

(1971) 03 BOM CK 0024
In the Bombay High Court
Case No : First Appeal No. 785 of 1967

Indian Central Tin Works

APPELLANT

Vs

The Employees" State Insurance Corporation

RESPONDENT

Date of Decision : 24-03-1971

Acts Referred:

Employees Compensation Act, 1923 — Section 3
Employees State Insurance Act, 1948 — Section 2, 53, 66
Factories Act, 1948 — Section 21

Citation : (1972) 74 BOMLR 61 : (1972) MhLj 279

Hon'ble Judges : K.K. Desai, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K.K. Desai, J.—An interesting question as to the scope of the liability of an employer to pay damages u/s 66 of the Employees" State Insurance Act to the Employees" State Insurance Corporation (hereinafter referred to as "the Corporation") has arisen in this first appeal.

2. One Ismail Abdul Karim had been in the employment of the appellant for more than 5 years prior to June 6, 1964. On June 6, 1964, at about 2.30 p.m., whilst this workman was working on a power press for embossing tin sheets, he attempted to remove obstacle in the way of the press and was injured and his right hand fingers were completely amputated. He suffered from certain further injuries. In connection with his injuries, he was paid the aggregate sum of Rs. 4,387.25 by the Corporation. The Corporation, therefore, filed Application No. 104 of 1965 under the provisions of Section 66 of the above Act alleging that the workman had suffered from employment injuries. The ease of the Corporation was that these injuries were caused by the negligence of the appellant-firm in not furnishing a guard to the danger zone between the die and the punch of the press and the appellant firm had committed breach of the provisions in Section 21(1)(iv)(c) of the Factories Act. The Corporation was accordingly entitled to be

reimbursed by the appellant-firm with the above amount of Rs. 4,387.25 and costs and interest.

3. Having regard to the denials in the written statement, the Employees Insurance Court formulated issues Nos. 1 and 4 as follows:

(1) Whether Opposite Party proves that a guard was provided for the danger zone in question and that the injured person removed it as alleged? (4) Whether the accident was due to negligence of Opposite Party in not providing a safety guard as alleged?

4. Upon appreciation of evidence, these issues were answered as follows:

(1) Yes, injured person raised it.

(4) Yes.

5. Now, there is no dispute between the parties that wire fencing by way of guard was provided by the appellant-firm so that the workmen may not be able to reach the power press whilst in motion. Mr. Ramaswami for the appellant-firm has contended that the finding of the Court on issue No. 4 was contradictory of its finding on issue No. 1. In his submission, immediate and proximate cause of the injuries suffered by the workman was removal of the wire fencing by the workman. Having regard to the accepted position in evidence that the workman had raised the wire fencing, the Court was not justified in finding that the injuries were suffered and/or caused by negligence of the appellant-firm. In this connection, Mr. Jaykar for the Corporation has submitted that the provision of wire fencing was insufficient to discharge the obligation cast on the employer firm under the provisions of Section 21 of the Factories Act. Under that section, all the employers are under an obligation to securely fence all machineries by safeguards of substantial construction and the construction must be such as the safeguards are maintained in position at every moment whilst the machinery is in motion or in use. The obligations under that section cannot be discharged if the machinery is fenced by safeguards which are removable by workmen so that the safeguards are not maintained in position whilst the machinery is in motion or in use. He, therefore, submitted that the removal of the safeguard by the workman was not sufficient to discharge the obligations cast against the appellant-firm under the above section. The appellant-firm was accordingly rightly held negligent and the finding of the Court that the injuries were the result of the negligence of the appellant-firm is correct.

6. In this connection, the main contention made by Mr. Ramaswami is that in the present case, the employee had not suffered from "employment injuries" and for that reason the appellant-firm was not bound to pay any damages or reimbursement u/s 66 to the Corporation. In that connection, he relied upon the definition of the phrase "employment injury" in Section 2(8) of the above Act and the provisions in Section 3 of the Workmen's Compensation Act. He relied on the fact that u/s 66 claim for damages and reimbursement are not payable except in

