

(1956) 08 MAD CK 0035
In the Madras High Court
Case No : A.A.O. No. 392 of 1954

S. Suppiah Chettiar

APPELLANT

Vs

V. Chinnathurai and Another

RESPONDENT

Date of Decision : 10-08-1956

Acts Referred:

Limitation Act, 1908 — Article 21, 14

Workmens Compensation Act, 1923 — Section 10(1), 3(5)

Citation : AIR 1957 Mad 216 : (1957) 1 LLJ 517 : (1956) 69 LW 896

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Advocate : S. Ramachandra Iyer and P.S. Srisailan, for the Appellant; K.S. Naidu, for the Respondent

Final Decision : Dismissed

Judgement

Ramaswami, J.—This appeal is directed against the order of the learned District Judge of East Tanjore, in O. P. No. 64 of 1953, rejecting

the application for permission to sue as a pauper under Or XXXIII Rule 5(d) (1) C. P. Code.

2. The allegations in the petition are: The first respondent is the owner of a licensed cargo-boat bearing No. 88. The second respondent is the-

managing agent of the first respondent and is" also a contractor doing business at Nagapattinam. On or about 12-3-1952 the 2nd respondent on

be-half of the first respondent engaged among others the petitioner's son Krishnaraju as a crew of the boat for the purpose of carrying beedi

tobacco bundles from Nagapattinam port. After loading, the boat left the port on 12-3-1952. On the voyage-the petitioner's son died in the boat

on 16-3-1953 near Tranquebar.

On enquiry the petitioner learnt that death Of the petitioner's son was caused by the cross-beam of the mast of the boat breaking and falling on his

son. The 2nd respondent who was to charge of the boat was negligent in not seeing that the cross-beam of the mast was in a fit condition. The

petitioner, therefore, claimed a compensation of Rs. 3635 under the Workmen's Compensation Act and the Fatal Accidents Act from both the

respondents. A further sum of Rs. 135 was claimed as the balance of pay due to the deceased.

3. The petitioner applied for compensation before the Commissioner for Workmen's Compensation, Madras, as he claims to be a dependant of

the deceased workman within Section 2(d) of Act VIII of 1923. Presumably acting under some advice, the petitioner applied for the withdrawal of

this petition before the Commissioner under Order 23 Rule 1 C. P. C. with liberty to agitate the matter by a suit in a court of law. The

Commissioner, who is a layman, without realising that he had no power to do so, not only allowed the withdrawal of the petition but also granted

permission to prosecute the claim in a civil court, Ex. A. 3. The petitioner has thereupon filed the present application to sue the respondents in the

pauper form in the District Court, East Tanjore.

4. The application has been dismissed on two grounds viz, (i) by reason of the presentation of the claim by the petitioner under the Workmen's

Compensation Act, the proposed suit is not maintainable; and (ii) the suit is patently barred by limitation. Hence this appeal.

5. On a consideration of all the circumstances of the case I have come to the conclusion that on ground No-(i), the learned District Judge's order

cannot be supported and that on ground (ii) it is unassailable. I shall now set out my reasons.

6. The point for determination is the scope of Section 3(5) of the Workmen's Compensation Act, 1923, which runs as follows:

Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a civil

court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a

workman in any court of law in respect of any injury-- (a) if he has instituted a claim to compensation in respect of the injury before a

Commissioner; or (b) if an agreement has come to between the workman and his employer Providing for the payment of compensation in respect

of the injury in accordance with the provisions of this Act." (see page 103 of Encyclopaedia of Labour Laws and industrial Legislation in India,

Vol. IV by A.N. Aiyar (Federal Law Depot, Kashmir Gate, Delhi).

