APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

1932
August 18

SHAH JAICHAND SOMCHAND, PROPRIETOR OF THE KHANDESH SAW MILL (ORIGINAL OPPOSITE PARTY), APPELLANT *v.* VITHAL BAJIRAO MARATHE (ORIGINAL APPLICANT), RESPONDENT.*

Workmen's Compensation Act (VIII of 1923), section 2 (1) (n), clause (ii) of Schedule II and section 10—Workman—Notice to be given by workman to employer—Want of notice, how far can it be condoned—Factories Act (XII of 1911), section 2 (3) (a)—Factory, meaning of.

The respondent was employed in a mill owned by the appellant. Whilst so employed he was injured losing his little, ring and middle fingers and a large part of the palm of his right hand. The index finger was rendered practically useless and his thumb was also injured. After the accident he was removed by the other employees of the appellant to the dispensary. No notice in writing of the accident was given by the workman to his employer, but several verbal applications for compensation were made to him. Ultimately the workman applied to the Court of the Commissioner for Workmen's Compensation. His application for compensation was resisted by the employer on two grounds (1) that no notice in writing of the accident was given by the applicant as required under section 10 of the Act, and (2) that the applicant was not a workman within the meaning of the Act. Both these grounds were overruled by the Commissioner who awarded the applicant compensation. Against this order the employer appealed to the High Court.

Held, (1) that no notice under section 10 of the Workmen's Compensation Act was necessary as the respondent had not voluntarily left the employment in which he was injured;

(2) that the Commissioner had power to condone the want of the notice required under section 10:

Fibre Aloes Factory v. *Jaffer*[1] and *Stevens* v. *Insoles, Limited*,[2] referred to;

(3) per *Patkar J.* that if the Commissioner had not such power but only power to excuse the delay in giving notice, then he would treat the application to the Commissioner as a notice by the workman;

(4) that the respondent was a workman within the meaning of section 2 (*1*) (*n*) and clause (*ii*) of Schedule II to the Workmen's Compensation Act as the Khandesh Saw Mill in which he was employed and the ginning factory which were both owned by the appellant being under the same roof and worked by the same motive power was a factory within the meaning of section 2 (*3*) (*a*) of the Factories Act;

(5) that section 2 (*3*) (*a*) of the Factories Act which defines a factory is not intended to cover individual businesses in one premises but is intended to denote any premises as a composite whole with a central source of power, i.e. either steam, water, or other mechanical or electrical power.

*First Appeal No. 168 of 1931.

(1) (1929) 31 Bom. L. R. 1059 at p. 1066. (2) [1912] 1 K. B. 36.

1932

JAICHAND SOMCHAND v. VITHAL BAJIRAO

APPEAL No. 168 of 1931 against the decision of J. F. Gennings, Commissioner for Workmen's Compensation, Bombay, at Surat, in Application No. 119/C-24 of 1930.

Proceedings to recover compensation under the Workmen's Compensation Act.

B. D. Mehta, for the appellant.

R. J. Thakor, for the respondent.

PATKAR J. In this case the respondent, a workman employed in the Khandesh Saw Mill at Nandurbar, received an injury to his right hand in December 1929 and made a claim for compensation in the Court of the Commissioner for Workmen's Compensation, Bombay. The Commissioner awarded Rs. 847 as compensation to the respondent.

The first point urged in this appeal is that the respondent did not give notice under section 10 of the Workmen's Compensation Act, VIII of 1923. The respondent received a serious injury to his right hand and was removed to the dispensary by the employees of the appellant and was in the hospital for one month and twenty days and attended as an outdoor patient for another month. He applied for compensation on several occasions to the appellant and finally in March 1930 made an application in the Court of the Commissioner for Workmen's Compensation. He does not appear to have given written notice to the opposite party but applied verbally. The learned Commissioner held that having regard to the fact that the appellant had constructive notice of the accident and he himself had reported the accident to the Factory Inspector, the want of written notice could be excused.