cases where an insured employee suffered from an employment injury. His submission was that the workman in this case was guilty of wilful removal of the fencing and safeguard and/or device which he knew had been provided for the purpose of securing the safety of workmen. In his submission, the workman guilty of the above wilful conduct would not be entitled to recover any compensation under the Workmen's Compensation Act and accordingly the injuries suffered by him would not be employment injuries within the definition of that phrase in Section 2(8) of the present Act. He has, therefore, submitted that the finding of the Court that the appellant-firm was bound to pay damages and reimburse the Corporation should be set aside. Mr. Jaykar has in this connection relied upon the decisions in *Bar Council Vs. K. Raghaviah*, *State Vs. L.C. Patel*, and *Nandlal Bhandari Mills Ltd. Vs. Employees' State Insurance Corporation*, . In his submission, whenever an employee suffers from personal injuries caused by accident arising out of and in the course of his employment, he should be held to have suffered from employment injury within the meaning of that phrase in Section 2(8) of the Act. The negligence of the workman in removing safeguards and fencings is irrelevant in connection with the question of his having suffered from employment injury. In this very connection, he has submitted that the obligation cast on an employer u/s 21 of the Factories Act is absolute and an employer is not absolved from the offence of breach of the obligations created by that section, because the workman may be guilty of removal of the safeguard provided by the employer. In his submission, the obligation against the employer being absolute u/s 21(1), the employer must in all cases be held negligent whenever he can be held to have not maintained the safeguards in position when machinery is in motion or in use. He, therefore, submits that in the present case the Corporation had a clear sustainable cause of action u/s 66 of the Act and the order of the Court should be confirmed.

7. In connection with these rival submissions, it is necessary to notice the relevant provisions in Sections 2(8) and 66 of the Employees' State Insurance Act, Section 3 of the Workmen's Compensation Act and Section 21 of the Factories Act. The relevant parts of these sections run as follows:

66. (1) Where any employment injury is sustained by an insured person .by reason of the negligence of the employer to observe any of the safety rules laid down by or under any enactment applicable to a factory or establishment..., the Corporation shall...be entitled to be reimbursed by the employer...the actuarial present value of the periodical payments which the Corporation is liable to make under this Act.

2. (8) "employment injury" means a personal injury to an employee caused by accident...arising out of and in the course of his employment in a factory or establishment..., which injury...would entitle such employee to compensation under the Workmen's Compensation Act, ?;

3. (1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation

in accordance with the provisions of this Chapter:

Provided that the employer shall not be so liable-

(a) ...;

(b) in respect of any injury, not resulting in death, caused by an accident which is directly attributable to-

(i) ?;

(ii) ...;

(iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen...

21 (1) In every factory the following, namely: (i) ...;

(ii) ...;

(iii) ...;

(iv) ...:

(a) ...;

(b) ...; and

(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:

Provided that....

8. u/s 53 of the Employees' State Insurance Act, bar is enacted against an insured employee from receiving or recovering compensation or damages under the Workmen's Compensation Act.

9. Now, it may at once be stated that having regard to the language of Section 21 of the Factories Act and particularly the phrase "shall be kept in position while the parts of machinery they are fencing are in motion or in use", it is clear that in all cases (except very exceptional) where it is found that the safeguard is not maintained in position whilst the machine is in motion or in use an employer will have to be held to have committed an offence of violating the obligation created u/s 21. This position does not require to be further elaborated having regard to the observations of the Supreme Court in the case of State of Gujarat v. Jethalal referred to above. That being the position, it is quite clear that the appellant-firm had committed violation of the obligation created u/s 21 in the present case. That is so, because, admittedly, the workman suffered injuries at the time when the provided safeguards were found not fixed in position so as to continue as safeguards. The safeguards were not in position when the power press was in

motion.

10. Even so, having regard to the language of Section 66, two questions which arise are as follows:

(1) Whether the insured employee-workman sustained employment injuries?

(2) Whether these injuries were sustained by reason of the negligence of the appellant firm to observe the safety rules laid down under any enactment applicable to its factory?

11. It is convenient to dispose of the second question first. The safety rules laid down by Section 21 which the employer firm was bound to observe provided that the wire fencing put up as safeguard in respect of the power press in question was liable to be maintained and continued in position when the power press was in motion and/or in use. The admitted fact was that when the workman suffered from injuries the safeguard of the wire fencing was not maintained in its position. Now, it is true that the employer firm had provided the wire fencing by way of safeguard and in normal circumstances this safeguard was sufficient security and was sufficient safeguard when the power press was in motion. As I have already stated, the obligation cast under the section was absolute. This required that the fencing and the safeguard should not be such as could be disturbed and removed by a defaulting workman. In other words, if the fencing and safeguard was such as could be easily removed, the appellant firm had not made sufficient arrangements to maintain the safeguard in position as required under the section. The phrase "negligence" in this connection has the meaning of not fixing the safeguard in a manner whereby it could be easily removed by a workman. The safeguards should have been so fixed as could not be removed by the workman. As the appellant-firm had not made sufficient provision for making the safeguard irremovable by an ordinary workman, it must be held to have been guilty of negligence in not observing the provisions in Section 21 of the Factories Act.

