Rahenah bte L Mande v Baxter Healthcare Pte Ltd and Another
[2002] SGHC 320

Case Number : DC Suit 1568/1999, RAS 600013/2001

Decision Date : 21 August 2002

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Roderick Martin with Loh Kim Kee (Martin and Partners) for the defendants / appellants; R Palakrishnan SC (Palakrishnan and Partners) for the plaintiff / respondent

Parties : Rahenah bte L Mande — Baxter Healthcare Pte Ltd; Mahenthran A/L Shanmugam

21 August 2002

Judith Prakash J

Introduction

1. This appeal involved the proper construction of s 33 of the Workmen's Compensation Act (Cap 354) ('the Act'). The precise issue was whether s 33(2)(a) prohibited a workman who had applied to the Commissioner for Labour for compensation in respect of injuries incurred in the course of his employment from starting an action against his employer for damages in respect of the same injuries while such application remained pending.

2. In construing the section as containing such a prohibition, I followed and applied, as indeed I was bound to, the decision of the Court of Appeal in *Ying Tai Plastic & Metal Manufacturing (S) Pte Ltd v Zahrin bin Rabu* [1984] MLJ 104. At that time I did not deliver my grounds as I took the view that the law had been settled by the *Ying Tai* decision. I have now received a request for my grounds as, apparently, the same question has arisen in pending matters before the District Court.

Facts

3. The plaintiff was employed as a worker in a factory operated by the first defendants. They also employed the second defendant On 21 August 1996, while the plaintiff was working at the factory, she was hit in the back by a forklift operated by the second defendant She suffered injuries and subsequently consulted solicitors.

4. On 4 November 1996, the plaintiff, through her solicitors, submitted a claim for compensation under the Act to the Commissioner of Labour. Some months later, the Commissioner wrote to the plaintiff stating that she was required to attend a medical reassessment in order for the doctor to complete a final medical report on the extent of her injuries. This medical reassessment took place on 9 May 1990.

5. On 25 June 1998, the plaintiffs solicitors wrote to the Commissioner asking him to reassess her damages and noting that the plaintiff 'may wish to consider common law damages'. The Commissioner replied that he was not yet able to assess the amount of compensation payable as he was still awaiting the final medical report and the doctor concerned had informed him that another reassessment was required in December 1998, The Commissioner also asked whether the plaintiff was maintaining her claim under the Act The plaintiff did not respond to this query.

6. On 25 March 1999, the plaintiff commenced this action in the District Court against the

defendants for damages for negligence. She did not notify the Commissioner before starting the action and she did not correspond with the Commissioner again until 17 September 1999. On that date, her solicitors wrote to the Commissioner stating that she was the plaintiff in this action and asked for a copy of the report lodged with the Ministry of Labour by the first defendants.

7. On 17 April 2001, after discovery and inspection of documents, the first Defendants' solicitors wrote to the plaintiffs solicitors asking if the plaintiff had withdrawn her application under the Act on or before 25 March 1999. The plaintiffs solicitors replied the same day stating that by issuing proceedings under common law the plaintiff had effectively withdrawn her claim under the Act. Notwithstanding that reply, the very next day the plaintiff's solicitors wrote to the Commissioner stating the plaintiffs position and, 'for purposes of clarity', notified him that the plaintiff was withdrawing her application for compensation under the Act.

The decision below

8. Then came the step that led to the appeal before me. On 18 June 2001, the first defendants took out an application to strike out the plaintiffs claim under O 18 r 19 of the RSC on the ground that the plaintiff had had no locus to commence the action on 25 March 1999 as, at that time, her application for compensation under the Act had not been withdrawn and s 33(2)(a) of the Act accordingly debarred her from starting a suit at law. The action was a nullity and it would be an abuse of the process of the court to allow it to proceed.

9. The application to strike out was dismissed by a Deputy Registrar of the District Court. The first defendants appealed. The appeal came on for hearing before a District Judge in chambers on 30 July 2001. He dismissed the appeal with costs and the first defendants then appealed further to the High Court

