(1964) 02 BOM CK 0001

Bombay High Court

Case No: Appeal No. 271 of 1962

Amritlal and Co. (Private), Ltd.		APPELLANT
	Vs	
Employees'' State Insurance Corporation (At Bombay)		RESPONDENT

Date of Decision: Feb. 6, 1964

Acts Referred:

- Employees State Insurance Act, 1948 - Section 66, 82
- Factories Act, 1948 - Section 21(1)

Citation: (1965) 2 LLJ 200

Hon'ble Judges: Y.V. Chandrachud, J

Bench: Single Bench

Judgement

1. This is an appeal against an order passed by the employees'' Insurance Court, Bombay, allowing the applications filed by respondent 1, the Employees'' State Insurance Corporation, for recovering compensation from the appellants, Amritlal & Co. (Private), Ltd. The appellant own a factory which manufactures dyes and chemicals. One Paul Danial Mascarenhas was employed in the factory as a maintenance mechanic, whose normal duty was to repair machines and electrical equipment. On 21 January, 1958, Mascarenhas tried to change the belt on a moving pulley, when the transmission machinery was admittedly in motion. He put a hook less ladder against the shafting in order to reach the pulley, which is situated at a height of about 15 feet 6 inches from the ground. While the belt was being changed, the ladder on which Mascarenhas has standing slipped, and his left arm got entangled in the moving pulley, He succeeded in extricating his arm, but in the process he slipped from the ladder and his arm was fractured. Whether the arm was fractured as a direct result of the fall from the ladder to a depth of 15 feet or whether the injury was caused on account of the arm being entangled in the moving pulley, is not clear from the record.

2. On the very next day, that is to say, on 22 January, 1958, the appellants submitted a report to the Employees State Insurance Corporation as also to the Factories inspector, setting out the circumstances in which the workman received the injury. On 4 February, 1958 the Factories Inspector issued a notice to the appellants stating that they had committed a breach of S. 21(iv)(b) of the Factories Act inasmuch as they had failed to provide a secure fencing to the transmission machinery and calling upon them to show cause why they should not be prosecuted for the breach committed by them. It is relevant to mention that though the appellants denied the allegation made by the Factories Inspector, they have not been prosecuted.

3. On 5 December, 1958 the Corporation served a notice on the appellants stating in terms that the appellants had committed a breach of S. 21(iv)(b) of the Factories Act, that the injury to the workman was caused on account of the omission of the appellants to comply with the provision contained in the Factories Act, that the Corporation had become liable to pay the several benefits to the workman under the Employees'' State Insurance Act, and calling upon the appellants to reimburse the Corporation with regard the payments which the Corporation was thus liable to make. On 20 January, 1959 the Corporation filed an application in the Employees Insurance Court, Bombay, asking for reimbursement form the appellants under S. 66 of the Employees State Insurance Act. On 16 January, 1961 a person called Madhusudan Acharya, who was formerly in the employment of the appellants, was examined as a witness on behalf of the Corporation. On 1 February, 1961 the Corporation filed an application for amendment of the application, stating that the injury was caused to the workman also on account of the fact that the ladder, on which the workman climbed for the purpose of changing the belt on the pulley, was not provided with hooks, nor was it provided with anti-skidding device and that the appellants were negligent in not complying with rule 68 of the Bombay Factories Rules, 1950. On 19 May, 1961 the learned Judge purported to allow the amendment partially, but, frankly and with respect the order passed by the learned Judge is not easy to understand. The learned Judge observed in his order allowing the amendment partially that to the extent to which the Corporation was seeking to alter the entire cause of action the Corporation could not be permitted to amend the application, but to the extend to which the Corporation was trying to adduce one more reason in support of the claim made in the original application, it would be open to the Corporation to rely upon the additional circumstance that the ladder on which the workman was asked to climb in order to be able to change the pulley on the shaft, was not provided either with hooks or with anti-skidding device. After allowing the amendment, no fresh evidence was led and in December 1961 the learned Judge passed an order allowing the application filed by the Corporation asking to be reimburse with regard to the payments made by it to the injured workman. Being aggrieved by the order passed by the learned Judge, Amritlal & Co. (private). Ltd., have filed this appeal under S. 82 of the Employees State Insurance Act, which provides by Sub-section (2) that an appeal shall lie to the High Court from

an order of the Employee''s Insurance Court, if it involves a substantial questions of law.

