KERALA HIGH COURT

P. Asokan

Vs

Western India Plywoods Ltd

C.M.A. No. 184 of 1983

(P.C. Balakrishna Menon, K. Sukumaran and M. Fathima Beevi, JJ.)

22.12.1986

JUDGEMENT

Sukumaran, J.

1. The question referred to the Full Bench relates to the interpretation to be placed on Sections 53 and 61 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the 'Act').

2. A Division Bench of this Court made some general observations on the scope of the sections in the decision in *Abad Fisheries v. Commr. for Workmen's Compensation*[1] The correctness of the observations was doubted by the Division Bench. Those observations would in one view be treated as obiter, in the light of the ultimate factual situation about the payment effected to the claimant, which was noted with satisfaction in the decision itself. It was felt desirable that the legal position is laid down authoritatively by a Full Bench of this Court, as the decision had wide application in relation to large number of claims arising in the industrial sector.

3. The C.M. Appeal is against an order of the court below which upheld the defendant employer's objection about the ouster of jurisdiction of the Civil Court, when the employee initiated proceedings invoking Order 33 Rule 5 Civil Procedure Code to sue the employer as an indigent person. The allegations of the employee and the objections of the employer may briefly be referred to.

4. The employee, a graduate in Science, was absorbed in the establishment after completing a period of one year apprenticeship. He was a student member of the Institution of Engineers (India) with effect from 11-2-1978. An accident occurred when he was attending to the roller mill installed in the factory of the employer; it resulted in the amputation of his left hand. At that time, he was preparing for the Associate Membership examination of the Institute. The loss of the hand, according to him, casts a life-long disability in designing and drawing, which are indispensable for writing the papers in "Engineering Drawing" and "Chemical Engineering Design." The loss of his arm makes him dependant upon another person as a help for, attending to his own physical requirements. The disablement benefit from the Employees' State

[1]1985 Ker LT 104

Insurance Corporation at the rate of Rs. 262.50 per month, would not in any way compensate him for the loss and agony sustained and suffered by him. Under diverse counts, compensation for a sum of Rs. 1,50,000/- was claimed. Before the court below it was clarified on his behalf that what he was claiming was not any benefit under the Employees' State Insurance Act or any other enactments but only damages or compensation for the injuries sustained by him due to the negligence of the employer.

5. He stated that he had not the means to pay the court fee payable and accordingly invoked Order 33 Rule 5 Civil Procedure Code to sue as indigent person.

6. The petition was opposed by the employer contending that the employee had no cause of action against the employer, the suit was barred by virtue of Sections 53 and 61 of the E.S.I. Act, and consequently a petition to sue as an indigent person has to be rejected under clauses (d) and (f) of Order 33 Rule 5 Civil Procedure Code, there being no good and valid cause of action and the suit of the nature being barred under a statutory enactment. The claim about the lack of means as pleaded by the petitioner was also contested.

7. The court below rejected the latter contention and took the view that the petitioner had no means to pay the court fee payable on the plaint.

8. However, the court below found that the petitioner was not entitled to sue as an indigent person both under clauses (d) and (f) of Order 33 Rule 5 Civil Procedure Code.

9. The view taken by the court below is challenged in the appeal.

10. The question is undoubtedly of great general importance. It was felt *prima facie* that, in a sense, restricting an employee to a total compensation as provided under the Act may result in subjecting him to a grossly differential and unjust treatment in the matter of his getting damages under law, and that such a situation may even imperil the validity of Section 53 of the Act, if it is construed literally and as widely as it appears in its form. The legal and constitutional implications involved in the issues for consideration before the court were such that this Court desired to have assistance in the case from a counsel. Sri. T.R.G. Warrier, on our request, usefully helped the court in projecting the case of the appellant. Sri. Sankaran Nair to whom notice was given, appeared for the Employees' State Insurance Corporation. Notice was also caused to be given to the Senior Central Government Standing Counsel.

11. We are of the view that the suit as framed does disclose a cause of action and consequently the rejection of the suit as bereft of a cause of action is unsustainable. There is no contention that the suit is filed beyond the prescribed time or that under ordinary circumstances, a suit for damages for negligence of a person is inconceivable. On a proper interpretation of the averments of the plaint, a cause of action is clearly disclosed. Whether the suit is liable to be dismissed on other grounds, including a statutory bar is an entirely different question.

12. The more important question is whether, to employ the language of clause (f) of Order 33 Rule 5, "the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force." For deciding this question, what are to be scanned by the court are the allegations in the application. At that stage, the court is not concerned whether it is open to the defendant to raise in the written statement, and to sustain it ultimately a

plea of a statutory bar. The court at that juncture is not justified to clutch at a plea dehors the averments in the plaint and on that basis to suppress the legal proceedings initiated by the indigent person. This is particularly so in view of the change in the language of the relevant clause after the amendment of the Code in 1976. The principles contained in the decision in *Gobardhan Das v. Raghunandan Das*[2], (where earlier case law is surveyed) would apply with greater force in the present context.