10. The reasons for the dismissal of the first defendants' appeal as given by the District Judge were as follows:

> (1) On the evidence before him, he was of the view that the plaintiff had, in effect, withdrawn or would at least be deemed to have withdrawn her application for compensation under the Act before or at the latest when she commenced the court action on 25 March 1999. While it was true that there was no express notification of the withdrawal from her or her solicitors to the Commissioner before 25 March 1999, the evidence showed that before that date she had decided not to proceed further with her application under the Act
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> (2) The Act did not prescribe any particular mode or procedure for the withdrawal of an application for compensation. Citing the statement of AP Rajah J, the first instance judge in the *Ying Tai Plastic case* (reported in [1982] 2 MLJ 145), to the effect that a workman's unilateral voluntary application for compensation under the Act could in the same way be voluntarily and unilaterally withdrawn by the workman, the District Judge opined that the plaintiff was entitled to make such unilateral withdrawal without following a prescribed mode.
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> (3) Even if the plaintiff had not withdrawn her application for compensation before 25 March 1999, her subsequent withdrawal was sufficient to allow her to 'maintain' the court action. An employee's cause of action in tort against her employer would, at common law, vest in her immediately the tort was committed and she would thereafter have a right to bring proceedings in court until such time as the applicable time bar set in. The purpose of s33(2)(a) was not to abrogate such right but to prevent workmen from getting a double benefit - both common law damages and compensation under the Act for the one injury. A compensation claim under the Act

might, however, take some time as the injuries have to be assessed and, in such case, the employee must be entitled to preserve her common law cause of action by issuing a writ before the limitation period expired, pending the finalisation of her compensation claim. If she wished to proceed further and maintain her common law action she would then have to withdraw her application under the Act. The effect of s 33(2)(a) was merely to prohibit the employee from proceeding on both fronts simultaneously. It was not to prohibit her from starting a common law action whilst the claim for compensation was pending. The District Judge found support for this view in both the first instance and the Court of Appeal decisions in the *Ying Tai* case.

The issues

11. There were only two issues:

(1) whether s 33(2)(a) had a prohibitory effect so as to make the existence of a claim for compensation an absolute bar to the commencement of a common law action; and

(2) if it did, whether the acts of the plaintiff before or on 25 March 1999 itself amounted to a withdrawal of her claim for compensation so as to remove the bar to the filing of these proceedings.

Construction of s 33(2)(a)

12. Sections 33(1) and (2) of the Act read:

'Limitation of workman's right of action

33. (1) Nothing in this Act shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted an action for damages in respect of that injury in any court against his employer or if he has recovered damages in respect of that injury in any court from his employer.

(2) No action for damages shall be maintainable in any court by a workman against his employer in respect of any injury -

(a) if he has applied to the Commissioner for compensation under the provisions of this Act; or

(b) if he has recovered damages in respect of the injury in any court from any other person.'

At the time the *Ying Tai* case was decided, these two sections were both comprised within s 33(1). The language of the old section was identical to that of the present ss (1) and *(2)* and the division of one sub-section into two that had been effected by the 1998 revision of the Act was made to simplify the understanding of the provision and not to change its meaning.

13. The District Judge took the view that the decision in *Ying Tai* allowed the plaintiff to 'maintain' her common law action against the first defendants by issuing a writ before the limitation period expired to protect her position on time bar even though she had not yet withdrawn her compensation claim on the date of issue. In ¶25 of his grounds be said:

'... a workman must surely be entitled to preserve his common law cause of action by issuing a writ before the limitation expires, pending the outcome of his application for compensation under the Act, If he wishes to proceed further and maintain his common law action, he must then

withdraw his application under the Act. The Act merely prohibits him from proceeding on both fronts.'

14. The District Judge bolstered his argument by stating that *Ying Tai* supported his view. He said (at 26):

'... A P Rajah J had at first instance (reported at [1982] 2 MLJ 145) found as a fact that the workman was illiterate and did not understand that he was making an application for compensation under the Act. The Judge consequently ruled that the workman had not applied for compensation under the Act before he commenced his common law action against his employer. At the urging of counsel, the Judge went on to comment on whether, if the workman had made an application for compensation under the Act, he was precluded from bringing a common law action for damages. In this case, the workman's solicitors had, only after the writ was issued against the employer, written to the Commissioner to put on record that the workman had not applied for compensation under the Act. The Commissioner had replied that since the workman wished to claim damages under the common law, the Commissioner would take no further action on the matter. In the last paragraph of his judgment, the Judge opined that 'the action may now proceed and be maintained by the plaintiff.' It appears to be implicit in the Judge's opinion that the workman in that case could withdraw his application under the Act after he had commenced his common law action, and then proceed and maintain his common law action. In the Court of Appeal, Chua J said at page 1071:

"We are in agreement with the learned Judge that the workman can withdraw his application for compensation under the Act and proceed and maintain his action for damages in the courts."

