

(2000) 11 GUJ CK 0070
In the Gujarat High Court
Case No : First Appeal No. 702 of 1993

Varghese O.

APPELLANT

Vs

Mukund Construction Co.

RESPONDENT

Date of Decision : 23-11-2000

Acts Referred:

Citation : (2001) GLR 806

Hon'ble Judges : M.R. Calla, J;D.A. Mehta, J

Bench : Division Bench

Advocate : M.B. Buch, for the Appellant; A.R. Mehta, for the Respondent

Judgement

M.R. Calla, J.—This Appeal is directed against the judgment and decree dated 24.1.92 passed by the 3rd Joint Civil Judge (S.D.) at Nadiad in Special Civil Suit No.18/86 whereby the suit was decreed against defendants Nos.1 and 2 holding them to be jointly and severally liable for payment of Rs.51,037-10 Ps. with interest at the rate of 12% per annum from the date of the filing of the pauper application i.e. 19.3.84 till the day of full realisation of suit amount and with cost of the suit.

2. The Plaintiff in whose favour the Special Civil Suit was decreed as above has preferred this Appeal before this Court with the grievance that he was entitled to a sum of Rs.2,53,000/-- but the suit has been decreed only partly.

3. The plaintiff i.e. the appellant herein was employed with the respondent No.1 Mukund Construction Co., defendant No.2 being the Insurer. The plaintiff had filed the Special Civil Suit with allegations that he had joined the job of the Company as a turner on 30.4.83 at the rate of Rs.16/-- per day. The plaintiff requested that he may be made permanent. The defendant - Company did not make him permanent, that the plaintiff was entitled to bonus of 20% per year and 10% H.R.A. and other benefits which generally accrue to the permanent employees. It was alleged that while the plaintiff was working in the defendant - Company on the lathe machine on 28.6.83 a piece of iron from the lathe machine

penetrated into his left eye and his eye was injured. The plaintiff got the treatment at Mahemdabad, Nadiad and Ahmedabad but the vision of his left eye was not restored. It was further alleged that the defendant Company failed to provide precautionary measures and preventive tools to the employees, more particularly to the plaintiff being a turner working on lathe machine and, therefore, it was because of the negligence of the defendant - Company that the accident occurred in which plaintiff's left eye was lost. His case was that it was a case of loss of vision of his left eye forever. The plaintiff asked for financial help from the defendant Company for Rs.1000/-- but the defendant paid Rs.500/-. When the plaintiff asked for more help considering the treatment and nature of injury to his left eye and loss of vision, defendant did not help. The plaintiff got treatment as indoor patient in the Hospital from 30.6.83 to 28.7.83 and 8.8.83 to 27.9.83. He had to bear the expenses for his treatment, medicine, operation, conveyance and for special diet etc. The plaintiff alleged that he had undergone a debt to the tune of Rs.25,000/-- for this purpose and interest over this amount. He had not been able to re-pay the debt as defendant - Company failed to help him. It was also alleged that the plaintiff belongs to Kerala and his family members are residing at Kerala, plaintiff is the eldest son and he had the liability to maintain his family. Because of the injury and disability sustained by the plaintiff, his career and future prospects were adversely affected. The defendant Company also terminated the services of the plaintiff and because of the termination he was rendered jobless and he and his family members had to face starvation. A Certificate was given by the Medical Officer of Nagri Hospital that the plaintiff had suffered disability to the tune of 30% because of the loss of vision in the left eye and this fact was very well known to the defendant Company. The plaintiff pleaded the case of negligence against the defendant - Company in not providing precautionary measures and preventive tools and it was also pleaded that the defendant No.2 as an insurer was liable to pay the plaintiff's claim. The plaintiff claimed damages to the tune of Rs.2,53,000/-- under different heads as under:-