It appears that sub-sections (*2*) and (*3*) of section 10 of the Workmen's Compensation Act indicate that the notice required by the section must be in writing though it is not specified in sub-section (*1*) whether the notice should be in writing or verbal. The notice must be given as soon as practicable after the happening of the accident and before

1932

JAICHAND SOMCHAND v. VITHAL BAJIRAO

Patkar J.

the workman has voluntarily left the employment in which he was injured. There is no evidence in the case that the respondent voluntarily left the employment in which he was injured. He was removed to the hospital by the employees of the appellant and he several times approached the appellant for compensation and also for employment but was referred to the Court. It is difficult, therefore, to hold that notice was necessary in the absence of any evidence that the respondent voluntarily left the employment.

Under the second proviso the Commissioner can admit and decide the claim notwithstanding that the notice has not been given or the claim has not been instituted in due time as provided in sub-section (*1*) if he is satisfied that failure to give the notice or to institute the claim was due to sufficient cause. The learned Commissioner held in the circumstances that want of written notice could be excused.

It is contended on behalf of the appellant that want of notice cannot be excused under the proviso but only the delay. The comma after the word "instituted" in the proviso would favour the contention of the appellant. In *Fibre Aloes Factory* v. *Jaffer*[1] it was held that the proviso would apply even supposing no notice whatever had been given. In other words, if no notice at all has been given, then "notice has not been given in due time" within the meaning of the proviso. In that case it was held that notice was in fact given, and therefore, the decision on this point would appear to be *obiter*.

In *Stevens* v. *Insoles, Limited*[2] it was held that the entry made in the company's own book by the manager was a written notice sufficient to satisfy the requirements of the Act and it was further held that because a written notice was not sent to the officials but only recorded in the books of the company, the company could not send their doctor to report was a suggestion which could not be countenanced.

(1) (1929) 31 Bom. L. R. 1059 at p. 1066. (2) [1912] 1 K. B. 36.

It appears that notice under section 10 is required to be given by a workman before he voluntarily leaves the service in order to enable the employer to have the workman medically examined under section 11, for the notice requires a statement of the address of the workman so that the workman can be traced wherever he may be and be medically examined. I am inclined to hold that no notice was necessary in the present case as the respondent did not voluntarily leave the service of the opponent and that want of notice could be condoned under the proviso. If, however, a notice in writing is necessary and only the delay could be excused, I would treat the plaint as a notice by the workman.

I think it is desirable that both the provisos to section 14 (*1*) of the English Workmen's Compensation Act, 1925, should be reproduced in section 10 of Act VIII of 1923, in order that want of notice may be expressly made liable to be condoned.

The second point urged on behalf of the appellant is that the respondent is not a workman within the meaning of section 2 (*1*) (*n*) of the Workmen's Compensation Act and clause (*ii*) of Schedule II of the same Act as the Khandesh Saw Mill was registered under clause (*b*) of section 2 (*3*) of the Indian Factories Act. It appears that the Khandesh Saw Mill and the ginning factory of the appellant are under the same manager and in charge of the same engineer. There is one boiler and one machine which drives the shafting in both the factories and both the factories are in the same premises and under the same roof. A factory is defined in section 2 (*3*) (*a*) of the Indian Factories Act as " any premises wherein, or within the precincts of which, on any one day in the year not less than twenty persons are simultaneously employed and steam, water or other mechanical power or electrical power is used . . . " I agree with the view of the lower Court that the section is intended not to cover merely individual business in any premises but is intended to denote any premises as a composite whole with a central source of power, i.e., either steam, water or other mechanical or

1932

JAICHAND SOMCHAND v. VITHAL BAJIRAO

Patkar J.

electrical power. I think, therefore, that the Khandesh Saw Mill and the ginning factory which are under the same roof and worked by the same motive power is a factory within the meaning of section 2 (*3*) (*a*) and no less than twenty men are employed on the whole premises.

The third point raised on behalf of the appellant is that the lower Court erred in assessing the disability at 50 per cent. The respondent has lost the little, ring and middle fingers and a large part of the palm of the right hand and the index finger, while the thumb, which has not been amputated, is injured. The thumb has not been amputated, and therefore, it cannot be said that there is a loss of the thumb. We do not agree with the contention of the respondent that the injury to the large part of the palm would amount to a loss of an arm. The respondent is entitled to compensation for the loss of the little, ring and middle fingers, which would amount to 15 per cent. and the loss of the index finger would amount to 10 per cent., in all 25 per cent., and it is conceded on behalf of the appellant that the loss of the palm might be assessed at five per cent., in all he is entitled to 30 per cent. The respondent, therefore, is entitled to Rs. 504, instead of Rs. 840, for compensation, and adding seven rupees as expenses he is entitled to Rs. 511.