15. With due respect to the District Judge, I think that he misread the Court of Appeal's decision and took the quoted remarks of Chua J out of context The passage in that judgment which dealt with the proper construction of s 33(2)(a) (then s 33(1)(a)), and which should have governed the lower court's approach to the instant case, is the following:

'Under section 33(1)(a) the worker is debarred from bringing a common law action for damages so long as there is an application by the workman before the Commissioner for compensation. But this debarment in no way affects the cause of action already vested in him. The Act does not prohibit the withdrawal of the application for compensation. As soon as the application for compensation is withdrawn, the right to maintain an action revives and the workman can then proceed with his action for damages in court. The workman's right to compensation under the Act lies dormant while he pursues his common law action but should he lose the action he may choose to ask the court, under section 33(2) [now section 33(3)], to assess compensation under the Act.' (at p 107E)

16. That passage makes it plain that by choosing to make an application to the Commissioner for compensation, an injured employee deprives himself of the ability to exercise his right to sue his employer at common law for the period that the application remains alive. If he changes his mind about his course of action, the employee is at liberty to withdraw his claim for compensation and then start a civil suit. Until such withdrawal he cannot start the civil suit. The construction which Chua J gave to s 33(2)(a) was based on the dual purpose of the legislation. First, it gave the worker an absolute right to obtain compensation without having to prove negligence on the part of his employer. At the same time, however, it protected the employer against the expense of fighting on two fronts by providing that the claim for compensation and the common law suit could not be resorted to simultaneously.

17. Following the law as enunciated in the quoted passage, with which I respectfully agreed, both the District Judge and I were constrained to hold that if the plaintiff here had started this action before withdrawing her claim for compensation this action would be a nullity and would have to be struck out.

18. On that basis, I proceeded to consider the second issue ie whether in this case the plaintiff had withdrawn her claim for compensation on or before 25 March 1999. On the facts of the case, it was clear to me that she had not. Whilst I agreed with the District Judge that no formal mode of withdrawal was prescribed by the legislation, and also the plaintiff had the right to withdraw the claim at any time before it had been finally assessed by the Commissioner, I took the view that such withdrawal had to be expressly notified to the Commissioner. It was not enough for (he plaintiff to simply form an intention not to proceed with her claim. She had to tell the Commissioner of such intention as otherwise the Commissioner would continue processing the claim. On the facts, no such notification had been given. The letter written by the plaintiff's solicitors in June 1998 indicating that she was considering proceeding with the common law claim was not a notification of withdrawal. It was simply a notification of a possible change of course by the plaintiff and was understood as such by the Commissioner, as evidenced by the Commissioner's response which was to ask whether the plaintiff wanted to proceed with the claim or not

19. The other argument put forward was that the filing of the writ itself was an implied and effective withdrawal of the application. I did not accept that argument either. First, it was dear from Chua J's judgment that in order for the right to sue to revive the claim had to be discontinued first. Nothing in the judgment indicated that it was permissible for the filing of the writ to act as a withdrawal of the claim and, in any case, such indication would have been contrary to the statement of principle made by the Court of Appeal. Secondly, the writ could not act as a notification of the withdrawal of the claim for compensation since the writ had nothing to do with the Commissioner and was not, and did not have to be, served on him. The Commissioner remained ignorant of the writ's existence until informed of it several months later. In the meantime the Commissioner may well have been continuing to handle the plaintiff's claim.

20. I was of the view that in this case there had been no effective withdrawal of the claim for compensation before the commencement of the action. I therefore allowed the appeal.

Ying Tai Plastic & Metal Manufacturing (S) Pte Udv Zahrin bin Rabu

21. As the question of the proper construction of s 33(2)(a) has arisen again, I think I should deal with the misconception of the court below as to what the Court of Appeal was really saying in the *Ying Tai* case. To do this, it is necessary to analyse the judgments both at first instance and on appeal. This analysis has been greatly contributed to by the very detailed submissions furnished by the solicitors for the first defendants.

23. The facts of *Ying Tai* were very similar to those of the present case. The plaintiff there, a male employee of Ying Tai Plastic & Metal Manufacturing (S) Pte Ltd ('the company'), lost four fingers of his right hand as a result of an accident in the course of his employment. Subsequently, he received a letter from the Commissioner of Labour enclosing certain documents. He then went to the Commissioner's office and affixed his right thumbprint to one of these documents under the misapprehension that he was acknowledging receipt of the Commissioner's letter. In fact, that document constituted a claim by him for compensation under the Act. Some four months later, the plaintiff commenced an action for damages. The company pleaded in its defence that by reason of s 33(1) of the Act and since he had not withdrawn his claim for compensation, the plaintiff was precluded from bringing any action for damages against the company. That paragraph of the pleading

went before the judge of first instance, A P Rajah J, for adjudication as a preliminary question of law. The question in issue was whether the plaintiff was precluded by the Act from maintaining the court action.

