
(1968) 10 MP CK 0007

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 3 of 1962

J.B. Mangharam and Co. and Another

APPELLANT

Vs

E.S.I. Corporation

RESPONDENT

Date of Decision : 11-10-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Employees State Insurance Act, 1948 — Section 66, 82(2)
Factories Act, 1948 — Section 21

Citation : AIR 1969 MP 110 : (1969) JLJ 420 : (1970) 1 LLJ 460 : (1969) 14 MPLJ 486 : (1969) MPLJ 486

Hon'ble Judges : S.M.N. Raina, J;G.L. Oza, J

Bench : Division Bench

Advocate : P.L. Dubey, for the Appellant; J.P. Diwan, for the Respondent

Final Decision : Dismissed

Judgement

This is a Letters Patent Appeal against the judgment of a Single Judge of this Court in an appeal arising out of a claim u/s 66 of the Employees' State Insurance Act, 1948 (hereinafter called the Act).

Appellant No. 1 Messrs. J. B. Mangharam and Co. is a partnership firm (hereinafter referred to as the firm) which is a well-known manufacturer of confectionary. Appellant No. 2 is the manager of the company. One Taromal, an employee of the said firm was working on the power press machine used for cutting tin by pressing the die. The tin pieces are inserted in the machine and after placing the same on the die the workman presses it with his foot. By pressing the die the tin is cut out of the desired shape and size.

On 16-10-1957 Taromal met with an accident while working the machine. His four fingers were partly cut on account of the falling of the die on his hand. Taromal was an insured person and since the injury was an employment injury, having arisen in the course of his employment, the Employees State Insurance Corporation (hereinafter referred to as the corporation) paid a sum of Rs. 1,625

to him as actuarial present value of the periodical partial disablement benefit according to the Employees State Insurance General Regulations, 1950 framed under the Act. After the payment was made, the Corporation claimed reimbursement u/s 66 of the Act of an amount of Rs. 1,732.50 from the firm. The claim was mainly on the ground that at the time of the accident the machine was not provided with a guard at the die, and as such the firm had contravened the provisions of Section 21 of the Factories Act 1948.

The Employees State Insurance Court, Gwalior allowed the claim of the Corporation with costs. The firm preferred an appeal u/s 82 of the Act, which was dismissed by late Sharma J. Being aggrieved thereby the firm has filed this Letters Patent Appeal.

The first point that was pressed before us was that the firm was prejudiced in this case as it was not expressly stated in the pleadings of the Corporation (respondent) that the machine in its working was dangerous, and as such likely to cause injury to any workman handling it. It was urged that in the absence of any such pleading there was no issue to this effect and, therefore, there could be no proper trial thereof. It appears that the appellant had raised these contentions before the learned Judge, who decided the appeal. But they were not accepted. The learned Judge dealt with this matter in paragraphs 2 and 3 of the judgment and we are in complete agreement with the observations made therein.

It is no doubt true that it was not expressly pleaded that the die was a dangerous part of the machine, but that was clearly implicit in the pleadings. It was stated in paragraph 4 of the plaint that at the time of the accident the machine was not provided with a guard at the die, and this amounted to a contravention of Section 21 of the Factories Act, 1948. Thus, according to the respondent, it was necessary to provide a guard in accordance with the provisions of the said section, and the simple issue at the trial was whether a guard was necessary or not, in view of the provisions of the aforesaid section.

The relevant safety provision is contained in Sub-clause (iv) of Sub-section (1) of Section 21 of the Factories Act, 1948, which is reproduced below for facility of reference:

"21." FENCING OF MACHINERY.- (1) In every factory following namely,--

(i)...(ii)...(iii)..

(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,--

(a)...(b).....

(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:"

So far as the instant case is concerned, the question, therefore, is whether the die of the power press is a dangerous part of the machinery within the meaning of the aforesaid provision. We have to look to the substance and not the form of the pleading. Even if a plea is not properly worded, it would make no difference if the substance is clear and the other side is not likely to be misled thereby. The whole object of the pleadings is to bring the parties to an issue and if a pleading fulfils this object no objection can be entertained merely on the ground that it is not expressed in particular terms. We may here quote the following observations of their Lordships of the Supreme Court regarding the construction of pleadings in *Kidar Lall Seal and Another Vs. Hari Lall Seal*, :

"The Court would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded."

Here in this case, the simple issue raised by the pleading contained in paragraph 4 of the plaint was whether the firm was bound to provide a guard at the die in view of the provisions of Section 21 of the Factories Act. An issue was framed accordingly and parties went to trial with full knowledge of what the real controversy was. The fact that it was not specifically stated in the plaint that the die was a dangerous part of the machinery was immaterial, because that was merely a logical inference from the pleadings of the corporation. If the die was not a dangerous part, no guard would be necessary u/s 21 of the Act.

Learned counsel for the appellant relied upon the ruling of the Supreme Court in *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, . In that case their Lordships had observed as under:

"Evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating thereto."