Rs. 25,000/- For the medicine, operation, consultation fees, conveyance, special diet etc. Rs.1,38,000/- For the actual-future loss as the plaintiff had sustained the physical disability of 30%. If no disability would have been sustained, the plaintiff would have been permanent in the labour market and would have earned applied to the plaintiff is Rs.575/- salary per month X 12 months X 20 years. Rs. 50,000/- For the mental shock, suffering and the agony sustained because of less vision to the left eye of the plaintiff. Rs. 15,000/- For the inconvenience caused to the plaintiff as there was none of his family members to attend him in the hospital, at the time of operation, treatment etc. Rs. 25,000/- For the loss of prospects in marriage because of the loss of the left eye of the plaintiff, his marriage prospects are adversely affected and therefore he will not get the good match. ----- Rs.2,53,000/- On these pleadings, Special Civil Suit for a sum of Rs.2,53,000/- was filed.

4. The defendant Company filed written statement below Exh.65 admitting the

fact that the plaintiff had joined the job on 30.4.83. It was also admitted that the accident had occurred on 28.6.83 and one piece of iron from the lathe machine penetrated into the left eye of the plaintiff. It was also partly admitted that the plaintiff had taken treatment at Mahemdabad, Nadiad and Ahmedabad, but the allegation with regard to not making him permanent has been contested. It was also denied that the plaintiff was entitled to get the benefit of bonus, H.R.A. etc. like permanent employees. The plaintiff's allegations that he was sincere, honest and hard-worker and that the defendant Company was satisfied with his work had also been denied. It was contended on behalf of defendant No.1 that it had no knowledge about the history of the plaintiff before he joined the services of the Company. The allegations of negligence were also denied and it was also pleaded that precautionary measures and preventive tools had been provided for, such as goggles and hand gloves. That the defendant No.1 had often instructed the employees to use precautionary measures but the plaintiff did not follow the instructions given by the defendant Company. It was also pleaded that the accident occurred and the injury was sustained while the plaintiff was on duty and, therefore, the case was only under the Workmen Compensation Act and not under the civil law. It was also pleaded that the Civil Court had no jurisdiction to try the Suit, more particularly when the amount was to be payable by the defendant - Insurance Company because there was a policy taken by defendant No.1 from defendant No.2. The defendant - Company had pleaded that there was no rejection of claim and it was also pleaded on behalf of defendant - Company that it had submitted the Claim Form. It was also pleaded that all precautionary measures had been taken and tools had been provided to its employees. The plaintiff had also filed a case before the Labour Court in which order was passed in favour of the plaintiff to restore his services to defendant No.1. The defendant - Company had paid Rs.1496-85 Ps. for the treatment as per the bills produced by the plaintiff and he was informed to produce Doctor's report and that the defendant No.1 was not liable for any amount, which was claimed. It was also pleaded that the Court had no jurisdiction to try the Suit and that the plaintiff is not entitled to get the amount as stated in para 10(a), (b), (c) and (d) of the plaint or any amount or interest from defendant No.1. Defendant No.2 had also filed written statement below Exh.66 admitting that the plaintiff was under the employment of defendant No.1 as daily wager as a turner and was not confirmed as permanent employee.

5. The trial court framed the following issues and recorded findings mentioned against each of the issues as under:-

(1) Whether this court has no jurisdiction to try the suit?

-- In negative

(2) Whether the plaintiff proves that he sustained injuries on his left eye due to accident which took place on 28.6.83 by rash and negligent act of the defendant No.1?

-- In affirmative.

(3) Whether the plaintiff has sustained disability i.e. loss of vision of left eye?

-- In affirmative

(4) Whether the plaintiff is entitled to the claim of Rs.2,53,000/-- or any other amount as damages against defendant No.1 and defendant No.2 jointly and severally?

Rs.51,037-10 plus interest at the rate of 12% p.a. from the filing of pauper application i.e. dated 19.3.84 and with cost of the suit.

(5) What order and decree?

-- Passed as below.

The suit was accordingly decreed for a sum of Rs.51,037-10 Ps. with interest at the rate of 12% per annum from the date of filing of pauper application i.e. dated 19.3.84 and with cost of the suit.