7. The corresponding section under the English Workmen's Compensation Act was Section I, sub-clauses (3) and (4) in the Workmen's

Compensation Act of 1906 and Section 29 under Workmen's Compensation Act of 1925" (See page 430 appendix G of Ramanatha Aiyar and

Krishnamurthi Iyer, The Workmen's Compensation Act, 1923, 2nd Edn. by H.L. Sarin -- The University Book Agency, Katcheri Road, Lahore

1939). The following is the summary of this section prescribing alternative remedies in the English Workmen's Compensation Act, taken from

Halsbury's Laws of England, Hailsham Edn., Vol. 34, paragraphs 1318 and 1319 (pages 961 to 963):

1318. As an alternative to accepting compensation under the Act the workman may elect to avail himself of any other remedy open to him against

his employer, at common law or under the Employers' Liability Act, 1880, or against any other person. The workman cannot, however, recover

both compensation under the Act and damages independently thereof.

1319. If the workman is injured by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer

is responsible, he may at his option, either claim compensation or take such proceedings as are open to him irrespective of the Act; but the

employer is not liable both independently of and under the Act, nor is he to be liable to any proceedings independently of the Act except in the

case of such personal negligence or wilful act.

The workman is thus given an option to elect the remedy he will pursue, and is bound by his election. In one case only is there a *locus poenitentiae*.

This is where, within the time limited for taking proceedings under the Act, the workman sues his employer for damages independently of the Act,

and fails, either in the court of first instance or on appeal. In this case, if the court thinks the facts disclose a liability to pay compensation, the action

is dismissed, but the Court at the plaintiff's option must proceed to assess his compensation. Hence this option is exercisable only by an

unsuccessful plaintiff. The penalty for suing the employer in such a case is that the Court when assessing the compensation is at liberty to deduct

there from, all or Part of the costs incurred through the workman bringing an action instead of proceeding for compensation under the Act. An

appeal on this question of deduction of costs lie to the Court of appeal.

8. The corresponding provisions in U. S. A. are comprised in the Compensation Acts particular to the States. Many, of the Compensation Acts, as

pointed out in 58 American Jurisprudence page 602, are elective, giving to the employer and employee the right to accept or to reject the

provisions thereof, while others are compulsory in character affording no such option. As a rule, the optional Acts confer a, right of election by

both employer and employee but there is little uniformity in this respect

9. But both under the Workmen's Compensation Act compulsory in character and affording no such option, and in the case of Compensation

Acts which are elective where the employee opts as a term of his contract of employment to come under the Workmen's Compensation Act, 58

American Jurisprudence points out, that it may be stated as a general rule that, aside from the exceptions created in a workmen's compensation

law itself, its operation is exclusive of all other remedy and liability with respect to both the employer and employee as between themselves, in

regard to all injuries compensable thereunder : Seas Shipping Co. V. Sieracki, (1945) 328 US 85 (A); Cook v. Massey, (1923) 35 ALR 200 (B);

Victory Sparkler and Co., 44 ALR 363 (C); Wirta v. N. North Butts Mining Co., (1922) 30 ALR 964 (D).

Common law remedies are preserved, however, in some instances, and in such cases the claimant is usually given the right to elect which remedy

he will pursue. Where such a right of election exists, the selection of either such remedies may operate as a bar to the pursuit of the other: Dahn v.

Davis, (1921) 258 US 421: 66 Law Ed. 698 (E); Conrad v. Youghiogheny and Ohio Coal Co. (1923) 36 ALB 1288 (P). But the institution of an

action at law which is dismissed on the ground that the plaintiff's remedy is under the Compensation Act does not bar a subsequent proceeding

under such Act. State Ex Rel City of Breckendridge v. District" Court of Wilkin County, (1917) 13 ALR 1097 (G). In most instances, the

Workmen's Compensation Acts, by their terms, effectually prohibit any attempt

by contract to impose limitations upon their operation, or the waiver or release, prior to the occurrence of an injury, of the benefits provided thereunder. *Brighton Young University v. Industrial Commission*, 65 ALR 152 (H) ; *Horadath v. Sheridan*, 58 WYO 211 (T). The power of the State to impose such a prohibition has been sustained *Alaska Packers Association v. Industrial Commission*, (1934) 294 US 532~(J) (Prohibition not a denial of due process) *New York! Central Rly. Co. v. White*, (1917) 243 US 188 (K). Therefore contracting out has been held to be invalid as being against public policy; *International Coal and Mining Co v James Nicholas*, (1920) 10 ALR 1010 (L); *Carpenter v. Globe mdem Co.*, 129 ALB 410 (M).