The decree of the lower Court would, therefore, be varied by awarding Rs. 511 instead of Rs. 847. The appellant should bear his own costs and pay the costs of the respondent of this appeal.

MURPHY J. This is an appeal against an award, made by the learned Commissioner for Workmen's Compensation, by the employing firm. The workman in question was engaged at the Khandesh Saw Mill in Nandurbar when he suffered the accident which occasioned the award, and was injured in the right hand, losing three fingers, while the index finger and right thumb were also injured, most of the palm of the hand being sheared away.

The disputed findings are :—

(1) that the workman gave sufficient notice,

(2) that he was a "workman" within the meaning of the Act, and

(3) that he suffered a 50 per cent. disability.

As to the first point, admittedly, no written notice was given, though a verbal application was made and was held sufficient, in the circumstances, by the learned Commissioner.

The formalities as to notice are prescribed in section 10 of the Act, which requires it "in the manner hereinafter provided", that is as in sub-section 2, which has a proviso enabling the Commissioner to excuse delay "for sufficient cause". There was here no notice in the manner provided, and the proviso in terms enables delay to be excused, unless one reads the phrase "notwithstanding that notice has not been given, and the claim has not been instituted in due time" disjunctively, that is, as allowing the Commissioner to excuse an omission to give notice, or a delay in instituting the claim, in which case the comma after "instituted" should have been omitted. A second obscurity in this connection is that notice is required to be given either before the workman voluntarily leaves his employment, or in the other case, "as soon as practicable and before the claim is made." The former provision has obvious reference to the succeeding sections about a medical examination. In England, the provisions as to notice are very similar, though the corresponding excusing proviso is wider and the requirement as to notice has been so liberally interpreted as to amount almost to a waiver of it. In the case of *Fibre Aloes Factory* v. *Jaffer*,[1] an appeal at the hearing of which I was a member of the Division Bench, the learned Chief Justice held that (p. 1066) :—

"... speaking for myself I am prepared to go one step further, and to say that the proviso would apply even supposing no notice whatever had been given. In other words, if no notice at all has been given, then 'notice has not, I think, been given in due time' within the meaning of the proviso."

[1] (1929) 31 Bom. L. R. 1059.

1932

JAICHAND SOMCHAND v. VITHAL BAJIRAO

Murphy J.

Though strictly speaking this opinion is *obiter*, for in the case then dealt with notice had been given, and the objection made was different, the view is in harmony with the trend of English decisions. There are obvious difficulties in the interpretation of these sections, but the intention clearly was that there should be power to condone irregularities of notice, and the case is not, I think, parallel to similar provisions in the Civil Procedure Code, the Railways Act and in many Acts concerning local authorities. On the whole, therefore, though I feel some doubt, I am prepared, in this case, to allow the learned Commissioner's interpretation.

I think the second point has very little substance. The place in question is a single building with one power unit only, and though part of it is used as a saw mill and the remainder as a cotton gin—and so technically there are two enterprises—they share the source of power and the skilled staff, and I think that they must be treated as a single concern, in which case the whole is a "factory" within the Act though the Saw Mill section, if separated, may not be one by itself. I think appellants fail on this point also.

Next comes the assessment of compensation. The loss of 3 fingers, by the schedule to the Act, is 15 per cent., that of the index finger—which here was not lost but only damaged—is 10 per cent.—making 25 per cent. in all. The learned Commissioner does not explain how he arrived at 50 per cent., that is 25 per cent. more. There was no medical evidence and I do not concede the position taken at the Bar, that the loss of these fingers was that of the use of the whole arm, though this might perhaps be found on proper evidence. What the actual injuries to the index finger and thumb were is not stated, and we cannot estimate them on the papers. I think the proper percentage here would be 30 per cent. as found by my learned brother with whose conclusions I agree.

Decree varied.

B. G. R.