(1957) 01 CAL CK 0009

Calcutta High Court

Case No: A.F.O.O. No. 225 of 1955

Sukhai		APPELLANT
	Vs	
Hukum Chand Jute Mills Ltd.		RESPONDENT

Date of Decision: Jan. 22, 1957

Acts Referred:

- Evidence Act, 1872 - Section 101
- Workmens Compensation Act, 1923 - Section 2(1), 3, 4(1)

Citation: AIR 1957 Cal 601 : 61 CWN 352 : (1958) 2 ILR (Cal) 63

Hon'ble Judges: Chakravartti, C.J; Mallick, J

Bench: Division Bench

Advocate: Nalini Kanta Mukherjee and Ram Krishna Das, for the Appellant;Phanindra Kumar Sanyal, for the Respondent

Final Decision: Allowed

Judgement

Chakravartti, C. J.

1. The appellant, Sukhai, was and is still employed as a cop-winder in the Jute Mill of the respondent jute company. On 26-12-1951, he was at his usual work when some chinese clay balls, attached to the winding-rod, broke loose and flying at a great speed, struck him in his left eye, causing a bleeding injury. He was immediately taken to the Chief Medical Officer of the Mills, who gave him first aid and then sent him to the Chinsurah Hospital for further treatment There the eyeball was removed on 3-1-1952. The workman was discharged on the 11th of January following, but it appears that he had to attend hospital [or further attention on certain subsequent dates as well. Ultimately, he resumed his duties on 5-2-1952.

2. The appellant, as I have already stated, is still in the employment of the respondent company. He is earning his usual wages and, according to his own evidence, he can do his usual work.

3. On 4-6-1952, the appellant made an application for compensation on account of the injury to his eye. He described the injury as ''loss of vision of the left eye (eye ball removed)'' and asked for a compensation of Rs. 1,260, subsequently amended to Rs. 882, on the basis that the injury was a scheduled injury and, therefore, the compensation was to be assessed on the basis of a thirty per Cent. loss" of the earning capacity. He stated his monthly wages to be Rs. 80 to Rs. 100 per month.

4. The respondent company admitted'' that the appellant was a workman in its employ, that an accident had happened to him in the manner alleged and that it had- also caused an injury to the appellant''s left eye. It was, however, contended that, nevertheless, the appellant was not entitled to any compensation, because the eye affected by the accident was already blind and, therefore, by the injury arising out of the accident and caused to the eye, the appellant''s earning capacity had in no way been affected.

5. The learned Commissioner for Workmen''s Compensation accepted the respondent''s case that at the time of the accident, the appellant was already blind of his left eye. In that view, he held that the appellant was not entitled to any compensation on the basis of a permanent partial disablement, but was only entitled to a half-monthly payment on account of his temporary disability during the days on which he had been unable to attend to his duties. The amount awarded by the Commissioner as half-monthly compensation was Rs. 50.

6. In proof of its contention that the appellant was already blind of his left eye at the time of the accident, the respondent company relied on two documents, namely, Ex. A (1) which is the service-record in the name of the appellant, and Ex. A, his service card prepared on the basis of Ex. A (1). It also relied on depositions of one Debendra Nath Bose, a clerk of the Labour Office of the respondent who had written and signed Ex. A (1) and one S.R. Mehta, the Labour Officer, who also had signed the same exhibit. The appellant entered the service of the respondent company in 1942, but it appears that the system of having a service-record and preparing service-cards was introduced only in 1947. The entry in Ex, A (1), against the column ''Identification Marks'', is ''Blind by left eye'' and the entry in Ex. A against the same heading is the same. Debendra Nath Bose who wrote Ex. A (1) stated that" when the appellant came to him. He found white spot on the pupillary area of the left eye and asked the appellant if he could see by that eye to which the appellant answered in the negative. S.R. Mehta deposed to the same effect. The Chief Medical Officer of the respondent company, Dr. P.K. Bose, to whom the appellant was taken after the accident, stated that he had found a big leucoma in the appellant''s left eye which was obstructing the pupillary area. He, however, admitted that he had not recorded the location of the leucoma or the site of the injury and that he was not an eye-specialist. The clerk who wrote Ex. A from Ex. A (1.) was not examined.

7. The learned Commissioner for Workmen''s Compensation held that there was no reason to think that, in 1949, long before the date of the admitted accident, the

entries made in the service-record and the service-card of the appellant had been incorrectly or falsely made. In the learned Commissioner''s view, the entries represented the true condition of the appellant''s eye, as it was in 1949, and that it followed that the appellant was blind of his left eye from before the date of the admitted accident.