10. Alternative remedies are prescribed because the grounds upon which damages can be obtained in the civil Court against the employers for breach of duty on the part of the Person occasioning it or on the part of his agents or servants are different from the compensation payable under the Workmen's Compensation Act which as Ruegg points out, Introduced a new and somewhat startling principle. By this Act the employer was for the first time made liable to compensate his workman for Injuries, quite irrespective of the consideration whether or not either he, or any one for whose acts he was in law liable, and had committed any breach of duty to which the injury was attributable. The intention of the Act made him an insurer of his workmen against the loss caused by injuries which might happen to them whilst engaged in his work. This insurance was made a part of the business costs just like any other hazard of the business. Insurance, it is true, is limited in extent. But it simplified the onerous responsibility placed on the workman or his dependants to prove damages and assessment of the same and substitute definite sums to be determined by the extent of the unfortunate workman's injuries and the amount of his wages and created a simple procedure whereby the recovery may be prompt, cheap and non-litigious. The essential features of the new Act, as compared with older practice, are based on the almost universally accepted theory that industrial risks should be perceived by society to be accompaniments and expenses of industrial enterprises. But on account of the fact that the insurance was of a limited extent, where the workman receives injuries and negligence and breach of duty are provable against the

employer and compensation is desired commensurate with the actual loss and injury involved, the workman was left intact to pursue the remedies

in the civil Court as before: *Byaii Hoe v. Narayana*, AUt 1937 Rang 451 (N); *Secy, of State v. Geeta*, AIR 1938 Nag 91 (O); *Unton v. Great*

Central Rly. Co., 1924 AC 302 (P); Statement of objects and Reasons published in Gazette of India, 1922 Part V page 313; Proceedings of the

Legislative Assembly, 1922; *Ruegg's Workmen's Compensation Act*, 1906, 9th Edn. 1922, Oh. I, pages 1-2.

11. This has resulted in the provisions being made for alternative remedies. The workman may, as an alternative to accepting compensation under

this Act, elect to avail himself of any other remedy against the employer's at common law, that is to say, in tort for damages for negligence or wilful

act of the employer or of some person for whose act or default the employer is responsible, or under the Employer's Liability Act, or against any

other person. But he cannot have the best of both the worlds and put his employer in double Jeopardy. That is why the Indian, English and

American Acts protect the employer not only against double payment but also against double proceedings. The option given to a workman by

these provisions either to claim compensation under this Act or take other proceedings, cannot be confined to an option binding only in the case of

success. Thus, if a workman brings an unsuccessful action for damages against his employer, he would be debarred from claiming compensation

under the Act. Conversely, if a workman instituted a claim for compensation under the Act and fails, he is then debarred from commencing an

action for damages at common law or under the Employer's Liability Act. What would amount to an Institution of a claim for compensation under

the Act is a question of fact depending upon the circumstances of the case (see page 103 of A.N. Aiyar, *Enclopaedia or Labour Laws*, Vol IV),

12. I shall now briefly examine the English, American and Indian case law on the subject,

13. In *Edwards v. Godfrey*, (1899) 2 Q B 333 (Q), the facts were: The appellant a builder. was erecting a studio at the top of a house more than

thirty feet high, and scaffolding was used in the work; the respondent, who was employed by him to glaze the studio, was injured by a fall-while

descending outside the house from the roof " to the ground. The respondent brought an action against the appellant under the Employer's Liar

bility Act," 1880, founded on an alleged defect in the condition of the ways, works and plant. At "the trial of the action in the Wandsworth County

Court on January 9, 1899, the jury found that the respondent had been guilty of contributory negligence, and judgment was entered for the

defendant, the present appellant.

