
(1965) 08 GUJ CK 0001
In the Gujarat High Court
Case No : Appeal No. 116 of 1963

Union of India

APPELLANT

Vs

Gopaldar Varandmal and Another

RESPONDENT

Date of Decision : 13-08-1965

Acts Referred:

Workmens Compensation (Amendment) Act, 1959 — Section 2(1), 2(4)
Workmens Compensation Act, 1923 — Section 22, 3, 3(1), 3(5)

Citation : (1966) 7 GLR 76 : (1965) 2 LLJ 636

Hon'ble Judges : M.U. Shah, J

Bench : Single Bench

Judgement

1. This is an appeal from an order of remand of a case passed by the learned Assistant Judge, Mehsana, in Civil Appeal No. 106 of 1961, on 7 August 1963, on his reversing the decision of the trial court disposing of the suit upon a preliminary issue. The issue was as regards the maintainability of a civil suit for damages by a workman in a civil court in respect of an injury to his eye resulting from the alleged negligence of his employer and the persons appointed by the employer to provide timely and efficient medical aid for treatment of the injury received by the workman in the course of his employment, when the workman had allegedly instituted a claim to compensation in respect of the injury under the Workmen's Compensation Act. The learned Judge has found that the suit as framed was maintainable and his finding is based mainly on the ground that the suit was one for damages suffered by the workman as a result of the negligence or want of care on the part of the employer and the doctors appointed by the employer and resulting in an injury to the workman's right eye and apprehensions of loss of vision to his left eye. The learned Judge has accordingly reversed the finding of the trial Court which had found that the suit was barred by Sub-section (5) of S. 3 of the Workmen's Compensation Act, 1923 (8 of 1923).

2. The respondent who was a workman was at the material time employed as a riveter in the workshop of the Western Railway at Mehsana. The plaint allegation

is that on 17 November 1958 at about 8 a.m. while the plaintiff (who will hereafter be referred to as workman) was working in the said railway workshop, an accident occurred and a foreign particle entered his right eye and caused grievous injury. This injury was caused by an accident arising out of and in the course of employment at Mehsana. However, he was not given any medical treatment at Mehsana Railway Hospital but was removed to Dohad Hospital. From Dohad, he was sent to Parel hospital at Bombay and from Parel hospital, he was removed to the J. J. Group of Hospitals at Bombay where he was treated under instruction from the defendant-railway, which will hereafter be referred to as the "employer." His removal from one place to another showed the negligence of the employer and as a result, the injury to his right eye was aggravated and an operation was performed in the J. J. Group of Hospitals on 27 November 1958 by the doctors appointed by the employer. The first operation did not prove successful and therefore, after some time, a second operation on his right eye was performed and this also failed. The injury to the right eye so caused in the course of his employment as alleged by the workman was likely in the medical opinion to affect his left eye and according to the medical opinion, it was necessary to remove the right eye in order to save the affectation to the left eye. I may say that it is not clear from the record before me whether the right eye was enucleated. It is the further case of the workmen that as a result of the negligence of his employer, which term would include the doctors appointed by the said employer to treat him medically, the vision of his left eye was impaired and there is apprehension of permanent loss to his left eye, besides there being an irreparable and permanent loss to his right eye. This, according to the workman, has deprived him of the happiness and zest of life; he has received a serious shock and has suffered considerable bodily and mental pain and his reasonable expectation of living a healthy and normal life has been considerably shortened according to the workman, has deprived him of the happiness and zest of life he has received a serious shock and has suffered considerable bodily and mental pain and his reasonable expectation of living a healthy and normal life has been considerably shortened and reduced. On these plaint allegations, the workman has filed a suit for damages at Rs. 10,000 against the said employer. This suit was first instituted in forma pauperis on 19 January 1960 and on the leave being granted, it was converted into regular Suit No. 150 of 1960 of the Court of the Civil Judge, Senior Division, Mehsana. In the suit, the Union of India through the Secretary, Ministry of Railways, New Delhi, was impleaded as defendant 1 and the General Manager of the Western Railway was impleaded as defendant 2.

3. The defendants resisted the plaintiff's suit and, inter alia, raised a preliminary objection as regards the maintainability of the suit in view of the fact that the plaintiff had earlier instituted a claim to compensation before the Commissioner appointed under the Workmen's Compensation Act, 1923 (8 of 1923), which will hereafter be referred to as the Act. It was also contended that, on the plaint allegations, cause of action did not arise within the jurisdiction of the Mehsana

Court and, therefore, the said Court had no jurisdiction.