8. Mr, Mukherjee, who appears on behalf of the appellant, tried to reopen the finding made by the learned Commissioner and pointed out that, in the course of his deposition in the present case, the appellant had stated that at the time the service-card and the service-record were written up, he had only shown a black mole in his left eye as an identification mark and that it was not a fact that the eye was sightless or that he had said so. We do not think that it is possible for us to go behind the learned Commissioner''s finding of fact and hold that the entries appearing in the service-record and the service-card were not honestly and truly made. The entries must be taken as genuine, but, at the same time, only for what they are worth, and it is not possible for us to hold in the face of the Commissioner''s finding that the entries had been incorrectly made, although there was in fact no white patch at the time in the left eye of the appellant and although he had not in fact said that he had no vision in the left eye.

9. Mr. Mukherjee next contended that even if the finding stood, his client was entitled to compensation on the principle laid down in the case of Ball v. William Hunt and Sons, Ltd., (1912) AC 496 (A). I am unable to see that the case cited by Mr. Mukherjee is of any assistance to him. The facts in that case were that a workman lost the sight of his left eye through an accident, but continued to work at his old rate of wages. Many years afterwards, he met with a second accident to the same eye which necessitated its removal. Before the second accident, although he was, in fact, a one-eyed man, the defect was not observable, but after the second accident it became observable with the result that although the workman applied for employment to several employers, none was willing to take him in on account of the visible disability. In those circumstances, the House of Lords held that the English Act which provided for compensation on account of incapacity for work was not limited to cases of incapacity to work. If, for example, a workman suffered an injury by accident which did not in fact reduce his capacity to work, but, at the same time, stamped him with such a visible mark of physical deficiency or deformity as dissuaded employers from employing him, ho would he incapacitated for work in the sense that his earning capacity would clearly be altogether destroyed. It was pointed out that the Workmen''s Compensation Act regarded a workman only as a wage-earner and was concerned not with any physical pain or suffering or disfigurement to which a workman might be subjected by accident, but only with, the loss of the power to earn wages resulting from the injury. If, therefore, a workman suffers as a result of an injury from a physical de-feet which does not in fact reduce his capacity to work, but at the same time makes his labour unsaleable in any market reasonably accessible to him, there will be either total incapacity for

work when no work is available to him at all or there will be a partial incapacity when such defect makes his labour saleable for less than it would otherwise fetch. The; capacity of a workman for work may remain quite unimpaired, but at the same time his eligibility as an employee may be diminished or lost. If such a result ensues by reason of the results of an accident, although the accident has not really reduced the capacity of the workman to work, he can establish a right to compensation, provided he proves by satisfactory evidence that he had applied to a reasonable number of likely employers for employment, but had been turned away on account of the results of the, accident visible on his person.

10. The case relied on by Mr. Mukherjee would be of assistance to him, if the facts were that, after the accident, the appellant had lost his job with the respondent company and had applied to other similar employers for employment, but had been unable to obtain any work because of his one-eyed condition. That this is an essential requisite which must be established before the principle of Ball''s case (A) can be attracted, was pointed out at great length by the Court of Appeal in England in the subsequent cases of Owners v. Llay Main Collieries Ltd., 25 B WCC 573 (B) and Hughes v. Pen-Maen-Mawr & Welsh Granite Co. Ltd., 26 BWCC 99 (C). There is no evidence in this case that the appellant has sought, but has been unable to procure employment. On the other hand, he is still in his old service and he is drawing his usual wages. The principle on which a workman can be allowed compensation for the results of an injury, although such injury may not in fact have affected his capacity for work, does not, therefore, apply in the present case and Consequently Ball''s case (A), is not relevant.

11. Mr. Mukherjee next advanced an argument based on the language of the Act. He contended that the injury suffered by the appellant in the present case was the loss of an eye and, therefore, one of the injuries expressly mentioned in Sch. I to the Act. He next pointed out that, u/s 3, a work- -man was entitled to compensation if personal injury was caused to him by accident arising out of and in the course of his employment and if such Injury had resulted in total or partial disablement of the workman for a period exceeding seven days. Proceeding next to the proviso to the definition of ''partial disablement'', as given in Section 2(g) of the Act, Mr. Mukherjee pointed out that according to the proviso, ''every injury specified in Sch. I shall be deemed to result in permanent parfait disablement'' and then he contended that, on the facts of the present case, a permanent partial disablement was to he deemed to have resulted under the very words of the statute and, therefore, the appellant was en- titled to the scheduled compensation without the aid of anything else.

12. Mr. Sanyal, who appears on behalf of the respondent, contended that the Act was not concerned with disablement, whether partial or total, in the physical sense, but was concerned only with disablement, alerting or destroying earning capacity. According to him, the direction of the statute, as contained in the proviso to Section 2(g), went only up to a presumption of a physical disability, but did not proceed

further to a presumption of loss or reduction of the capacity to earn and therefore it furnished no readymade basis for a claim to compensation.