6. Aggrieved from this order that the decretal amount was too less and that the Suit ought to have been decreed for the entire amount, present Appeal has been preferred by the appellant.

7. Learned counsel for the appellant has submitted that against pain, shock and suffering a sum of Rs.50,000/-- has been granted by the trial court and a sum of Rs.1037-10 Ps was granted against medical expenses against the claim of Rs.2,53,000/-. Learned counsel for the appellant has urged before us that even if other aspects are taken to have been correctly decided by the trial court, the grant of no amount whatsoever against the loss of future income, although it was established by evidence that it was a case of loss of 40% disability so far as the vision of the left eye is concerned is certainly a matter which requires consideration by this Court. Learned counsel for the appellant has submitted that the Nagri Hospital had found the disability to the extent of 30% only but Dr.Ashok D.Patel - P.W.3, who was examined at Exh.93 categorically stated that it was a case of 40% disability. The trial court did not deal with this aspect at all and rest contended by saying in the end of para 10 of the impugned judgment that it can be said that the plaintiff has sustained disability as he lost vision of left eye. Learned counsel for the appellant has submitted that actual extent of disability has not been determined and no definite finding in this regard has been given by the trial court and this finding is obviously vague. It has been submitted that the income of the appellant was Rs.16/-- per day, which can be rounded to Rs.500/-- per month.

8. The argument of the learned counsel for the appellant is that by treating his monthly income to be Rs.500/-- and taking into account the 40% disability, the appellant should have been granted certain amount against future loss of income. No other point has been urged or pressed before us.

9. Learned counsel for the respondent - Insurance Company has argued that the appellant should have actually approached the Workmen Compensation Commissioner for compensation.

10. The question of jurisdiction i.e. Issue No.1 has been correctly decided by the trial court and we are in agreement with the reasons recorded and finding arrived at by the trial court that the appellant - plaintiff had the discretion to choose his remedy. In the context of the terms of Exh.109 also the remedy at common law could not be treated as closed or excluded. The remedy under Workmen Compensation Act does not foreclose the civil right to approach the Civil Court and it was open for the plaintiff to opt either of the two remedies.

Even if we examine the case from the point of view of compensation under the Workmen Compensation Act, according to Schedule I Part -II, the list of injuries deemed to result in permanent partial disablement, Item No.(25) under the heading of "Other Injuries" loss of one eye, without complications, the other being normal, is a case of 40% loss of earning capacity. We find no reason to disbelieve the say of P.W.3 Dr. Ashok Patel examined at Exh.93 that it is a case of 40% disability. In this view of the matter, the appellant's capacity to earn in future stands reduced by 40% and he has to be compensated adequately for this loss of 40% income. In the facts of this case, this loss of income for future comes out to be Rs.200/-- per month i.e. Rs.2400/-- per annum. The age of the appellant being 23 at the time when he met with this accident, if we apply the multiplier of 15, the amount against loss of income comes out to be Rs.36,000/-, in addition to the amount, which has been granted to the appellant for pain, shock and suffering and against the expenses of medicine etc. We find that on this aspect, the impugned judgment suffers from the vice of non adjudication and had this grievance of the appellant been adjudicated by the trial court, the appellant would have been found to be entitled for a further sum of Rs.36,000/-- in addition to the amount, which has been granted. Accordingly, we hold that the appellant is entitled to a further sum of Rs.36,000/--, in addition to what has been granted by the trial court, with interest at the rate of 12 per cent per annum from 19.3.84 (date of application) till the date of realisation and the decree passed by the trial court is modified accordingly.

11. Thus, the Appeal is partly allowed to the extent as above and the decree be drawn accordingly. In the facts and circumstances of this case, no order as to costs.

12. Taking into consideration the long period, which has already lapsed and the fact that the accident had occurred way back in 1983 and even this Appeal before us is as old of 1993 and the decree had been passed in the year 1992, we expect that the respondents jointly and severally would pay the due amount to the appellant as per this order, as early as possible, but in no case later than eight weeks from the date the certified copy of this order is produced before them.