13. In the present case, the court below has drawn freely on the detailed contentions raised in the objection, and the submissions regarding the scope and ambit of the Employees' State Insurance Act and in particular Section 53 and 61 thereof, to take the view that the suit is likely to be barred on the basis of such submissions. This is clearly impermissible on a proper and correct interpretation of the above provision. If a person had filed the suit after payment of the court fee, that suit would not have been liable to be dismissed at that stage, without considering and deciding an issue relating to the sustainability of a statutory bar as pleaded by the defendant. The situation cannot be different, for the only reason that the suit happened to be filed by an indigent person. The rejection of the plaint at the threshold stage under Order 33 Rule 5 is unsustainable.

14. The above finding would lead to the setting aside of the order of the court below. It may have to consider the matter over again. While doing so the court below will have necessarily to advert to the observations made by this Court in 1985 Ker LT I04 supra. If the observations do not represent the correct law, it will only create prolonged agony for the employee, who had been the victim of the accident. That course has to be avoided if possible. The correctness of the decision has therefore to be examined herein now.

15. We may at the outset refer to the background of the industrialisation of the country and the emergence of the Labour Laws.

16. India also had its industrial activisation, particularly after the first World War and along with it, emerged some labour enactments. The winds of change, the liberal ideas, the inspiration of revolutions elsewhere, all had given momentum to the emerging trade union forces. The clamour for better employment conditions could no longer be ignored. Legislation was undertaken in the background of expanding industrialization and strongly emerging trade union organization. Dr. Ambedkar, while functioning as the Law Member of the Viceroy's Executive Council, brought about labour legislations of great sweep and impact. The Industrial Disputes Act, 1947, the Employees' State Insurance Act, 1948 and the Industrial Employment Standing Orders Act, 1947, were some measures of that period. They strived to usher in industrial peace, regulated conditions of employment, and conferred some benefits

[2] AIR 1968 Ori 213

in the organized sectors of industry.

17. We have referred to the above background only to show that the Act, as eloquently stressed by its own preamble, was one intended to confer benefits on the workmen and not to put a ceiling on the legal liabilities of an employer.

18. The fact that this Act was not applicable to all the industrial establishments is not without significance. Only such of those units who could have the capacity to share the burden so caused under the enactment, were brought within the purview of the Act. The dominant idea of the

enactment was to confer benefits on the workmen, and not reduce or restrict a preexisting liability of the employer.

19. Before we advert to the statutory scheme of the Act, and consider pointedly the specific provisions of the enactments referred to above, it is desirable to sketch a general background of the law as it dealt with the liabilities arising out of employments in the organized industrial sector.

20. Law had no difficulty in projecting an equity aspect, in imposing a burden on the master and relieving the hardship of the servant, who was at any rate in those days, an underdog, with unlimited disabilities and difficulties. Even when the servant was guilty of a tort, the master also was saddled with the responsibility to meet the claim of the victims of the servant's negligence. The theory of vicarious liability was evolved and developed over the years.

21. It is better to have a peep into the working of the factories to which the Act had application. In its early stages, the work was fraught with bodily risk. Some were direct; and some indirect. Many such injuries came to be termed as 'employment injuries'. Some were categorized as accidents. The cost of relief against such mishaps was cast upon the masters or the employers. The inter-position of a disease would not render the accident otherwise than one arising out of the employment, when such employment did lead to an injury. As a learned Law Lord explained the concept :

> "A workman in the course of his employment spills some corrosive acid on his hands; the injury caused thereby sets up erysipelas - a definite disease; some trifling injury by a needle sets up tetanus. Are these not within the Act because the immediate injury is not perceptible until it shows itself in some morbid change in the structure of the human body, and which when shown we call a disease ? I cannot think so."

(See *Brintons Limited v. Turvey*[3], A line of cases discussing such concepts may throw some light in understanding sickness and sickness benefits in respect of which also provisions are made under the Employees' State Insurance Act.

22. Some reference is also necessary as regards the liabilities of an employer under law when through a negligence attributable to him or to his agents or employees, a person suffers injury and loss. The liability relating to negligence evolved through centuries, is fairly crystallized on some of these aspects. A tortious liability is clearly

[3](1905 AC 230)

posited on the employer in such cases. Even in situations where tortious liability would not arise, liability may arise by virtue of the operations of statutes. Some may be even strict liability as that term is understood in law. In respect of a self same act or omission, an employer may get exposed to a plurality of liabilities. A liability created under a statute and to be remedied under the statute, does not without more, destroy or efface or extinguish an antecedent liability existing under common law or otherwise. The following passage occurs in 'Mc Gregor on Damages' at paragraph 274 :

> "Where a single act violates two separate interests protected by the law two causes of action arise."