12. As regards the above first question, it first requires to be emphasised that a claim u/s 66 must be for compensation and damages paid by the Corporation to an insured employee in respect of employment injuries suffered by him. The right conferred on the Corporation u/s 66 is right of an insurer to indemnity and reimbursement. Apparently, this right of indemnity can only arise in cases where cause of action arose in favour of the insured employee for receiving compensation from the employer. Law did not intend to create any rights in favour of the Corporation where employer was not bound to pay compensation to the workmen for injuries suffered. This discussion clarifies ambiguities, if any, in the provisions in Section 2(8) of the Employees' State Insurance Act and Section 3 of the Workman's Compensation Act. As already noticed, u/s 53 of the Employees' State Insurance Act, a workman who recovers damages under that Act cannot recover any further compensation for injuries suffered by him from the employer under the Workmen's Compensation Act. The language of the

provisions in Section 2(8) of the Employees' State Insurance Act and Section 3 of the Workmen's Compensation Act is plain and clear and does not suffer from any ambiguities. The injury that can be described as employment injury must u/s 2(8) be such as would entitle the workman to compensation under the Workmen's Compensation Act, if he was a workman within the meaning of that Act. The direct negative of the definition of "employment injury" as contained in Section 2(8) would, therefore, be that in cases in which a workman's claim for compensation would not be sustainable u/s 3 of the Workmen's Compensation Act the Corporation would not be entitled to reimbursement. But Mr. Jaykar for the Corporation submits that u/s 3 of the Workmen's Compensation Act a right to compensation for personal injury arises in favour of every workman whenever injury is caused to him by accident arising out of and in the course of his employment. Apparently, under the first part of Sub-section (1) of Section 3 the right to compensation is based on the condition of the injury having been caused by accident arising out of and in the course of employment. But this is not the only condition required to be satisfied for a successful claim by a workman u/s 3 of the Act. In this connection, one cannot fail to take notice of the contents of Clauses (a) and (6) of the proviso to Sub-section (1) of Section 3. A claim for compensation for injuries suffered by a workman would not be sustainable in the situations mentioned in the Clauses (a) and (b) in the proviso. That is patent on the language of the proviso. Thus, having regard to the contents of Sub-clause (iii) of Clause (b) in the proviso, a workman would be entirely disentitled to any claim for compensation u/s 3 if the claim arose from injuries suffered by him by the wilful removal by him of any safeguard or other device which he knew to have been provided for the purpose of securing the safety of workmen. Reading the provisions of Section 2(8) and Section 66 of the Employees' State Insurance Act with the provisions in Section 3(1) of the Workmen's Compensation Act and particularly in the proviso to Sub-section (1), it is abundantly clear that in cases in which compensation cannot be adjudged in favour of a workman by reason of the situations mentioned in the proviso to Sub-section (1) of Section 3, the workman cannot be said to have sustained employment injury. There can be no right of indemnity in favour of the Corporation in respect of payments of compensation made by it to an injured workman in cases in which the workman would not be entitled to payment of compensation by reason of the situations mentioned in the proviso to Sub-section (1) of Section 3 of the Workmen's Compensation Act.

13. Mr. Ramaswami is accordingly right in his submission that in the present case the workman had not suffered from any employment injury and the Corporation was not entitled to any right of indemnity u/s 66. This is so because there is no reason to set aside the finding of the Court below that the safeguard that had been provided in connection with the power press in question had been removed by the workman concerned. It is quite clear from the evidence of the workman himself that he had raised the wire fencing himself. He had done so because the sheet on which he desired to work the power press had stuck up and he wanted

to remove the obstacle which was the cause of the above situation. The removal was wilful and was by a person who knew that the safeguard of the wire fencing was for see the purpose of securing the safety of workman including himself. Under the circumstances, his claim for compensation for injuries suffered by him was liable to be rejected if instituted u/s 3 of the Workmen's Compensation Act. As discussed above, under the above circumstances, the injuries from which he suffered could not be held to be employment injuries. The Corporation had no right of indemnity in respect of the compensation paid to the workman, because he had not suffered from any employment injuries.

14. Under the circumstances, the appellant is entitled to succeed. The order dated July 31, 1967, made by the Employees' Insurance Court is set aside. The Corporation will pay costs of the appellant-firm.