24. Rajah J found as a fact that the plaintiff was illiterate in both Malay and English and did not understand that he was making an application for compensation at the time he affixed his thumbprint to the document in the Commissioner's office. Consequently, the judge ruled that 'The plaintiff has not applied to the Commissioner for compensation under the provisions of the Act'. This was the judge's main finding and was sufficient to dispose of the matter before him. But, at the urging of counsel and dearly *ex abunti cautela,* Rajah J went further to say that the workman had any rate withdrawn his application and that it was his opinion that the action could then proceed and be maintained by the plaintiff. It is this portion of his judgment that was relied on by the District Judge in the present case and it reads:

> 'The accident took place on May 23, 1981, the alleged application for compensation was made on July 7, 1981, the so-called application was withdrawn by the plaintiff on January 12, 1982 and the Commissioner notified the plaintiffs solicitors on January 29, 1982 that "since your client Zahrin Bin Rabu wishes to claim damages under the common law in respect of the above accident, please note that this office will take no further action on the matter." In my opinion the action may now proceed and be maintained by the plaintiff.'

This last paragraph of Rajah J's judgment was clearly orbiter in view of his first finding that no application had been made by the plaintiff since the plaintiff had not understood what affixing his thumbprint to the document really meant and had not intended to make a claim under the Act.

24. The appeal of the company to the Court of Appeal was dismissed. From a careful reading of its judgment, it appears that the Court of Appeal only proceeded in relation to the first finding by the trial judge. This is shown in the following extract from the judgment (at p106B-1):

> 'Two issues were raised before the learned Judge: —
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> (1) whether the Respondent by having appended his thumb print to Ex. P3 "has applied to the Commissioner for compensation under the provisions of this Act";
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> (2) if the answer to (1) is in the affirmative whether the Respondent was precluded from bringing any action for damages in the High Court
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> The learned Judge was satisfied that the Respondent was completely illiterate and that, unless someone had interpreted and explained the contents of Ex. P2 and Ex. P3 to him in Malay, he would not have known what the contents of Ex. P2 were. The learned Judge was also satisfied that when the Respondent arrived at the office of the Commissioner he was not aware of the contents of Ex P2 and Ex. P3 and that the officer who attended to him had not seen to it that the documents were interpreted to the Respondent through a proper interpreter. The learned Judge found the Respondent to be a truthful witness and he accepted the Respondent's evidence in regard to Ex. P2 and P3 and found that the Respondent appended his right thumb print to Ex. P3 in the belief that what he was doing was to acknowledge the receipt of a letter from the Commissioner. The learned Judge therefore was of the view that the Respondent had not applied to the Commissioner for compensation under the provisions of the Act.
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> On the second issue, the learned Judge was of the view that "a workman's unilateral voluntary application for compensation under the Act can in the same way voluntarily and unilaterally be

withdrawn by the workman thus enabling him to proceed and so maintain his action for damages in any Court."

We were of the view that on the evidence the learned Judge was right in coming to the conclusion that in fact the Respondent had not applied to the Commissioner for compensation under the provisions of the Act. We therefore dismissed the appeal, but reserved judgment on the interpretation of section 33(1) of the Act.'

25. The quoted passage establishes that the appeal was dismissed only on the ground that the Respondent (the plaintiff below) had not applied for compensation. Further, the apparent omission to address the second finding of the trial judge made it clear that Chua J was deliberately refraining from making any comment on the lower court's second finding in terms of the facts before it. All that Chua J was prepared to do was to explain the operation of s 33(1) of the Act and this was, with respect, the correct course, for having agreed with the finding that there had been no application for compensation to begin with, the court would have been venturing into never-never land if it dealt with the effect of the withdrawal of a non-existent application.

26. Chua J then went on to consider the proper construction of s 33(1) and the submission made on behalf of the company that the mere application to the Commissioner by a workman for compensation operated to abrogate the injured workman's cause of action at common law with the resultant toss of his common law right of action for damages against the employer. The Judge also referred to the further submission of the company that once an application for compensation was made to the Commissioner it could not be withdrawn. Dealing with these submissions, Chua J opined that

'The Act is "An Act to consolidate and amend the law relating to the payment of compensation to workmen for injury suffered in the course of their employment"

In the construction of a consolidating Act, there is a particularly strong presumption that it does not alter the existing law....

Counsel for the Appellants seeks to put an interpretation to section 33(1)(a) which, if his arguments were to prevail, would in effect make an alteration to the common law. There is a presumption against changes in the common law. It is presumed that the legislature does not intend to make a substantial alteration in the law beyond which it expressly declares, (per Lord Goddard C.J. in National Assistance Board v Wilkinson [1952] 2 QB 648)....

