Rajendiran a/l Manickam & Anor v Palmamide Sdn Bhd & Anor [2020] MLJU 2565

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

HASNAH MOHAMMED HASHIM, KAMALUDIN MD SAID AND LEE SWEE SENG JJCA

CIVIL APPEAL NO B-04(IM)(C)-82-02 OF 2019

7 July 2020

T Manoharan (Nik Muhammad Shafiq with him) (Ong & Partners) for the appellants.
Alvin Julian (Wong Hui Ling with him) (Zaid Ibrahim & Co) for the respondents.

Lee Swee Seng JCA:

JUDGMENT OF THE COURT

[1]This is an appeal against the decision of the learned High Court Judge on 16.1.2019 allowing the respondent's Appeal and setting aside the Sessions Court Judge's decision. The respondent's application to strike out the appellants' writ of summons dated 23.12.2016 and statement of claim dated 21.12.2016 was allowed. The appeal before us concerns an interpretation of the relevant provisions of the Employees Social Security Act 1969 ("Socso Act") and amendments to the Socso Act with respect to whether an employee who is injured in the course of his employment in a workplace accident can claim under the Socso Act and thereafter bring a further claim under common law under the tort of negligence or occupier's liability.

The Appeals

[2]The defendants as the employers of the plaintiffs had applied under O 18 r 19(1)(a),(b) and (d) of the Rules of Court 2012 to strike out the plaintiffs claim for damages for negligence, breach of statutory duties and occupiers' liability arising out of the injuries they sustained in an explosion and fire in the factory on 6.10.2015 which they said was caused by a contractor that was engaged by the defendants to do welding works in the factory.

[3]The plaintiffs suffered severe burns as a result of the explosion and fire resulting from welding works done in another part of the factory by the defendants' contractor; they said the factory should be shut down when the electrical repairs were being done for the safety of the workers. The first plaintiff (P1) suffered 54.5% of burns out of the total body surface area and is now certified to be permanently disabled and unfit to work. The second plaintiff (P2) suffered 15% of burns with permanent disability and reduced capacity to work.

[4]Whilst both P1 and P2 had received compensation from the Socso Board for the days when they could not work as they were on medical leave, P1 who worked in the maintenance department of the second defendant had also received compensation for future loss of income as he is now certified as unfit to work. P2 continues to work for the first defendant as a factory operator but only able to do light duties. There was no compensation made for the injuries sustained and for pain and suffering and the loss of amenities.

[5]The Sessions Court Judge decided that the matter should proceed to trial and dismissed the defendants' application to strike out the plaintiffs' claim for damages under common law including a claim for aggravated and exemplary damages for what was alleged as the employers' gross negligence in providing a safe place of work for their employees.

[6]On appeal the learned High Court Judge was of the view that the single issue was whether a claim under the Socso Act debars any further claim under common law. The learned High Court Judge said that section 31 of the Socso Act expressly bars an insured person from recovering any further compensation or damages under any law from the employer if he had already received compensation under the Act.

[7]The position as explained by the Federal Court is that section 31 of the Socso Act prohibits any further claim whether under statute or common law. See *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ 74 and *Che Noh Bin Yacob v Seng Hin Rubber (M) Sdn Bhd* [1982] 1 MLJ 80. That being so the suit in the Sessions Court below is a complete non-starter and doomed to fail. The High Court therefore struck out the plaintiffs' claim.

[8]Both the plaintiffs implored that the puny compensations from the Socso compensation scheme could hardly sustain them and their families as they are the sole breadwinner for their families.

The Arguments

[9]The principles of striking out and the tests applicable are clear as encapsulated in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at page 37. The Supreme Court held as follows:

> "The principles upon which the Courts acts in exercising its power under any of the four limbs of O18 r19 Rules of the High Court 1980 are well settled. It is only in **plain and obvious cases** that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer of it **obviously unsustainable**".(emphasis added)

[10]The fact that the plaintiffs' case may be weak and unlikely to succeed is no justification for denying the plaintiffs their day in court. See the Federal Court case of *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88.
Whether the plaintiffs being employees who had sustained injuries in a factory arising not from their work is said to have sustained "employment injuries"

[11]Learned counsel for the plaintiffs argued that the injuries of the plaintiffs sustained whilst they were working, were nevertheless not "employment injury" and the expression "employment injury" must necessarily be interpreted to be confined to injury sustained arising from work done that is within their scope of work and not from an act caused by the negligence of a contractor engaged by the Employer to do electrical welding works in the factory.

[12]The definition of "employment injury" appears to be wide enough to cover the kind of injuries sustained arising from the work done in the same factory by another contractor and not by the employee.

[13]The defendants argued that the plaintiffs are estopped from arguing against the fact that their injuries are "employment injuries" as they must have represented their injuries to be that and before the Socso Board agreed to make payments out to them for the period when they could not work, the Board can only make payments out pursuant to a claim arising from an "employment injury".

