
(1962) 02 MP CK 0010

In the Madhya Pradesh High Court

Case No : O. (Misc.) F.A. No. 50 of 1961

J.B. Mangharam and Co.

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 09-02-1962

Acts Referred:

Employees State Insurance Act, 1948 — Section 66
Factories Act, 1948 — Section 21

Citation : (1963) JLI 772

Hon'ble Judges : P.R. Sharma, J

Bench : Single Bench

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

Final Decision : Dismissed

Judgement

P.R. Sharma, J.—This is an appeal against the order dated the 12th of September, 1961 passed by the Judge, Employees' State Insurance Court Gwalior, in Civil Case No. 5/58.

2. An application was presented by the Employees' State Insurance Corporation u/s 66 of the employees State Insurance Act, 1948 (hereinafter referred to as the Act) against the principal employer and the manager of the J. B. Mangharam Factory Gwalior stating that the insured person Taromal, while he was working in the Appellants' factory on the die of a punching machine, met with an accident on 16-10-1957 as a result of which four fingers of his left hand were cut At the time of the accident the die of the punching machine was not provided with a guard. The omission on the part of the Defendants to provide a safety-guard amounted to a contravention of the provisions of Section 21 of the Factories Act. The insured person having received serious injury in the course of and arising out of his employment, the injury was an "employment injury". The Medical Board acting u/s 72 of the Employees' State Insurance Act (General) Regulations, assessed the permanent partial disablement of Taromal at 25% The applicant had to pay a sura of Rs. 107. 50 nP to Taromal as temporary disablement benefit

and the actuarial present value of the periodical payments of permanent partial disablement benefit payable to Taromal, comes to Rs. 1,625. The applicant, therefore, claimed that it was, by virtue of the provisions of Section 66 of the Act, entitled to recover from the Defendants the amount of Rs. 1,732.50 nP. The applicant's claim was decreed in full by the lower Court. The Defendants have now come up in appeal to this Court.

3. Although several contentions were raised by the Defendants in their written statement, only a few of them were urged, in support of this appeal. It was, to begin with, contended by the learned Counsel for the Appellants that the applicant in the present case did not set out under what Clause of Section 21 of the Factories Act the Defendants were bound to provide a guard on the die. Due to this omission in the pleadings no issue was framed by the trial Court on the point whether the punching machine on which Taromal worked was "a dangerous part of any other machine" within the meaning of sub Clause (c) of Clause 4 of Sub-section (1) to Section 21 of the Act. I am afraid there is no force in this contention. It was alleged in para 4 of the plaint that the punching machine was not provided with guards and that the omission by the Defendants to do so amounted to a contravention of the provisions of Section 21 of the Factories Act. The machinery in the present case would not fall under any other clause of Sub-section (1) to Section 21 of the Act. The parties went to trial with full knowledge of the fact that the question whether the die on which Taromal worked was "a dangerous part of a machinery" was an important point of controversy between them. The applicant examined Shri Prabhakar Lambore, Factories Inspector on this point and he was cross examined at length by the Defendants as to his competence to give an opinion on the point whether the die was a dangerous part of a machinery. Mr. Danani, General Manager of the Gwalior Engineering Works, was summoned by the Court as an expert witness for his opinion on this important question. No objection was raised before the trial Court by the Defendants to his examination or to evidence being led by the applicant through Prabhakar Lambore on the point that the die was "a dangerous part of a machinery".

4. It was held by their Lordships of the Supreme Court in *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, , that where the Defendants went to trial with full knowledge that a certain question was in issue, had ample opportunity to adduce their evidence thereon and fully availed themselves of the same, the absence of a specific pleading on that question was a mere irregularity, which could not be said to have resulted in prejudice to the Defendants. The ratio of this decision applies fully to the facts of the present case. It was alleged by the applicant that the Defendants were bound u/s 21 of the Factories Act to provide guards on the punching machine. The machine was not, as already observed above, such as could fall within the kinds of machinery dealt with in any other part of Sub-section (1) of section 21 of the Factories Act. Issue No. 4 framed by the Court was whether by reason of the die of the punching machine being not provided with a guard at the time of the accident, the Defendants had

contravened the provisions of Section 21 of the Factories Act, 1948 The applicant as well as the Defendants led evidence on the question as to whether the die of the punching machine was a dangerous part of a machinery." In these circumstances, I am clearly of the opinion that the omission to specify the particular provision u/s 21 of the Factories Act, by virtue of which the Defendants were bound to provide a guard on the die of the punching machine was a mere irregularity which has not resulted in any prejudice to the Defendants.

5. It was next contended by the learned Counsel that the evidence on record was not sufficient to prove that the die of the punching machine was "a dangerous part of a machinery". The question as to what is meant by the word "dangerous" was dealt with by me in *Jiyujee Rao Cotton Mills Ltd. v. The Employees' State Insurance Corporation* CMA No. 35 of 1960 decided by Gwalior Bench on 9th April 1961, wherein it was held that a dangerous part of a machinery means from which in the ordinary course of working danger may be reasonably anticipated, even if such danger would arise from negligence of some outside source. The following passage from the decision in *John Summers & Sons Ltd. v. Frost* (1955) 1 All. ER 870, further elaborates the same principle:

The necessary and sufficient condition for the emergency of the duty to fence imposed by Section 14 of the Factories Act is that some part of some machinery should be "dangerous". The question is not whether the occupiers of the factory knew that it was dangerous; nor whether a factory Inspector had so reported, nor whether previous accidents had occurred; nor whether the victims of these accidents had, or had not, been contributory negligent. The test is objective and impersonal. Is the part such in its character, and so circumstanced in its position, exposure, method of operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent 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.