No application was made at the time on" behalf of the respondent for an assessment of compensation u/s 1, Sub-section 4 (1), of the Workmen"s

Compensation Act. 1897; but on January 30 the respondent filed with the Registrar of the County Court a request for arbitration under the Act,

which came on for hearing on March 13, when the Judge made an award in favour of the respondent for 11 shillings a week. The employer

appealed. It was argued for the respondent that the proceedings under the Workmen"s Compensation Act, 1897, were properly brought, and the

County Court Judge acted within his jurisdiction in awarding compensation. -

The provisions of Section 1, Sub-section 2 (b), only apply where the injury is caused by the personal negligence or wilful act of the employer or of

some person for whom he is responsible; that is not the case here. The object of the sub-section was in cases of negligence to preserve the

workman his existing civil remedies, with the qualification that the employer is not to be liable to pay compensation both under and independently

of the Act ; there is nothing in the sub-section, either express or implied, to prevent the workman from having a double remedy in respect of the

same injury, and from taking proceedings under the Act after failure of his proceedings independently of the Act, provided only that he does not

get double compensation.

Sub-section (4) does not cut down the rights of the workman either at common law or under the Employer"s Liability Act; it was intended to

obviate 45 far as possible the costs of Independent proceedings, and also to give Jurisdiction to the County Court Judge, who, when sitting as 6

Judge to try an action under the-Employer"s Liability Act, could not act as an arbitrator under the Workmen"s Compensation Act. The only effect

of not applying under Sub-section (4) is that the county Court Judge could not proceed then and there to assess the compensation under the Act.

It was held as follows :

Where a workman, who has been injured by an accident arising out of and in the

course of his employment, brings an unsuccessful action to recover damages against his employer, and is desirous of having compensation for his injury assessed under the Workmen's Compensation Act, 1897, he must follow the procedure prescribed by Section I Sub-section (4) of that Act, and must apply then and there to the Judge trying the action for an assessment of compensation; he cannot at subsequent date initiate independent proceedings against his employer by a request for arbitration under that Act.

In *Cribb v. Kynoch Ltd.* No. 2, (1808) 2 KB 551 (R), it was held :

The "option" given to a workman by the Workmen's Compensation Act, 1897, Section 1, Sub-section 2 (b), either to claim compensation under the Act or take other proceedings cannot be confined to an option binding only in the case of success. The procedure prescribed by Section 1, Sub-section (4) of the Workmen's Compensation Act 1897, must be strictly followed, and that sub-section has no application except when proceedings based on the common law liability of the employer have been commenced within six months from the occurrence of the accident. A workman cannot give the notice required by Section 2 Sub-section (1) as a foundation for future proceedings under the Act, in the event of a common law action commenced after the expiration of six months from the occurrence of the accident being Unsuccessful. On the construction of Section 1, Sub-section. 2 (b) and (4) read together, that this application for compensation could not now be entertained." (1899) 2 QB 333 (Q) applied.

In *Harrison v. Wythemoor Colliery Co.*, 1922 2 KB 674 (S) it was held, following the two decisions cited above, that once a workman has availed himself of the provisions of the Workmen's Compensation Act, he is no longer entitled to pursue his alternative remedy at common law.

In *Alagappa Mudaliar v. Veerappan Chettiar*, AIR 1942 Mad 116 (T) it was held that the claim referred to in Section 10(1) and Section 22 of the

Workmen's Compensation Act, 1923, means a formal claim made before the Commissioner and not a claim made of the employers. In that case

what Happened was that a workman sustained serious injuries in the course of his employment. On the persuasion of his employers he filed a leave

application in which he falsely stated that he fell into a channel and so wanted

some leave. Subsequently the employers did not keep up their promise to support him.