13. In my view, the contention oF Mr. Sanyal is plainly not correct. ''Partial disablement'' of a workman is defined in the case of a disablement of a permanent nature a,s "such disablement as reduces his earning capacity in every employment which he was capable or undertaking at the time." The proviso says that "every injury specified in Schedule I shall be deemed to result in permanent -partial disablement." If one substitutes for the words ''permanent partial disablement'' occurring in the proviso, the definition given earlier in the section, it will read us follows : "Every injury specified in Schedule I shall be deemed to result in such disablement as reduces his earning capacity in every employment which he was capable of undertaking at the time." What is to be deemed under the mandate of the statute is, therefore, not limited to the physical aspect of the disablement, but extends to the reduction of the earning capacity as well. Prima facie, therefore, and if the words of the proviso to Section 2(g) read with Schedule I, are to be taken in a literal sense, the conclusion seems to be inescapable that whenever an injury of the kind specifically mentioned in the Schedule has been suffered by a workman as a result of an accident, he becomes instantly entitled to compensation and compensation of the amount prescribed by the Schedule without any necessity for any investigation into further facts.

14. This, however, does not seem to me to dispose of the matter. A far more difficult question still remains to be decided and that is whether in speaking of injuries to various organs and describing them as ''loss'', the Schedule has in view sound organs or merely the organs as such, whether sound or unsound. When an organ is lost in the sense that it is removed, that is to say, is sliced off by an accident or is amputated, it is obvious that the organ is lost in the physical sense and at the same time the functions of the organ are lost with it. When an organ is not lost in the physical sense, but its use is completely and permanently lost, then such loss is to be taken as the loss of that organ, as contemplated by the Schedule, by virtue of the Note thereto. The third case of the loss in a physical sense of an organ which was already useless, however, remains. In answer to the argument of Mr. Mukherjee, it may be contended that while it is right so far as it goes and right when it is applied to cases of injuries to sound organs, it cannot be held to extend to the case of the loss by accident of an organ which was already inert or useless. There is no reason, it may be said, why the Legislature should have thought of compensating a workman for the loss of something which was of no aid to his working or earning capacity without even any proof that some embarrassment had actually been caused.

15. The question is by no means free from difficulty. There is at least one case mentioned in the Schedule which would suggest that only the loss of a sound organ is contemplated, It is the case of a "permanent total loss ot hearing.'''' The reference

in that case is obviously to die function of the ear and not to the physical organ, but it may be said, on the other hand, that it was necessary to refer in particular to hearing, because, unlike other limbs or parts of the human anatomy, the ear lobes are not really organs of hearing and, therefore, the loss of the ear-lobes would not involve loss of power of hearing, as the loss of any other limb would involve the loss of its function. It is, however, not necessary to pursue this point on the present occasion any further, because, in my view, the case before us can be decided on another point.

16. Before I indicate what that point is, I may say that although I have held that on the facts of the present ease, the principle laid down in Ball''s case (A), was not yet attracted, I would be inclined to make an order in the form in which an order was made in the ease of King v. Port of London Authority, (1920) AC 1 (D), even if I held that the appellant''s left eye was already sightless at the time of the accident and that the Schedule was concerned only with the loss of sound organs. The injury in that event would be a non-scheduled injury and compensation would be payable u/s 4(1)(c)(ii) of the Act, if permanent partial disablement was otherwise proved. In the case before the House of Lords, an accident had occurred to one of the eyes of a workman which had previously been practically blind. By reason of the accident, no present incapacity had occurred and the workman was till earning his old wages. Nevertheless, the House of Lords thought that it would be proper and indeed it was necessary to make a declaration that, by reason of the accident, a liability of the employer to pay compensation to the workman had arisen, but that the liability would be enforceable if and when the workman was able to prove that by reason of the harm caused to his bodily system by the accident, his earning capacity had at last been affected. It was strenuously contended before the House of Lords by Sir John Simon, as he then was, that there was no right in the Court to make an award, unless there was a present right to compensation, but the argument was repelled by each of the very distinguished Lords who constituted the House. They pointed out that it was essential, when an accident had caused an injury to a workman and the injury, although it did not affect the present earning" capacity, was likely to affect the capacity in future, to make a declaration of the employer''s liability when the evidence was fresh find then adjourn the matter, reserving to each of the parties thereto liberty to make such further application as they might be advised to make in future. For example, although because of the generosity of the employer, the workman found it unnecessary to seek work from other establishments at the time, the generosity might cease and when subsequently the workman found himself thrown on the general market, he might be unable to obtain any work on account of the disfigurement caused by the injury. His incapacity at that point of time would be a result of the injury caused by the accident, but if the liability was not declared when the evidence was fresh, it would be impossible to establish it at some distant point of time in the future, either because evidence would by that time have disappeared 01 perhaps the law of limitation would intervene. As regards the words

of the then English Act which were more or less similar to the words of the Indian statute, each one of the noble and Learned Lords pointed out that there was nothing in them to bar what they called a "suspensory award." If we made an award of that contingent character, we would not be proceeding on the likelihood of an affection of the other or, as it has been called, the "stand-by eye" which was condemned in Hargreaves v. Hanghhead Coal Co., (1912) AC 319 (E) and later in Birch Bros. Ltd. v. Brown, (1931) AC 605 (F), but we would be proceeding on the likelihood of the affection of the injured eye itself impairing the workman''s earning capacity in future, although it was not doing so at present. That is permissible.