The aforesaid observations, if carefully examined would go to show that they do not help the appellant at all. What their Lordships laid down was that evidence let in on one issue could not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. The issue whether the die is a dangerous part of the machinery cannot be said to be different from the issue whether the die needed a guard in view of Section 21 of the Factories Act. Both the issues are akin to each other and in substance the same. It would, therefore, be idle to contend that the real issue whether the machinery was dangerous was not before the parties and as such the firm (appellant) had no opportunity of adducing evidence thereon. In fact, the appellant did adduce evidence on this

point and also cross-examined the court-witness, having the aforesaid issue in mind.

Thus, this is a case where the parties went to trial with full knowledge that the question whether the machinery was dangerous or not was in issue and as such there is no question of prejudice to the appellant. The contention of the appellant was, therefore, rightly negated by the learned Judge,

The next question for consideration is whether the die was a dangerous part of the machinery and as such needed a guard. It appears to us that this is primarily a question of fact, which could not be challenged even in appeal before the learned Single Judge in view of the provisions of Section 82 of the Act. Sub-section (2) of Section 82 lays down that an appeal shall lie to the High Court from an order of an Employees Insurance Court, if it involves a substantial question of law. In *Hindle v. Birtwistle* 1897 1 Q.B. 192 it was held that the question whether a part of a machinery is dangerous within the meaning of the Factories Act is one of fact in each case and will depend on whether there is a substantial probability that accidents will result from use of the machinery. If the question is one of fact no appeal would lie to the High Court in view of Section 82.

The question whether a particular machinery or part thereof is dangerous or not can be looked upon as a question of law only where the Court commits an error in construing the word "dangerous" which has not been defined in the Act. However, as this point was not raised we propose to consider whether the finding of the Court which has been upheld by the Single Judge that the die was a dangerous part of the machinery is correct or not.

As pointed out above the word "dangerous" has not been defined in the Act. But it has been construed in a number of English decisions in the context of such laws. In 1897-1 QB 192 which is a leading case on the point it was held as under:

"It seems to me that machinery is dangerous, if in the ordinary course of human affairs danger may reasonably be anticipated from it when it is worked without protection. To say that because accidents have happened through its use therefore it must be dangerous, is wrong. To say that because no accidents would happen if it were worked with absolute care therefore it cannot be dangerous, is also wrong. In considering whether machinery is dangerous the contingency of carelessness on the part of workman in charge of it, the frequency with which such contingency is likely to occur, and all other matters likely to make the machine become dangerous, are to be taken into consideration. If taking what is reasonably certain to happen, the court thinks there is a substantial probability that accidents will result from the machinery, the machinery is dangerous within the Act, and the court should convict."

14-A. In a more recent case in *John Summers & Sons Ltd. v. Frost*, 1955-1 All ER 870 the grinding wheel of a power driven grinding machine was held to be a dangerous part of the machinery requiring a secure fencing on the basis of the same principles.

Learned counsel for the appellant brought to our notice the case of *Close v. Steel Company of Wales Ltd.* 1960-2 All ER 657 affirmed in 1962 2 All ER 953 but we do not find any departure from the principles laid down in 1897 1 QB 192 (*supra*). It was observed therein as under:

"A part of a machine should not be regarded as dangerous within the language of the section unless the risk and the injury can be fairly described as reasonably foreseeable in the ordinary course."

From the aforesaid decisions it is clear that a machinery or part thereof, is dangerous if in the ordinary course of its working danger may reasonably be anticipated from it when working without protection, taking into account the various factors incidental to its working, including the carelessness of the workman.

We may here briefly refer to the evidence adduced by both the parties on this point. Shri Prabhakar Lamore (P. W. 1) Factory Inspector clearly stated that the die was a dangerous part of the machinery and as such it was necessary to provide a guard. He further added that if the guard had been properly provided the possibility of such an accident would be excluded. The evidence of this witness was contradicted by Bashir Hussain (D. W. 1), who is an employee of the firm as well as by the court-witness Shri Moolraj Dalani (C. W. 1). The question whether the die is dangerous part of the machinery is more or less a matter of opinion and there can be a difference of opinion, if it is examined from different points of view,

It may be that ordinarily such accidents may be rare. But that would make no difference, because in the ordinary process of its working the hand of the workman can very easily go under the die through negligence, or otherwise in the absence of the guard. Even Shri Moolraj Dalani (C. W. 1) had to accept in his examination-in-chief that to some extent safety was ensured by providing a guard, though not much. The degree of safety would no doubt depend on the type of the guard provided. Perhaps, the witness was influenced by the consideration that by providing a guard operational efficiency of the machinery would be effected. But that is no consideration. The object of the guard is to prevent the hand of the workman coming under the die in an unwary moment, and thereby ensuring the safety of the workman. Without the guard the possibility of the hand coming under the die is definitely there. The tin has to be manipulated by hand "close to the die while operating the machine and the hand is bound to be injured, if it comes under the die, in the course of its operation. The die is, therefore, clearly a dangerous part of the machinery requiring a guard.

We, therefore, agree with the learned Single Judge that as the firm had failed to provide a guard at the die, which is a dangerous part of the machinery, it had contravened Section 21 of the Factories Act, 1948, and as such was liable u/s 66 of the Act.

No other point was pressed before us.

The appeal, therefore, fails and is hereby dismissed with costs; counsel's fee Rs. 25/-, if certified.