4. On the aforesaid pleadings, the learned trial Judge raised a number of issues and amongst them were the following two issues 7 and 9 :

"7. Whether this court has no jurisdiction to hear this suit ?

9. Whether the present suit is not maintainable as the plaintiff had filed a claim under the Workmen's Compensation Act ?"

5. The learned trial Judge reached a conclusion that the suit was not maintainable in view of the provision of Sub-section (5) of S. 3 of the Act. He negatived the defendants' plea of want of jurisdiction of the Court on his findings that the alleged course of action had arisen at Mehsana. He held that defendant 2 was not a necessary party. However, on his finding on issue 9 that the suit was not maintainable, the learned trial Judge dismissed the workman's suit. In Civil Appeal No. 106 of 1961 that was filed by the said workman in the Court of the Assistant Judge at Mehsana, the learned trial Judge held that the suit was maintainable. He has agreed with the findings of the trial Court that the defendant 2 was not a necessary party and that Mehsana Court had jurisdiction to try the suit. He has set aside the findings of the trial court on the rest of the issues. In this view of the matter the learned Judge has remanded the suit to the trial Court for disposal in accordance with law. Aggrieved by these findings and the remand order, the employer, namely, Union of India, has filed this appeal which has now come up for hearing before me.

6. Sri Agraval, learned advocate appearing for the appellant, who will hereinafter be referred to as the employer, has contended before me that the workman having instituted a claim to compensation in respect of the injury, his civil suit for damages will not be maintainable by reason of Sub sec (5) of S. 3 of the Act. Sri Agraval has further contended that according to the plain allegations, the cause of action did not arise within the jurisdiction of the Mehsana Court, as the negligence which is alleged is the negligence of the doctors at Bombay and not at Mehsana. As the point involved is an intricate one and of far reaching importance, I have thought it fit to request Sri B. G. Thakore to appear as amicus curiae and I am thankful to him for his valuable assistance in the matter.

7. Before I discuss the aforesaid two contentions of Sri Agraval, it may be stated that it is not disputed that the workman had made an application to the Commissioner for Workmen's Compensation and this application which is Ex 17/1 and bears date 9th January 1960 was produced on the record of the trial Court. In the said application which was in prescribed form under S. 22 of the Act, the workman had made a concise statement of the circumstances in which the application was made and the relief of the order which he had claimed. In this statement, it was stated that while he was cutting rivets of a wagon in wagon repair department, Mehsana as a riveter, a foreign body flew and entered into his right eye. It was further stated that the workman had sustained the following injury :

"His right eye was severely and grievously injured and he was operated twice by the railway doctors but without success. The applicant has lost his vision in the said injured eye and it is feared by the railway doctors that he might lose vision in his another eye also and thus be rendered totally disabled permanently."

8. On this statement, the workman had claimed a lump-sum payment of Rs. 5000. While setting out the steps he had taken to secure a settlement by agreement, the workman has stated that there was a partial disablement for ever and an apprehension of permanent total disablement. The Commissioner has, after following the prescribed procedure, passed an order awarding the workman a compensation of Rs. 1,112. This was in addition to a sum of Rs. 148 paid earlier by the employer to the workman. The compensation was awarded for the injury sustained by workman to his right eye and this was considered as a permanent partial disablement. The injury was alleged and accepted a "loss to one eye" and the compensation was awarded on the basis provided for in Sch. I under Ss 2(1) and 2(4) as it stood before the Amendment Act 8 of 1959, which provides for payment of 30 per cent of loss of a workman's earning capacity. This award was made on 21 January 1963 during the pendency of the civil suit in the trial Court. No appeal has been filed against this award as stated by Sri Acharya.

9. It is clear that the workman had instituted a claim before the Commissioner for Compensation in respect of the injury sustained by him as a result of the accident that took place on 17 November 1958, that the aforesaid claim for compensation was instituted on 9 January 1960 and an award has been passed in the matter by the Commissioner 21 January 1963. It makes no difference that the award was given after the institution of the civil suit for damages by the workman out of which this appeal arises. Sri Agraval, therefore, contends that as the workman had instituted a claim to compensation in respect of the injury suffered by him as a result of the aforesaid accident, the workman was not entitled to maintain the civil suit for damages in respect of the injury.