[14]"Employment injury" is defined in section 2(6) of the Socso Act to mean a "**personal injury** to an **employee** caused by **accident** or an occupational disease arising out of and in the course of **his employment** in an industry to which this Act applies." (emphasis added)

[15]The plaintiffs placed much reliance on the case of *Indah Water Konsortium Sdn Bhd v Govindarajan a/l Alajan @ Narayanan* [2014] 9 CLJ 812 where an employee working as an operator was said to be working outside his scope of work when he drove the company's vehicle as a driver and was injured in the course of it. His injury was held to be not "employment injury" and as such he was not barred from suing the employer under the tort of negligence.

[16]Though the plaintiffs' argument may be weak, we do not think their claim should be struck out *in limine.* The claim is inextricably linked to the issue as to whether the plaintiffs, even if they be so barred, should be given the right to pursue a claim for aggravated and exemplary damages for gross negligence on the part of the defendants as Employers.

[17]Was the prohibition to claim under section 31 of the Socso Act designed to prohibit a claim for aggravated and exemplary damages as well? Or was it designed to prevent a double claim such that if a common law claim is more than what is paid out under the Socso compensation scheme, then the plaintiffs are entitled to keep the additional payment under common law and that would address the problem of recovering twice, once under a no- fault liability

scheme under the Socso Act where both the employers and employees had contributed monthly as required under the Socso Act and the other under a common law claim personal injury claim.

[18]The Socso Act being a social piece of legislation, there is no rhyme nor reason why the Employer by contributing towards Socso compensation scheme would be immunised against all claims for aggravated and exemplary damages even if they are grossly negligent in providing a safe place of work for their employees.

[19]This argument of barring only claim for general and special damages but no bar against a claim for aggravated and exemplary damages for personal injuries sustained does not appear to have been argued and considered in the two Federal Court cases.

[20]The Court of Appeal in *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353 explained when exemplary damages are awarded in a claim under the tort of negligence and breach of statutory duty as follows:

> "**[65] Exemplary damages** are damages awarded for cases when the courts find the actions of the wrongdoers to be **reprehensible** and a **conscious complete disregard of another's rights**. It is not compensatory in nature but intends to reform or deter the defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit. Lord Devlin in the often quoted case of *Rookes v Barnard* (1964) AC 1129 puts it this way:
>
> > There are certain categories of cases in which the award of exemplary damages can serve useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into civil law a principle which ought logically to belong to criminal." (emphasis added)

[21]Aggravated damages would be awarded in a case where there is found aggravating conduct or circumstances in the negligent act committed which has resulted in the wrongdoer profiting at the expense of safety of its employees.

[22]Here it was alleged that instead of shutting down the operation of the factory whilst the contractor attends to the welding works, the defendants had wanted the employees to continue working to ensure that production is not adversely affected. Whether that is true or not is a matter for trial as there is a conflict of affidavit evidence here.

[23]At the end of the day the risk is that of the employees here as plaintiff to assume with the burden on them to prove on the balance of probabilities and failing which they would be liable to pay costs if their suit is struck out.

[24]Learned counsel for the defendants argued that if there is gross negligence on the part of the them as employers in failing to provide a safe place of work, there would be criminal charges preferred against them under the Occupational Safety and Health Act 1994 ("OSHA"). While that may be so, it is little comfort to the injured employees who now have to suffer the permanent partial or total disabilities for the rest of their lives, with dimmed

prospects of improvement and more probably the darkening reality of diminished strength and vigour in working with one's hands to put food on the table for one's family.

[25]It appears to be a double whammy when because of no income arising from being hospitalised and not being able to work, one has to resort to a quick compensation for loss of income arising from such a disability, only to be told that just because some payments have been made under the Socso compensation scheme, the injured employees are now barred from claiming against their employer under common law for damages under negligence or occupier's liability.

[26]The law should be given some space to develop against the backdrop of the harsh reality of pitiable and puny compulsory no-fault compensation under the Socso Act and that of other statutory amendments after the two Federal Court cases.

Whether section 31 Socso Act bars a common law claim in the light of section 28A Civil Law Act 1956 and the repeal of section 42 Socso Act.

[27]Section 31 of the Socso Act provides as follows:

> **"31. Liability of employer and his servant**
>
> An **insured person** or his dependants **shall not be entitled to receive or recover from the employer of the insured person**, or from any other person who is the servant of the employer, **any compensation or damages under any other law for the time being in force in respect of an employment injury** sustained as an employee under this Act:
>
> Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks under Part IV of the Road Transport Act 1987[Act 333]." (emphasis added)

[28]The Explanatory Statement in the Bill to the Employees' Social Security Act 1969 states as follows:

> "For obvious reasons it has been provided that an insured person shall not be entitled to receive for the same period and in respect of the same disablement invalidity pension and permanent disablement benefit or compensation under the provision of the Workmen's Compensation Ordinance and the benefits under the proposed Bill (Clause 96)."

