation, and of Harikisan Deepchand on behalf of the respondents. The injured person Laxman Ramji has stated in his evidence the circumstances in which the accident occurred and that there was no guard at any time on the machine. Since the circumstances in which the accident occurred were not disputed and since the fact that there was no guard at any time on the machine also was not disputed, the evidence of the injured person is not of much consequence for this appeal. The Inspector of Factories has stated that it was possible to provide a guard to the danger zone. He has stated that if the guard would have been there, the accident could have been avoided. A suggestion was made in his cross-examination as to whether he had suggested any type of guard to the respondent-company. He agreed that such a suggestion was made by him to the respondent-company but the respondent-company had told him that it was not possible to put up a guard. No suggestion is made in his cross-examination to the effect that no kind of guard at all was capable of being installed in this machine and that such an installation was mechanically or commercially not feasible at all. In the evidence of Harikisan, the managing partner of the respondent-company, he has stated that the Factory Inspector had made remarks in the inspection book prior to the accident suggesting that a guard should be put up on the press. The manager had then written to some companies to suggest a guard. He had written to Joseph Leslie & Co., but he did not receive any reply from this company. Then he wrote to Garlic & Co. on 7 April, 1962 and from this company he received a reply on 16 April, 1962. He then says as follows :

"We are unable to pick up a guard for this machine. I produce a photograph of a new similar machine. It also has no guard provided. The enquiries are also not able to devise guards. For these reasons I could not provide a guard."

8. In his cross-examination he has stated that he had worked in Crux Workshop in Germany for seven years. He had not manufactured a machine for sale but he had manufactured some small machines. He went to the companies to whom he had written, but he was told that they had no suggestions to make. He concludes by saying :

"I did not take steps to provide a guard. I am unable to provide a guard."

9. This was all the evidence on which the learned Judge has found that a guard was incapable of being erected on the machine.

10. It is obvious that the copies of the correspondence cannot be treated as evidence. The originals were admittedly not produced. No reason is shown why no one from these companies was examined by the respondents in support of their case that a guard could not be erected. Even these copies, assuming that they could be looked into, do not assist the respondents. The letter written by Harikisan to Joseph Leslie & Co. is of no use because no reply was received. The letter written to Garlic & Co. did make an enquiry stating that interlocking or any other type of safety guards on power machines were required to be erected and desiring to know as to whether this work could be undertaken by this company. The reply received is a printed post-card which appears to be of the routine type used for acknowledgements and it only says that the inquiry of 7 April 1962 was received by them regarding installation of safety guards and that "we are unable to quote in this instance." It is obvious from this reply that it is not a considered reply at all because no quotations had ever been asked for by the respondents in their letter of 7 April 1962. The reply seems to be a routine one acknowledging the inquiry made in the letter. Nothing therefore can be inferred from this correspondence with Garlic & Co. to the effect that a guard was incapable of being erected. If the company wanted to say that they did not comply with the absolute requirements of S. 21 of the Factories Act because it was impossible of compliance, it was up to them to have led adequate evidence to show that this was so. So far as the enquiries with the two companies are concerned, beyond the production of copies of the letters, which by themselves prove nothing, the company led no evidence. The only evidence led was of Harikisan, the manager. The learned Judge has accepted his evidence because Harikisan claimed that he had been a competent engineer having seven years' experience. As to what are his qualifications is not apparent on his evidence at all. He stated that he worked in Crux Workshop in Germany for seven years. But in what capacity he worked is not known. As to what was the nature of the experience gained by him in Crux Workshop or anywhere else is not apparent, on his evidence. He has stated that he had manufactured small machines. It is impossible to conclude from this evidence that this witness has the competence to decide whether a guard could be mechanically devised for machines of the type involved in the present

accident. In fact he says that they were unable to pick up a guard for this machine because his enquiries revealed that it could not be erected. He has not given evidence as to the reasons why the companies has told him that the guard could not be erected. His evidence is every vague and does not at all establish that guards were mechanically incapable of erection. Under these circumstances, the finding of the learned Judge that the respondent could not feasibly erect the guards is based on no evidence.

11. It is true, as Sri Damania says, that an appeal under S. 82 of the Act against the decision of a Judge of the Employees' Insurance Court lies only on a substantial question of law and ordinarily this Court would not interfere on a question of fact. But it is clear that the finding must be supported by evidence and if the finding is without evidence, this Court cannot mechanically accept that finding as would be the case if the present finding of the learned Judge were accepted. If the finding that the guard was not capable of being erected cannot be accepted, then there is no doubt that there was negligence on the part of the respondent-company in not fixing a guard. That there was an absolute liability under S. 21 of the Factories Act cannot reasonably be disputed. If that was the liability and if the machine was a dangerous machine, the company was negligent in not erecting a guard, as required by S. 21.