Again it has been stated at paragraph 279 :

> "Where a single act not actionable *per se* causes separate damage on two separate occasions, it seems that two causes of action accrue."

The author notes in para 900 at page 606 :

> "A large body of case law exists upon the duty owed by the employer to the employee in respect of the latter's physical safety. The actions sound as much in tort as in contract;..."

The learned author further notes about social security benefits and statutes which provides a compromise solution (See Para 1124 at page 758). The same idea is expressed by Charlesworth on 'Negligence' in para 201 at page 133 :

> "It is a familier position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other."

Again in para 1175 at page 705, it is stated :

> "A statutory duty not infrequently gives rise to a liability to a civil action. This liability is sui generis and quite independent of any other form of tortious liability."

A question was raised of page 710, para 1187 in the following sentence :

> "Where the statute creates a liability not existing at common law and provides a particular remedy - Is it the only remedy ?"

It was answered as follows :

> "It depends on the object and intention of the statute."

23. Clerk and Lindsell on Torts deal with this topic at page 212 (para 5-09). It is stated :

> "Itemisation of awards. In all but a few exceptional cases the victim of personal injury suffers two distinct kinds of damage which may be classed respectively as pecuniary and non-pecuniary. By pecuniary damage is meant that which is susceptible of direct translation into money terms and includes such matters as loss of earnings, actual and prospective, and out-of-pocket expenses, while non-pecuniary damage includes such immeasurable elements as pain and suffering and loss of amenity or enjoyment of life."

And again at page 227, there occurs the following observations of Lord Reid :

> "It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or the public at large, and that the only gainer would be the wrongdoer."

This feature of a single act or omission generating liabilities under different branches of law should not be lost sight of while we approach the interpretation of a seemingly simple Section such as the one contained in the Employees' State Insurance Act, 1948.

24. In relation to the interpretation of statutes courts will have a positive role to play. If a Section yields two different interpretations, that which leads to an arbitrary or shockingly unreasonable result has to be eschewed. If an interpretation is such that it will expose the enactment to a distinct peril of invalidation as offending a Constitutional provision, the courts would be fully justified in reading down the provision and giving it an interpretation consistent with its constitutionality. Even the courts without much of enthusiastic exuberance of judicial activism can bring about just results by a meaningful interpretation.

25. The scheme of the enactment on a close analysis, takes care of only such liabilities as are geared to the employment injury. They do not purport to deal with the tortious liability of an employer. The enactment is not one intended to relieve the employer of the alleged hardship arising out of a multiplicity of liabilities, which is simultaneously a tort under common law and a violation of a statutory provision. A different view would produce patently discriminatory results which could hardly be upheld by an alert judicial mind. Take the case of a stranger suffering an injury or meeting with death as a result of a negligent operation of an employer's machinery. Doubtless, for the tortious liability, the stranger or his legal representatives can sue, and secure through the process of law, a substantial sum by way of monetary compensation for the loss and suffering arising from such negligent act or omission of the employer. The compensation is calculated on the basis of well-known factors relevant in that connection. Quite often, substantial sums would be awarded by way of compensation. No artificial ceiling as provided under the enactment (the E.S.I. Act) would operate in such a case. Should there be a reduction, and sometimes such a drastic reduction in the compensation payable, for the only reason that the victim is none other than the employee ? No doubt, he had put on the employee's garb when the accident happened. Can he be differentially treated for that inconsequential attire ? The answer, we conceive, must be an emphatic negative.

26. We may therefore reiterate that the scheme of the Act is to give additional benefits to a needy Section of employees. The benefits under the E.S.I. Act can be claimed by only those whose wages are below the statutorily fixed amount. The employee also, has generally to make his contribution for getting the benefits provided under the Act. A person employed for a higher remuneration, would not be deprived of the better benefits, even while he does not make any contribution as in the case of the employee covered by the E.S.I. Act. It does not stand to reason that the weaker Section of the employees who make an additional contribution from their wages, should lose all other benefits available under law, to others similarly situate.

27. A single act can give rise to a multiplicity of causes of action. That is now fairly well recognized. It is unnecessary to refer to all the decisions on the point. Mc Gregor on Damages deals with that aspect in paras 274-275. The different heads of pecuniary damages have been similarly dealt with in paragraphs 1094 and 1218.