Therefore, he filed an application before the Labour Commissioner. The employers contested the allegation of the workman that he was injured in the course of his employment. The Commissioner dismissed the application on the technical ground that he was barred by time u/s 10(1) of the Act. The workman thereupon instead of filing an appeal u/s 30, filed a suit before the District Munsif, Tirunelveli, for compensation and for damages for negligence. That suit was dismissed on the ground that it was barred by Section 3(5) of the Act. This decision was confirmed on appeal by the Subordinate Judge.

In second appeal, Horwill J., after passing strictures on the conduct of the employer and the Labour Commissioner, upheld the dismissal of the suit on the ground that the suit was barred u/s 3(5) of the Act, as there was a claim for compensation instituted and admitted by the Commissioner and which got ended in dismissal.

In *Rouse v. Dixon*, 1904 2 KB 628 at page 631 (U), the observations of the Court of Appeal are apposite :

That being so, it seems to me that when a claim is made under the Workmen's Compensation Act which cannot be enforced because the case does not come within the Act at all, the right of the workman to make any other claim is not lost There is nothing in the Act to lead to the extraordinary result that, where a claim is made under the Act, but withdrawn before there has been any decision upon it, all other liability on the part of the master is thereby wiped out.. The intention of the Act was only to prevent the master from being liable to pay twice over." (Per Lord Alverstone O. J.I.

If the workman acting under a mistake gives notice of a claim under the Workmen's Compensation Act, and then withdraws that claim, I think no effective option has been exercised." Per Lord Wills J.).

A converse case under the same section is one decided by the Court of Appeal in *Bennet v. L. and W. Whitehead Ltd.*, 1926 2 KB 380 (V). The action was instituted first, but it was discontinued, by the workman who thereupon started proceedings under the Workmen's Compensation Act.

The Court of appeal by a majority (Scrutton L. J. dissenting) held that the workman is not debarred from proceeding with his claim. The decision

of the Court of Session in Scotland in *King v. Edinburgh Collieries Co.*, 1924 SO 167 (VI) which held that the mere commencement of the

proceedings cannot amount to a conclusive election was referred to with approval.

Atkin L. J. at page 409 stated that he can find no authority which makes one choice conclusive, except in a case where proceedings have reached

the conclusion.

That election is a question of fact importing as it does a knowledge in the person electing, is to be found in *Burke and Unsworth v. Elder Dempster*

Lines Ltd., 1939 3 All ER 339 at p. 343 (W). A summary of this principle of election is found in *Willis and Barrats Workmen's Compensation*

Act 1944 Edn. at pages 524 and 526.

14. The term "instituted" u/s 3(5) of the Workmen's Compensation Act has nowhere been Judicially defined. But the following definitions taken

from Ramanatha Aiyar's Law Lexicon "of "institute" may be usefully borne in mind;

Institute : Set on foot; commence. "Instituted" in respect of legal proceedings means, commenced: *Blackburne v. Blackburne*, (1868) 37 LJ 73 :

1 P and D 563 (Xr. To begin an action; to accuse; to appoint an heir by will A counter claim is a "proceeding instituted" (*Hoodbars v. Cathcart*,

(1895) 1 QB 873 (Y).)

"Institute when applied to legal proceedings, signifies the commencement of the proceedings. When we talk of "instituting an action" we understand

bringing an action. Criminal proceedings can not be said to be "instituted" until a formal charge is openly made against the accused by complaint

before a Magistrate".

The word "instituted" in Section 3(5) of the Workmen's Compensation Act can therefore be taken as meaning "setting on foot an enquiry" and is

more than a mere filing of a claim. Even in the decision in AIR 1942 Mad 116 (T), the claim before the Commissioner was admitted by him and

was, therefore, held to come within Section 3(5). I must respectfully point out, however, that the decision of Horwill J. in the above case is not

based upon any discussion of the relevant English or Indian cases and seems to

be a case of first impression and nothing, more.