10. In order to appreciate this contention, it will be necessary first to refer to the relevant provisions of the Act Section 2, Cls. (e) and (n), respectively, define the terms "employer" and "workman." It is not disputed that the plaintiff is a workman and defendant 1, an employer, within the meaning of the Act. Section 3 provides for the liability of the employer for compensation. Sub section (1) of S. 3 provides as under :

"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) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;

(b) * * *"

11. Proviso (b) refers to the injuries which are directly attributable to the acts of omissions and commissions of the workman and has no reference to the employer and has no relevance in the instant case. The next relevant provision to be considered is Sub-section (5) of S. 3 of the Act which reads as under :

"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) * * *"

12. Sri Agraval relies upon Sub-section (5) of S. 3 and contends that the application for compensation as well as the suit for damages are in respect of the same injury and, therefore, the workman having first instituted an application for compensation, he is not entitled to file a suit for damages in respect of the same injury in any Court of law. There is considerable force in this argument. However, the decision on this question will depend upon the material fact whether the relief prayed for in the workman's civil suit flows from the accident arising out of and in the course of the workman's employment with special reference to the alleged affectation to the workman's left eye and the resultant bodily pain, mental distress and other effects as stated in the plaint.

13. Now, as aforesaid, the workman's case as stated in the plaint is based on the allegation that after he had received the injury on that fateful morning of 17 November 1958, it was the duty of the employer to provide him with necessary, timely, speedy and efficient medical aid and the employer had failed in the discharge of his duty. It is further alleged that he was removed from Mehsana to Dohad and from Dohad to Bombay Parel hospital and ultimately to J. J. Group of hospitals at Bombay. The plaint allegation further is that as a result of the gross negligence of the employer which term, as aforesaid, would include the negligence and want of efficiency of the doctors appointed by the employer for the purpose, the workman has suffered permanent partial disablement to his right eye and his vision in the left eye has been impaired. He has further alleged that he has suffered mental and bodily pain and the expectations of his life have been shortened.

14. The first question which falls for consideration is whether the plaint allegations constitute the same cause of action as in the compensation application which will disentitle the plaintiff-workman to maintain the civil suit in respect of the injury. For this purpose, it has to be seen what are the injuries received by the workman and on what grounds he had prayed for damages in the

civil suit. Now, it cannot be dined that the injury to the right eye of the workman was caused as a result of the accident which occurred on that fateful morning and this arose out of and in the course of his employment and therefore, the workman's civil suit in respect of that injury would be covered up within the ambit of the relevant claim to compensation instituted by the workman under the Act in which proceedings the workman has been awarded compensation as aforesaid. Sub section (5) of S. 3 of the Act is intended to guard the employer against double jeopardy-double proceedings and double payments. That appears to be the object of the enactment of Sub-sec (5) of S. 3 of the Act. It is, therefore, necessary to consider whether the suit claim as subsequently instituted by the workman puts the employer to a risk of double proceedings and double payment. This, in my judgment, would be the correct test. I am fortified in this view by the following observation of S. Suppiah Chettiar Vs. V. Chinnathurai and Another, :

"A workman may, as an alternative to accepting compensation under the Workmen's Compensation Act, elect to avail himself of any other remedy against the employer 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 put his employer in double jeopardy. That is why the Act protects the employer not only against double payment but also against double proceedings. The option given to a workman 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 institute 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."

15. Now, it cannot be disputed that the injury which is received by the workman to his right eye is an injury within the meaning of Clause (e) of Sub section (1) of S. 4 of the Act. As a result of the aforesaid accident, a foreign body (bar of rivet) flew and entered into the right eye of the workman. This happened at the very time of the accident. Ultimately, the workman lost his vision in the right eye and, therefore, there was loss of right eye and therefore he would be entitled to compensation payable for loss of one eye which he has been already paid under the aforesaid order of the Commissioner which has been accepted by the workman. In Bai Shakri Vs. New Manekchowk Mills Company Ltd., , Shelat, J. (as he then was) in a case under the Compensation Act while considering the import of the word "accident" in S. 3 of the Act has observed as under :

"The word "accident" in S. 3 generally means some unexpected event happening without design even though there may be negligence on the part of the workman. It is used in the popular and ordinary sense and means a mishap or an untoward event not expected or designed. What the Act really intends to convey

is what might be expressed as an accidental injury. It includes not only such occurrences such as collisions, tripping over floor obstacles, falls of roof, but also less obvious ones causing injury, e.g., strain which causes rupture, exposure to a drought causing chill, exertion in a stoke hold causing apoplexy and shock causing neurasthenia. But the common factor in all these cases is some concrete happening at a definite point of time and incapacity resulting from the happening."