17. But, as I have said, the present case can be disposed of on another and a short point. The appellant proved that that he was a workman; also proved that he had suffered an injury by accident in the course of his employment under the respondent company. Those facts having been proved by the appellant, prima facie, the liability of the respondent company to pay compensation was established, particularly as the injury appeared to be one of the scheduled injuries. If the respondent company wanted, nevertheless, to prove that it was not bound to pay compensation, the onus clearly lay on the company to establish affirmatively that circumstances were present in the case which conferred on it an immunity against a liability to pay compensation. As a matter of fact, it did plead a circumstance, namely, that the appellant was already blind of the left eye when the accident had occurred. All that the company proved however were two entries made in its records on the statement, I shall assume, of the appellant himself that he was unable to see by his left eye and on the observation of a white patch on the pupillary area. This, however, was very far from proving that the blindness of 1949 was incurable or that it was lasting up to 1951 when the accident had occurred. None of the three persons who had made the entries was a medical man and even the Chief Medical Officer who claimed to have seen the appellant''s eye immediately after the accident and to have noticed a leucoma on the pupillary area was not an Eye-Specialist and he certainly made no statement as to the effect of the leucoma on the appellant''s power of vision. It is somewhat remarkable that although in the service-card and the service-record there was the entry "Blind by left eye" against the heading "Identification Marks''", there was no entry at all on the reverse of the card against the heading "Eye'''. Strictly speaking, therefore, the entry does not relate to the condition of the eye at all, but it was made only as an identification mark which is rather extraordinary. Be that as it may, I shall assume, as I have said, in view of the finding of the learned Commissioner, that the appellant did say in 1949 that he could not see by his left eye and that there was also a white patch in the pupillary area. Whether from his statement that he could not see by left eye, it can be inferred that he could see nothing at all, I am not sure -- because common men of the illiterate class often say, when they cannot fully distinguish objects by an eye, that they cannot see with it -- but I shall assume that the blindness was complete. Even so, I am altogether unable to see how by proving that condition of the eye in 1949,

the respondent company discharged the onus of proving that, even in 1951, the appellant''s eye had continued to be in the same sightless condition. The sightlessness of 1949 might have been caused by cataract or some other cause which might have ceased to operate in later years. One can think of many other possibilities. It appears to me that an entry made by two. laymen that the appellant was blind of his left eye in 1949, based on his statement that he could not see at the time, is wholly insufficient to discharge the onus lying on the respondent company of proving that the appellant''s left eye was really sightless to the fullest extent or even if it was so in 1949, that it was sightless even in 1951. That onus not having been discharged, the prima facie claim, otherwise established by the appellant is not dislodged and, therefore, it entitles the appellant to compensation.

18. The next question is what the compensation ought to be: On our finding that the Appellant''s left eye has not been proved to have been sightless at the time of the accident, there can be no question that the injury is a scheduled injury. The learned Commissioner has placed if on record that both parties agreed before him that the wages of the appellant were Rs. 70/- to Rs. 80/- per month. If that be so, the compensation to which the appellant is entitled will be thirty per cent, of Rs. 3,360/- which is the amount of compensation for permanent total disablement, as prescribed by Schedule IV for workmen drawing wages exceeding Rs. 70/- but not exceeding Rs. 80/- per month. The "actual amount will be Rs. 1008/-.

19. For the reasons given above, this appeal is allowed. The order of the learned Commissioner for Workmen''s Compensation is set aside, We hold that the appellant is entitled to compensation of the amount of Rs. 1008/- on the basis of a permanent partial disablement caused by the loss of his left eye which has not been proved to have been incurably sightless in 1949 and to have continued to be so till 1951.

20. If the appellant has withdrawn the amount of Rs. 50/- awarded by the learned Commissioner, that amount would be deducted from the amount awarded by our order and in that event the appellant will be entitled to only Rs. 958/-.

21. The appellant is also entitled to his costs before the Commissioner for Workmen''s Compensation, which we assess at Rs. 10/- and his costs of this appeal -- the hearing fee being assessed at three gold mohurs.

Mallick, J.

22. I agree.