6. The law requires that every dangerous part of a machinery must be securely fenced and this is so even though the effect of fencing securely is to make the machine unusable.- See *John Summers & Sons Ltd. v. Frost* 1955 1 All. ELR 870 in which the decision in *Davies v. Thomas Owen & Co.,* (1919) 2 KB 39, was approved.

7. P. W. 1-Shri Prabhakar Lambore's evidence in the present case establishes that the die of the power punching machine is a dangerous part of a machinery and that if it had been provided with a guard the accident which resulted in injury would not have occurred. The fact that he did not call upon the employer to provide the die with a safety guard or prosecute him for his omission to do so does not affect the responsibility of the Defendants in the present case to securely fence the die by safety guards of substantial construction, which had to be kept in position while the die was in use Whether the die was a dangerous part of a machinery was not at all a matter to be judged on any scientific

principles requiring expert knowledge. As laid down in John Summer's case (supra), the test to be made is a purely objective and impersonal one. Even the Defendant's own witness Bashir Hussain who is a "mistry" in the department where Taromal worked had to admit that the die is a dangerous part while it is in use. Shri Danani has also stated that the die, when it falls on the tin when the liver is pressed by the foot, is a dangerous part of the machine. The mere fact that the die was not provided with any guard by its manufacturer or, as deposed by Shri Danani and Bashir Hussain, no effective safety guards could be provided to the die without impairing the working of the machine cannot in view of the decision in John Summer's case (supra) affect the Defendant's responsibility under the law to securely fence the die by safety guards of substantial construction. This obligation under the law cannot be evaded by the issue of instructions to employees. See *Thomas v. Thomas Bolton & Son Ltd.* (1928) 139 LT 397.

8. The die has now been provided with a safety guard which leaves an opening of only about a quarter of an inch for putting the tin-sheet and bringing out the tin cover. The trial Court on inspecting the safety guard now provided has agreed with the opinion of Shri Danani that if any person were to hold something with his thumb and three fingers, it would not be possible for the fingers in that position to go beneath the safety guard. This fact is enough in my opinion to show that a safety guard could, if it had been provided, have afforded ample protection to Taromal while he was working on the machine.

9. Much stress was laid by the learned Counsel for the Appellants on the statement of Taromal to the effect that the punching machine fell from above due to a defect in it. But this was a mere surmise on the part of Taromal. In his re-examination he stated that although he had brought to the notice of the "mistry" the fact that the machine was defective, he did not know whether the defect had been removed by him. The concluding portion of the re-examination resolves all doubt in so far as the fact of absence of safety guard on the die is concerned. Taromal deposed that if the machine had been provided with a safety guard then only so much part of the hand would have gone inside it as was necessary for removing the tin which had been punched and no more.

10. The question as to whether the Corporation is entitled to be reimbursed by the employer or the principal depends on the fact whether an employment injury is sustained 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, or by reason of any wrongful act of the employer or his agent. The facts that the employer was guilty of contributory negligence or that the punching machine fell on account of any defect in it would not be material for determining the liability of the employer u/s 66 of the Act, if the workman would have been protected from injury by a safety guard.

The fact remains that the die being a dangerous part of a machinery, the employer was bound to securely fence it by a safety guards of substantial

construction The evidence on record leaves no room for doubt that if a safety guard had been provided on the die the worker could not have inserted four of his fingers under the die in order to take out the punched tin. These facts are, in my opinion, sufficient to lead to an inference that the injury in question was sustained by Taromal by reason of the negligence of the employer to observe the safety rules laid down in the Factories Act.

In this view of the matter the Appellants cannot escape their liability u/s 66 of the Act to reimburse the Corporation.

11. Lastly it was contended by the learned Counsel for the Appellants that the sum of Rs. 107-50 nP. paid to Taromal as temporary disablement benefit could not be recovered from the employer. By virtue of Section 66 of the Act the employer or the principal is bound to re-imburse the Corporation the actual present value of the periodical payments which the Corporation is liable to make under this Act. The temporary disablement benefit is payable u/s 51 (a) of the Act during the period of such disablement. It has to be paid in addition to permanent partial or total disablement during the life of the workman, whenever either is admissible. The learned Counsel tried to suggest that the temporary disablement benefit payable under Clause (a) of Sub-section (1) of Section 51 of the Act could not be combined with permanent disablement benefit payable under Clause (b) or (c). He could not, however, support this proposition by any authority A bare reading of the provisions of Section 51 is, in my opinion, sufficient to show that the Clause (b) or (c) of Sub-section (1) do not exclude the right to receive temporary disablement benefit under Clause (a) thereof This contention of the learned Counsel cannot, therefore, be accepted.

12. The result is that this appeal has no force and is hereby dismissed with costs Counsel's fee Rs 25.