16. It is clear from the aforesaid observations with which I am in respectful agreement that the common factor in an accident is

"Some concrete happening at a definite point of time and incapacity resulting from the happenings."

17. Some concrete happening in this case is the foreign body being thrown in the right eye of the workman on the relevant day and the resultant incapacity is the loss of his right eye. Thus, it is clear that the loss of right eye to the workman was the incapacity resulting from the accident for which he had instituted a claim to compensation before the Commissioner. In my judgment, therefore, the civil suit for damages that is filed by the workman in the civil Court in respect of the injury, namely, loss of one eye, that is to say, loss of the right eye, will put the plaintiff to double jeopardy and as such, will fall within the mischief of Sub-sec (5) of S. 3 of the Act, and the suit in this respect will be barred and will not be maintainable; the workman having earlier instituted the claim for compensation for the said injury.

18. This takes me to a consideration of the other grounds on which the workman has claimed damages in the suit. The plaint allegation is that as a result of the negligence of the employer, he has lost his right eye and he had to depend solely on the remaining left eye which was now found to be affected and "medical experts were of the opinion that the said injured eye was tending to affect petitioner's other eye also gradually" and he apprehends the loss of his left eye. He has further based his claim on the grounds of shortening of his expectations of life and of physical bodily and mental pain that he has received. There are, inter alia, the grounds on which the workman has claimed compensation in the civil suit. Therefore, the question that now falls for my consideration is whether the civil suit for damages on these grounds and other stated grounds except the ones relating to loss of right eye can be said to be barred by the provisions of Sub sec (5) of S. 3 the Act.

19. Sri Agraval contends that the suit for damages on the other stated grounds is also barred by virtue of the provisions of Sub sec (5) of S. 3 of the Act. In order to substantiate his view, Sri Agraval has addressed me on the evolution of this branch of law relating to compensation to workmen for injuries suffered in the course of their employment. For this purpose, he has invited my attention to the corresponding provisions of the English Compensation Acts of 1906 and 1925. Sub-section (1) of Workmen's Compensation Act, 1906, reads as under :

"1. (1) If an any employment personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

This Sub section corresponds to Sub-section (1) of S. 3 of the Act. Sub-section (2) of S. 1 of the English Act reads as under :

"(2) Provided that

(a) the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed."

Proviso (a) corresponds to proviso (a) of S. 3(1) of the Act. It is not necessary to consider this proviso in this case. Proviso (b) of S. 1(2) of the English Act reads as under :

"(b) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

20. It may be stated that there is a corresponding provision in the new English Act (Workmen's Compensation Act 1925) and the corresponding provision is S. 29 of the said Act. The relevant provisions of the Act (Indian Workmen's Compensation Act 8 of 1923) are Sub-section (1) of S. 3 and Sub sec (5) of S. 3 of the Act However, it has to be noted that these Sub-sec (1) and (5) of S. 3 of the Act do not deal with and bar a civil suit for compensation for an injury caused by personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, for which provisions is made in the English Acts, The Indian Act is silent on this point and bars suits only for personal injury referable to accident within the meaning of S. 3(1) of the Act. The protection against the double proceedings or the double payment that is provided for by proviso (b) to Sub-section (2) to S. 1 of the English Act of 1906 and S. 29 of the English Act of 1925 materially differs in this respect from the relevant provisions made in Sub-secs. (1) and (5) of S. 3 of the Act. The omission of the words

"When the injury was caused by personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible,"

in the Act is significant. The legislative intent appears to be that the injury which flows as a result of the personal negligence or wilful act of the employer or of

some person for whose act or default the employer is responsible will not be covered up within the meaning of Sub-section (5) of S. 3 of the Act and will not operate as a bar to the institution of the civil suit.

21. Sub-section (4) of S. 1 of the English Workmen's Compensation Act, 1906, will also furnish a valuable guide in this connexion and reads as under :

"If within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such section, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act."

22. The corresponding provision in the new English Act of 1925 is Sub-section (2) of S. 29. There is no such corresponding provision in the Act and the omission to make similar provision in the Act is significant.