4. Sri Jayakar, who appears on behalf of the Corporation, has raised a preliminary objection to the maintainability of the appeal, on the ground that the order passed by the learned Judge does not involve any question of law, much less a substantial question of law and therefore the appeal cannot be entertained. It is impossible to accept the contention of Sri Jayakar. The first error from which the judgment of the learned Judges suffers, as pointed out by Sri Gawade, is that the entire judgment is based on the assumption that Madhusudan Acharya, who was formerly in the employment of the appellants was examined as a witness not by the Corporation, as he in fact was, but by the appellants. The learned Judge has relied upon the evidence of Madhusudan Acharya to the extent to which statement were made by the witness in favour of the Corporation in his examination-in-chief. The learned Judge has, however, declined to attach any weight to the answers given by the witness in this cross-examination, obviously on the ground that the witness was trying to favour the appellant as a belated attempt. In para. 13 of his judgment the learned Judge observes :

"The witness Acharya, who was examined for the opposite party (that is to say, for the appellants) states that he was present when the accident took place and that in his presence the injured person was asked to put the belt on the pulley. He does not talk of any instruction given to the injured person not to work when the machine was in motion .... Only the cross-examination he stated that a procedure was laid down for putting on a belt and that the machine must be stopped before placing the belt on the pulley .... . So I very much doubt the genuineness of his belated contention that there was such a procedure."

5. It is obvious from the process of reasoning adopted by the learned Judges in Para. 13 of his judgment that were he conscious, as, with respect, he should have been, that Acharya was examined as a witness not by she appellants but the Corporation, he would not have failed to take into account the answers given by the witness in his cross examination. In fact, it has been overlooked that the evidence of a witness is not merely the answers which the witness gives in his examination-in-chief and it is incumbent on a Court dealing with facts, to take an integrated view of the entire evidence by not ignoring the admissions which the witness has made in his cross-examination. The learned Judge has dealt with the evidence of Acharya on the basis that Acharya was] examined as a witness by the appellant and has, on that assumption, tried to find faults with the evidence of that witness by indicating that the appellants did not choose to ask the witness in his examination-in-chief any questions with regard to the instructions which were supposed to have been given to the workman that he should not attempt to put a belt on the moving pulley without cutting off the power supply to the transmission machinery.

6. It is not as if the statements contained in Para. 13 of the judgment are stray or casual. In para. 16 of the judgment the learned Judge has reverted to the evidence of Acharya again and observes that :

"But Acharya, the opposite party''s witness, swears that he had instructed the injured person to fix hooks to the ladder, ..."

7. The entire judgment is thus influenced by an assumption which is wrong and that, in my opinion, would be sufficient to vitiate the order passed by the learned Judge.

8. There is another error, equally serious, from which the order passed by the learned Judge suffers. A part of the judgment, as stated earlier, is based on an unwarranted assumption and that part of the judgment which is not based on this assumption is based on evidence which seems to me to be clearly inadmissible. The defence of the appellants to the claim made by the Corporation was that the pulley was situated at such a height from the ground, it may be recalled, that the distance between the ground and the pulley is 15 feet 6 inches, that in the normal course of circumstances, danger from the unfenced pulley could not be reasonable foreseen. It was also contended on behalf of the appellants that specific instruction were given on several occasions that no workman should attempt to change the belt on the pulley while the transmission machinery was in motion. The learned Judge has rejected this defence on the ground that in the accident report which was sent on behalf of the appellants on 5 December, 1958, the appellants had made a reply which was inconsistent with their defence that instructions were given to the workmen not do mount the belts on moving pulleys. Clause (c)(ii) of the statutory form in which the accident report is required to be sent contains the query :
"In our opinion, was the injury due to an accident directly attributable to the willful disobedience of the injured person to and order expressly given or to a rule expressly framed for the purpose of securing the safety of employees ?"