Under the Act the worker, unlike the employer, is not obliged to inform the Commissioner of the accident, nor is he obliged to apply to the Commissioner for compensation in respect of it The act of applying for compensation is purely a voluntary one on the part of the workman.

The employer's liabiliy to pay compensation under the Act is absolute. The worker (unlike under the common law) does not have to show negligence on the part of the employer. The Act in fact gives the worker rights against his employer which he did not have under the common law.

Section 33 provides for a limitation of the workman's right of action but it does not specifically say that the workman's common law right of action for damages is automatically extinguished if he applies to the Commissioner for compensation under the Act. What it does say is that a workman shall not maintain an action for damages if an application for compensation has been made by him to the Commissioner.

It seems to us that it was never the intention of the legislature to deprive a workman of his common law rights against his employer. The scheme of the Act is not to abrogate a workman's common law cause of action but to enable him, if he wishes, to get a speedy remedy for the injury suffered by him. The Act sees to it that he does not get a double benefit — both compensation under toe Act and damages under the common law for the one injury (Sec. 18).

A workman's cause of action in tort against his employer immediately vests in him under the common law and he has the right to bring proceedings in the court and this right continues in him until such time as he may be debarred from doing so by the law of limitation.

Under section 33(1)(a) the worker is debarred from bringing a common law action for damages so long as there is an application by the workman before the Commissioner for compensation. But this debarment in no way affects the cause of action already vested in him. The Act does not prohibit the withdrawal of the application for compensation. As soon as the application for compensation is withdrawn, the right to maintain an action revives and the workman can then proceed with his action for damages in the court The workman's right to compensation under the Act lies dormant while he pursues his common law action but should he lose the action he may choose to ask the court, under section 33(2), to assess compensation under the Act;

The Act does not expressly declare that an application to the Commissioner for compensation under the Act ipso facto abrogates a workman's common law right for damages.

We are in agreement with the learned Judge that the workman can withdraw his application for compensation under the Act and proceed and maintain his action for damages in the courts.' (at pp 106-107)

27. What is noticeable when comparing the paragraphs quoted above with those cited in ¶20 is that Chua J when dealing with the first issue referred to the workman as 'the Respondent', clearly indicating that he was dealing with the facts as well. Chua J, however, stopped using that description immediately after dealing with the first issue. When dealing with the second issue and in the rest of his judgment, the judge was addressing the construction of s 33(1) of the Act and in so doing he spoke theoretically of 'the worker' or 'the workman' and never used the term 'the Respondent'. It would appear that the Court of Appeal was not in the second half of is judgment dealing with the facts of the appeal before it but was commenting on the meaning and effect, in general terms, of what is now s 33(2)(a). That portion of the judgment cannot therefore be read as endorsing the second finding of Rajah J.

28. The District Judge in this case considered that when Chua J made the statement, *'We are in agreement with the learned Judge that the workman can withdraw his application for compensation under the Act and proceed and maintain his action for damages in the court',* he was agreeing that the action could be started first and the claim withdrawn subsequently. Chua J, however, said nothing regarding the application of the statement of law by the trial judge to the facts of the case before him. Indeed, it appears from the two reports that no one specifically brought to the attention of either Rajah J or the Court of Appeal the fact that the purported withdrawal there took place after the commencement of the plaintiff's action. The first defendants submitted, and I agreed, that it was not possible to conclude that Chua J had agreed that it would not be a breach of s 33(2)(a) for a workman to commence an action before withdrawing his application for compensation when the Judge had himself said, just a few paragraphs before that, that, 'under section 33(1)(a) the worker is debarred from bringing a common law action so long as there Is an application by the workman before the Commissioner for compensation'.

29. The construction placed by the Court of Appeal on s 33(2)(a) accords with the purpose of that section. The primary purpose of the option of proceedings offered by it was to ensure that the employer would not be exposed to the 'double liability' of having to pay both compensation and damages. This purpose included also the protection of the employer from multiple proceedings and expenses relating to the same.

30. The District Judge appeared to consider that the word 'maintainable' as used in s 33(2)(a) meant actively prosecuting an action. This was not the interpretation given to that word by Chua J in the *Ying Tai* case. The Court of Appeal equated 'maintainable' with 'bringing a common law action for damages'. Chua J accepted that the word 'maintainable' referred to the right to bring an action and not to the right to actively prosecute it. This accords with the definition of the term 'right of action' given by *Black's Law Dictionary* (6th Ed) which states that that term includes 'the legal right to maintain an action'.