23. In this connexion, two passages from Halsbury's Laws of England, 2nd Edn., Vol. 34, at p. 961, may be referred to with benefit. In Part IV under the caption "Alternative Remedies" and S. 1 under the caption "Against the Employer," Paras. 1318 and 1319 read as under :

Paragraph 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 Employer, Liability Act, 1880, or against any other person. The workman cannot, however, recover both compensation under the Act and damages independently thereof."

Paragraph 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 to be 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."

24. On a careful consideration of the scheme of the Act and the relevant provisions of the Act along with the relevant provisions of the English Workmen's Compensation Acts of 1906 and 1925, in my judgment, the injury alleged to have been caused to the workman by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, cannot be said to be barred under the provisions of Sub-section (5) of S. 3 of the Act. I must say that Sri Agraval's reference to the relevant provisions of the English Act although not helpful to substantiate his view-point that the civil suit

in the instant case is barred as a whole, has been of valuable assistance to me to come to a conclusion.

25. In my opinion, a useful test for the purpose of determining whether a suit for damages on the ground of personal negligence or wilful act of the employer would be barred is whether the Commissioner working under the Act would have jurisdiction to entertain and grant relief in case of a claim for compensation or damages arising out of the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible. In my view, it cannot be said that the Commissioner can adjudicate upon the question of the personal negligence or wilful act of the employer or of some persons for whose act or default the employer is responsible and grant relief. The Commissioner will be concerned only with the question whether the injury caused to the workman by the accident arose out of and in the course of his employment and to what award of compensation the workman will be entitled to. This is the only possible view as it appears from the scheme of the act. In the instant case, the suit for damages on the grounds other than the one relating to the injury to the right eye is based on the alleged negligence of the employer and the doctors appointed by the employer and, therefore, this part of the suit claim could not have been adjudicated upon and no relief could have been granted to the plaintiff-workman in that respect by the Commissioner working under the Act. Applying the aforesaid test, in my judgment, the civil suit for damages on the second set of grounds (other than the one relating to the right eye) will not be barred by virtue of Sub-section (5) of S. 3 of the Act.

26. Again, the act of negligence of the employer or of some persons for whose act or default the employer is responsible which results in an injury to the workman is a distinct act and constitutes a different cause of action than the one referred to in Sub-section (5) of S. 3 of the Act.

27. In any view of the matter, therefore, it follows that the workman's suit on the grounds other than the aforesaid ground, namely, loss of right eye will in my judgment be not a suit for damages, in respect of any injury that can be said to be covered up by Sub-section (5) of S. 3 of the Act. Sub-section (5) will not, therefore, operate as a bar to the civil suit as aforesaid. The plaintiff-workman is, therefore, entitled to maintain the suit on the second set of grounds. I wish to make it clear that the question whether the "employer," which term would include the persons appointed by him, namely, the doctors in this case, were negligent or not and whether the employer is responsible for such an act will be questions to be decided by the trial Court in accordance with law. This decision of mine only decides that the workman-plaintiff is entitled to maintain the suit as framed save on the ground of loss of right eye.

28. Sri Agraval then contended that the civil Court at Mehsana has no jurisdiction to hear the suit. His submission is that the negligence alleged is that of the doctors at Bombay and, therefore, the Mehsana Court can have no jurisdiction. This is factually an incorrect statement. The relevant averment is to be found in

Para. 10 of the plaint which states that

"the cause of action arose at Mehsana on 17 November 1958 when the petitioner met with an accident and received injury in his right eye and again on 27 November and 20 December 1958 when the petitioner was negligently treated and operated on all these dates when no proper and reasonable care was taken towards the petitioner and again on all such dates and on 21 September 1959 when the petitioner made several representations for getting proper compensation and damages."

29. It is clear from the plaint allegation that the cause of action arose within the jurisdiction of Mehsana Court. The two Courts below were, therefore, right in coming to the conclusion that the Mehsana Court had jurisdiction and I am in agreement with the reasoning of the learned appellate Court Judge.

30. From the aforesaid discussion, in my judgment, it is clear that civil suit for damages filed by the workman against the employer would be maintainable on all grounds save on the ground of loss of right eye and the civil Court will have jurisdiction to try and determine the suit. The order of remand is, therefore, maintained with this modification.

31. In the result, the appeal partially succeeds. There will be no order as to costs of this appeal.