9. The answer given by the appellant to this query is in the negative. The learned Judge relies upon the answer and has proceeded to infer that in view of the negative answer made on an earlier occasion, the defence of the appellants that instructions were issued to the workers not to mount the belts on moving pulleys was an afterthought. The errors into which the learned Judge has fallen is that though the accident report dated 5 December, 1958 was admitted in evidence by consent of parties, all that appears to have been consented to was that such a report was in fact made. There was no concession as regards the truth of the statements contained in the report and the learned Judge seems to me to be clearly in error in assuming that the statements contained in the report would bind the appellants. Assuming for the sake of argument that a concession was made that the statements contained in the accident report should be taken into account, the learned Judge could surely not have ignored the other documents which also went in by consent. Along with the accident report which was put on the record at the instance of the

Corporation, four other documents were also produced and one them is at Ex. 13 which is a reply dated 11 December, 1958 made by the appellants to the Corporation. In that reply the appellants have stated expressly that specific instructions were issued to the workers not to mount the belt on moving pulleys and that Mascarenhas had treated on a treacherous ground by disobeying the instructions which were given by the company. The serious errors into which the learned Judge has fallen must vitiate his judgment and Sri Gawade seems to me to be right in contending that the order passed by the learned Judge involves a substantial question of law.

10. The question which arise is whether the Corporation is entitled to be reimbursed by the appellants under S. 66 of the Employees'' State Insurance Act. Section 66 provides, in so far as is material, that where any employment injury is sustained by an insured person as an employee under the Act, by reason of the negligence of the employer to observe any of the safety rules laid down by or under any enactment applicable to a factory or establishment, the Corporation shall be entitled to be reimbursed by the employer to the extent of the actuarial present value of the periodical payments which the Corporation is liable to make under the Act. There are several impediments in the way of the Corporation in proving its claim for reimbursement. In the first place, the pulley on which the workman attempted to mount the belt, is situated at a height of 15 feet 6 inches from the ground and in the normal course of circumstances, a risk emanating from such as unfenced pulley cannot be said to be reasonably foreseeable. Section 21(1)(iv)(b) of the Factories Act, of which the contravention is alleged provides that in every factory every part of the transmission machinery shall be securely fenced unless it is in such position or of such contraction as to be sage to every person employed in the factory as they would be if they were securely fenced. It is well-settled that though the liability which the Factories Act imposes on the employers is in the nature of an absolute obligation and though the absolute obligation has to be discharged by providing for cases in which the workmen may be unwary, indolent, inadvertent or careless, yet the liability does not extend to cases in which the danger is not reasonably foreseeable - see State v. L. C. Patel 61 Bom. L.R. 1021. The learned Judge has taken the view in Para. 10 of his judgment that an unfenced pulley was not sage for an employee who was asked to change the belt on the pulley and that, therefore, it could not be said that the particular part of the transmission machinery was safe by reason of its position. The learned Judge has unfortunately overlooked the evidence of Acharya that specific instructions were issued to the workmen that they should not attempt to change the belts on moving pulleys when the transmission machinery was in motion. The position of the pulleys which would normally eliminate a reasonable possibility of danger and the specific instructions which were issued by the appellants would take the case out of S. 66. Sri Gawade has drawn my attention to a rather significant circumstance that in the several reports which were made from time to time by the Factories Inspector, it was never suggested that the

pulleys were not in a safe position or that they were required to be fenced. It is also significant that despite the notice which was given to the appellants on 4 February, 1958, no prosecution was eventually launched against them. The view taken in a large number of English decisions, which are referred to in the judgment in State v. L. C. Patel 61 Bom. L.R. 1021 (vide supra) is that in order to determine the question as to whether particular employer has committed a breach of the safety rules, the relevant consideration is whether without an actual accident happening the employer could have been prosecuted for noncompliance with an absolute provision. Not unoften the circumstances that an injury has been caused to a workman, alters the entire complexion of the matter and one is apt, rather too readily, to resort to the principle res ipso loquitur. It seems to me plain, from such facts as they appear on the record of the present case that the appellants were not prosecuted for the breach which is now alleged against them, because the prosecution would possibly not have succeeded.

11. For these reasons, the order passed by the learned Judge will be set aside and the appeal will be allowed with costs throughout.