28. The observations of Lord Russell of Killowen while dealing with the English enactment of 1934, would also lend support to the view we have taken. (vide *Rose v. Ford*[4],.) Clerk and Lindsell have noted that in addition to social insurance, common law action is on the increase. (vide page 578 para 963.). Reference may also be made in that connection to the decision in *Mc Leod v. Bauer*[5], This also indicates that the role of the socially beneficent legislations is not to suppress remedies available even anterior to their enactments. Such social welfare legislation should receive liberal construction as has been stressed by the Supreme Court in *Chairman, Board of Mining Examination v. Ramjee*[6],

29. We are comforted that such an approach and attitude have been adopted by the highest court in the land and by other courts, although in different factual situations. The approach and attitude are common and fundamental, notwithstanding the difference in the statutory provisions applicable in the case. Some of the decisions of the Supreme Court, of the Karnataka High Court and of the Bombay High Court may be referred to in that connection.

30. In three decisions, the Supreme Court, dealt with the analogous provisions like sickness benefits granted under Employees' State Insurance Act and the impact of the statutory provisions on Section 61. An interpretation protecting the rights of the workmen and liberal in his cause in that sense, had been adopted by the Supreme Court. (See *Hindustan Times Ltd. v. Their Workmen*[7], and *Technological Institute of Textiles v. Its Workmen*[8], In the latter case, there is the following significant observation :

> "It is apparent that the Employees' State Insurance Scheme does not cover all contingencies of sickness ....."

[4](1937) 3 All England Reporter 359
[5](1951) 2 Lloyd's Rep. 125
[6](1977) 2 SCC 256 : (AIR 1977 SC 965)
[7] AIR 1963 SC 1332
[8](1965) 2 Lab LJ 149)

(Emphasis supplied)

Notwithstanding the general treatment of sickness benefits under Section 49, the claim of a workman for sick leave was upheld by the Supreme Court as permissible; Section 61 of the Act did not pose a bar to the claim. The Supreme Court, highlighted an important aspect, namely the sufferings of the workmen, in dealing with the case before them. The court observed :

> "It has to be appreciated that a workman is prevented from earning the normal daily wages during the period of his illness and there is no justification for the argument that the rate of benefit at about half his wage, under the Act, should be considered sufficient so as to deny him the benefit of sick leave on full emoluments for a period of 7 days when he is certified by a competent medical officer to be ill for that or a longer period. Sickness is a serious misfortune to a workman for it not only prevents him from earning his normal wages, but is a drain on his meagre financial resources by was of additional expenditure on food, nursing and visits to the medical centre etc."

(See *Alembic Glass Industries v. Workmen*[9], at p. 2094.)

In other words, the court should not ignore the suffering workman, and drift in an area of abstract concepts when it interprets a socially benevolent legislation. The Division Bench of the Bombay High Court (*Coorla Spg. and. Wvg. Co., Bombay v. Trimbak*[10],) also dealt with a case of sickness benefit, pursuing the approach indicated by the Supreme Court decisions supra.

31. An illustration may probably make the idea clearer. Take for instance an accident causing loss to an employee or his dependants, arising out of the negligent operation of a motor vehicle of the employer. The employee may be covered by the E.S.I. Act, 1948 and entitled to claim the compensation provided therein. There is a liability in respect of such a negligence, cast under Section 110-A and other provisions of the Motor Vehicles Act, 1939. Sections 53 and 61 of the Employees' State Insurance Act may, at first blush, appear to bar the victim of the tragedy from claiming the more advantageous benefits under the Motor Vehicles Act, 1939. That would, doubtless, operate to the disadvantage of the employee. He loses the benefit of a higher compensation only for the reason that he is an employee. It is difficult to assume that Parliament intended such an oppression to operate on the employees, when it enacted the Employees' State Insurance Act. The Mysore High Court adopted a construction of the E.S.I. Act and the Motor Vehicles Act, which advances the cause of the victim. It was held that the liability for negligence arose under the law of tort and that when the substance of the liability was tortious, the statutory modulation of the remedy did not deprive him of such compensation for such tortious liability, Section 53 of the E.S.I. Act notwithstanding. This progressive liberal and just interpretation commends itself for our acceptance.

32. In the light of the above discussion, we are unable to subscribe to the restricted view, taken in some of the different contexts, in *National Insurance Co. Ltd. v. P. Saraswathi Mohan*[11], following *Mangalamma v. Express*

[9]AIR 1976 SC 2091 [10]1979 Lab IC 936 [11] AIR 1982 Mad 371

Newspapers Ltd[12]*.,* and *Hindustan Aeronautics v. P.V. Perumal*[13], In the later case, only Section 61 of the Act was considered. There was no discussion on the scope of Section 53.

33. In the light of our above discussion we are unable to agree with the observations of the Division Bench as contained in 1985 Ker LT 104 supra. We hold that Sections 53 and 61 of the E.S.I. Act do not bar the action as pursued by the appellant in the court below in the circumstances indicated above.

34. In the result, we allow the appeal and set aside the order of the court below. That court will now deal with the petition on its merits and proceed in accordance with law. We direct the parties to bear their respective costs.

Appeal allowed.