12. Sri Damania then said that assuming there was a liability under S. 21, it extended only to parts of machinery which was dangerous and not to a machine which is wholly dangerous. For this argument he relies on Ss. 21, 23 and 24 of the Factories Act and rule 57 framed under S. 23. Section 23(1) provides for the employment of young persons on dangerous machines. It says :

"No young person shall work at any machine to which this section applies, unless he has been fully instructed as to the dangers arising in connexion with the machine and the precautions to be observed and has received sufficient training in work at the machine or is under adequate supervision by a person who has a thorough knowledge and experience of the machine."

13. Rule 57 makes provision for employment of young persons on dangerous machines. Under this rule certain specified machines are deemed to be of such dangerous character that young persons shall not work on them unless the provisions of S. 23(1) are complied with. Sri Damania says that the Factories Act has dealt separately with regard to machines which are dangerous and since the machine on which the present accident occurred was a dangerous machine of this character, only young persons were prevented from working on these machines unless the requirements of the section were complied with. According to his argument, S. 21 does not deal with such dangerous machines. He contends that S. 21 deals with every dangerous part of a machinery. The argument is that S. 21 will apply not when certain whole machine is dangerous but when certain parts of the machinery are dangerous. He fairly agreed that the argument in the way in which it has been advanced now was not advanced before the learned Judge. First of all, there is no reason to think, in the absence

of any such contention having been taken before the learned Judge, that the whole machine on which the present accident occurred was a dangerous machine. But assuming that it were so, I am unable to accept the contention of Sri Damania that S. 21 will not apply to such a machine. Section 21 is intended to protect all workers working on machines by providing that dangerous parts of machines shall be securely fenced by safeguards of substantial construction which shall be kept in position while the parts of the machinery they are fencing are in motion or in use. This is a general protection to all workmen working the machine from dangerous parts of the machinery. It would not be a reasonable construction of the section to say that only when some parts of the machines are dangerous that the obligation to provide a safeguard arises and that it does not arise when every part of the machine or, in other words, the whole machine is dangerous. Sections 23, 24 and other to which Sri Damania has referred make provision for additional protection in special circumstances, such as, when a young person is required to work on the machine. The fact that certain additional protections are provided under those section does not affect the general protection intended to be given to all workmen working on machines of which some parts are dangerous and that is the reason why S. 21 generally makes a provision that machines of which parts are dangerous will securely fenced by safeguards of substantial construction. I do not think therefore that this argument has any substance.

14. The other argument was that it was not commercially practical to fence the machine. I have already dealt with the argument that it was mechanically not feasible to fence the machine and I have held that there was no evidence given on behalf of the respondents that it was mechanically not feasible to fence the machine by providing a guard. No evidence is also given to show that commercially this was not practical. In fact, a contention of this nature does not appear to have been raised before the learned Judge at all. The next argument was that under S. 23 there is no absolute liability to provide a fencing to a dangerous part of a machine. The question will not arise in this case because it was conceded before the learned Judge that there was a liability under S. 21 of the Factories Act, but there was no negligence to which the accident in question could be attributed. Moreover, the Supreme Court has now held that the liability under S. 21 is absolute.

15. The main argument which was advanced before the learned Judge was that there was no way in which the machine could be fenced by a guard and since all attempts of the respondents to fence the machine were unsuccessful, no negligence could be attributed to the respondents. If it had been established that the machine was incapable of being fenced by a guard, the question whether it could be held that the respondents were negligent could have arisen. But for the simple reason that there is no evidence that the machine in question could not be fenced and that the finding of the learned Judge that it could not be fenced is without any evidence, it is not necessary to deal with the argument whether negligence could have been attributed to the respondents because the machine

was incapable of being fenced. Under the circumstances, I am unable to accept the finding of the learned Judge that a proper guard for the machine could not be erected. There was no evidence led by the respondents on which such a conclusion could be reasonably sustained and in view of the fact that otherwise it is admitted that the liability under S. 21 had arisen it is not possible to uphold the order of the learned Judge.

16. The appeal will therefore have to be allowed and the order of the learned Judge will have to be set aside. In consequence, there will be a decree in favour of the Corporation in the sum of Rs. 1,631.56 with interest at the rate of 6 per cent. per annum from the date of the application till payment. The respondents will pay the appellant's costs of this appeal.