[29]When the Socso Act was first passed the original version of section 31 reads as follows:

> "An insured person or his dependants shall not be entitled to receive or recover from the employer of an insured person:
>
> (i) any compensation under the **Workmen's Compensation Ordinance,1952**, or
>
> (ii) **"damages under any other law for the time being in force, in respect of an employment injury** sustained as an employee under this Act." (emphasis added)

[30]The current version of section 31 except for the proviso was amended by Act A 814 which came into force on 1.7.1985.

[31]There was also then section 42 of the Socso Act which provides as follows:

> "42. When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any **similar benefit admissible under the provisions of any other written law**."

[32]By the Employees' Social Security (Amendment) Act 1997 [Act A981] which came into force on 1.5.1997 section 42 was later deleted. The same Amendment Act also introduced the proviso to the current section 31 with respect to the non-applicability of the prohibition to injuries sustained as a result of a motor vehicle accident where the employer or a servant of the employer is required to be insured against Third Party Risks under Part IV of the Road Transport Act 1987.

[33]The 2 Federal Court cases decided in 1982 were decided before the amendment that deleted section 42 in 1997.

[34]What then is the effect when section 42 of the Socso Act was deleted? The only written law with respect to compensation or damages with respect to employment injuries is the Workmen's Compensation Act 1952 which compensation is far inferior to what is claimable under the Socso Act and so is mainly used by foreign workers who are not covered under the Socso Act.

[35]The deletion cannot be to allow for a claim now under both the Socso Act as well as the Workmen's Compensation Act. At any rate for Malaysian workers, subsequent amendments to the Socso Act had allowed for a claim under the Socso Act even if one's employer has not so registered its employee under the Socso Act with the result that there was hardly a claim made by a Malaysian workman under the Workmen's Compensation Act 1952.

[36]There was also the provision of section 28A Civil Law Act 1956 which came into force on 30.5.1975 under an amendment introduced by the Civil Law (Amendment) Act 1975 Act A308 which provides as follows:

> "**28A. Damages in respect of personal injury**
>
> In **assessing damages** recoverable in respect of **personal injury** which does not result in death, there **shall not be taken into account-**
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;
>
> (b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or
>
> (c) **any sum** which has been or will or may be **paid** under **any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.**" (emphasis added)

[37]"Employment injury" is of course a species and subset of "personal injury" as defined in section 2(6) of the Socso Act and the written law in relation to the payment of any benefit or compensation would be by and large the Socso Act since the Workmen's Compensation Act 1952 has very limited utility.

[38]Whether or not Parliament had intended section 28A(c) Civil Law Act 1956 [ACT 67] to apply to an "employment injury" is a matter which should be more fully argued at the trial in the Sessions Court where it may finally land up in the Court of Appeal, being the final court of appeal for a matter emanating in the Sessions Court.

[39]This would be a proper case where the trial judge should, as rightly decided by her, proceed with the trial as was done in *Abdul Rahim Bin Mohamad v Kejuruteraan Besi Dan Pembinaan Zaman Kini* [1998] 4 MLJ 323, though the High Court there was of the view that the plaintiff was precluded from making his claim under common law as he was within the meaning of an "insured person" under the Socso Act and as such his claim should be under Socso Act as the injury was an "employment injury" even though the employer had not so registered the plaintiff with the Socso Board or made contribution under the Act.

[40]The meaning of "insured person" as modified by a subsequent amendment to the Socso Act was considered in *Liang Jee Keng v Yik Kee Restaurant Sdn Bhd* [2002] 2 MLJ 650 where it was held as follows:

> "....'insured person' as defined under s 2(11) of the SOCSO Act. The present s 2(11) of the SOCSO Act defines:
>
> 'insured person' means a person who is or was an employee in respect of whom contributions are, were or could be payable under this Act, notwithstanding that such industry or employee was not so registered, so long as the industry was one to which this Act applies.
>
> The present provision of s 31 was introduced into the SOCSO Act vide an amendment Act A675/87 which came into effect on 1 July 1987. Prior to that amendment, the previous provision of s 31 read:
>
> 'insured person' means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, present definitions of an 'insured person' is much more wider than the previous one. It covers an employee in respect of whom contributions 'could be payable' under the Act. It also covers employee who was not so registered under the SOCSO Act, so long as the relevant industry was one to which the SOCSO Act applies. In other words, even though the said employee was not registered with the SOCSO office at the time of the accident and no contributions are or were paid under the Act, the employee is still considered as an 'insured person' if the contributions 'could be payable' under the Act, so long as the industry was one to which the SOCSO Act applies."

Our Decision

[41]The plaintiffs' claim may be weak but that is no justification for striking out *in limine* when yet another attempt is

made by testing the limits of the law where in a case of a social piece of legislation, any ambiguity has to be resolved in favour of the injured employee.

[42]We dare not say the plaintiffs' claims are completely hopeless and a total non-starter. This is certainly not a plain and obvious case where the plaintiffs' claim should be struck out. A smoldering wick should not be snuffed out at this stage in as much as a bruised reed may yet blossom in the days ahead.

[43]We unanimously agreed that the matter should be sent back to the Sessions Court for trial and that the order of the High Court striking out the plaintiffs' claim be set aside with costs in the cause.

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