To sum up in the language of Ruegg, the remedy under the Workmen's Compensation Act will often overlap the remedy of compensation or

damages for negligence under the Fatal Accidents Act in the civil Court. The obligation under the Workmen's Compensation Act which is more

akin to that of an insurer, is independent of any negligence or breach of duty on the part of the Master and is outside the law of Torts :

See *Darlington v. Roscoe and Sons*, 1907 KB 219 at p. 230 (Z); *Salmonds Law of Torts* p, 112; *Pollock on Torts* pp. 79, 84, 86; *Underbill on*

Torts p. 349; *London Brick Co. v. Robinson*, 1943 AC 341 at p. 344 (ZI); *Works Manager, Carriage and Wagon Shop, E.I. Rly. Vs. Mahabir*, .

But two venues of claim to the injured workman against the master, does not mean that the injured workman or his dependant would be enabled to

obtain a double compensation; nor will he in every case be able, to prosecute his remedies alternatively.

Where a double remedy exists, the employer, the workman or his dependant, by the construction placed upon the Act in England and India, is put

to the election which remedy he will pursue. This remedy has generally to be exercised before the proceedings are commenced.

15. Bearing these principles in mind. If we examine the facts of this case, inasmuch as the dependant did nothing more than file a claim and

withdrew it before the proceedings were commenced and which commencement would only be with effective taking of notice to the opposite side,

there has been no such election as would debar the workman's dependant from instituting a suit in the civil Court and which as the plaint shows

was under the Workmen's Compensation Act and the Fatal Accidents Act. Therefore, the petition should not have been rejected on this ground.

16. Ground No. 2: The Article of the Limitation Act under which this suit would fall cannot be Art. 120, because"" that Article would come into

play only if the suit is one for which no period of limitation is provided elsewhere in the, schedule; On the other hand, if the proceedings have been

started under the Workmen's Compensation Act, 1923, Section 10(1) of that Act provides a period of limitation for proceedings before the"

Commissioner under that Act. This being a period provided by a special law, it will prevail over the general provisions of the Limitation Act.

The proceeding under the Workmen's Compensation Act is not a suit. Articles 21 and 22, of "the Limitation Act covers two sets of cases, viz.,

when a person is killed, the compensation is claimed under the Indian Fatal Accidents Act, 1855 as in this case, and the period of limitation fixed is

one year from the date of death of the person killed. The father, the petitioner in this case would come within the term representative" set out in

Art. 21 of the Limitation Act Article 22 would cover suits by the injured workman for compensation for any other non-fatal injury to the person

and for which the period of limitation fixed is one year.

This case being a suit filed by the deceased's representative, which term includes all or any one of the persons for whose benefit a suit may be

brought under the Fatal"" Accidents Act, 1855 will fall under Article 21. Therefore, looked at from any point of view, this suit is hopelessly barred

by limitation.

17. It was pressed before me that in dismissing the application to sue as a pauper on the ground of limitation, the learned District Judge exceeded

the limits set down by me "in Annamalai Chettiar in re, 69 MLW 555: AIR 1956 Mad 677 . But in this decision I have carefully pointed out that

the object of the order and rule is to prevent our Courts from being flooded with palpably worthless, obviously time barred and manifestly

untenable suits by paupers uninhibited by the sobering responsibility induced by payment of heavy court-fees. Therefore, this is a case of the suit

being patently barred by limitation.

18. The learned Advocate for the petitioner realising this urged in the lower court that the petitioner should be allowed to invoke Section 14 of the

Limitation Act. But the lower Court rightly refused to allow him to do so, because in the first place it is doubtful whether the proceeding before the

Commissioner" under the Workmen's Compensation Act, can be said to be a civil proceeding: secondly, this is not a case of the Commissioner

having no jurisdiction to entertain the application, because it was the workman's dependant who elected to go before the civil Court instead of

prosecuting the matter before the Com-missioner under the Workmen's Compensation Act; and thirdly in such circumstances the question of

prosecuting in good faith before a Tribunal which from defect of Jurisdiction and other causes of like nature is unable to entertain it, does not arise.

19. Therefore, the dismissal of the petition under ground No. 2 is unassailable. This appeal is dismissed with costs.