Kamis bin Satari v Nasir Natarajan
[2005] SGHC 188

Case Number : DC Suit 5221/2003, RA 18/2005

Decision Date : 03 October 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Andrew J Hanam (Clifford Law Corporation) for the appellant; Joseph Goh (Vincent Lim and Joseph Goh) for the respondent

Parties : Kamis bin Satari — Nasir Natarajan

Employment Law – Workman claiming and receiving compensation under Act – Workman subsequently claiming for damages and receiving interim payment – Whether workman's claim for damages should be struck out in light of s 18(a) of Act – Whether consequences of s 18(a) avoided where workman receiving compensation under genuine mistake – Sections 18(a), 33(2)(a) Workmen's Compensation Act (Cap 354, 1998 Rev Ed)

3 October 2005

Woo Bih Li J:

Background

1 The plaintiff, Mr Kamis bin Satari ("Kamis"), filed this action against the defendant, Mr Nasir Natarajan ("Nasir"), for damages for personal injuries and losses sustained in respect of an accident on 14 August 2002. He was then alighting from a lorry driven by Nasir. Both men were co-workers employed by Wanin Industries Pte Ltd ("Wanin") at the material time. This action was filed on 12 November 2003.

2 Although Nasir was the named defendant in this action, the defence was being conducted by Wanin's insurer of the lorry, The Asia Insurance Company Limited ("Asia"). Asia eventually agreed to the sum of $5,000 as interim payment to account of damages which might be payable to Kamis in this action. The cheque for $5,000 was forwarded to Kamis' solicitors on 2 October 2004. Kamis collected the cheque on 8 October 2004. However, Asia's solicitors subsequently discovered that on 6 September 2004, Kamis had received $11,025 from Wanin's other insurer, QBE Insurance (International) Ltd ("QBE"), as compensation under the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("the Act"). Asia then applied (in the name of Nasir) to strike out Kamis' claim and for the return of the $5,000. The application was allowed by a deputy registrar. Kamis' appeal to a district judge was dismissed. Kamis then appealed to the High Court. I dismissed his appeal for the reasons stated below.

The court's reasons

3 Asia's counsel, Mr Joseph Goh, relied on s 18(*a*) of the Act which states:

> Where any injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof —
>
> (*a*) the workman may take proceedings against that person to recover damages and may claim against any person liable to pay compensation under this Act, but he shall not be

entitled to recover both damages and compensation; …

4 Kamis' counsel, Mr Andrew J Hanam, accepted that Kamis could not recover both compensation under the Act and damages under the common law. As Kamis had already received compensation under the Act, he should not be allowed to pursue his action, but Mr Hanam relied on a mistake which Kamis allegedly made. Kamis' case was that he had thought that the $11,025 he had received was the interim payment and hence he was not aware that it was compensation paid under the Act.

5 The district judge, Ms Valerie Thean, said that she did not investigate the allegation of mistake as she thought that was unnecessary. In [11] of her grounds of decision ([2005] SGDC 107), she said:

> I did not investigate these contentions of mistake as I did not think it necessary. Section 18 of the Act is clear that Mr Kamis cannot be in receipt of money under the Act and yet press his claim in court. …The relevant caselaw on the Act is also clear that the intent of the Act is to prevent the workman from obtaining compensation both under the Act and pursuant to common law. If indeed Mr Kamis has recovered his compensation by mistake, then he must take any steps open to him under the Act if any, before pressing on with his claim in court.

6 Before me, Mr Hanam maintained the same allegation about Kamis' mistake. However, pursuant to directions given by me, some more affidavits were filed. These were:

(a) a second affidavit of Kamis;

(b) an affidavit of his solicitor, Ms Viviene Kaur Sandhu; and

(c) two affidavits from employees of the Ministry of Manpower ("MOM").

7 Mr Hanam relied on some English cases and the local case of *Low Swee Fong v Gammon (Malaya) 1959 Ltd* [1962] 1 MLJ 295 ("*Low Swee Fong*") for the proposition that a workman is not barred from pursuing his claim for damages under the common law if he received workmen's compensation in ignorance of his right to claim damages or if he did not know that the payment he was receiving was being made by way of such compensation. I would add that while *Low Swee Fong* was dealing with a provision which was *in pari materia* with s 18(*a*) of the Act, the English cases, *ie*, *Young v Bristol Aeroplane Company Limited* [1946] AC 163 ("*Young*"), *Olsen v Magnesium Castings & Products Ltd* [1947] 1 All ER 333 ("*Olsen*") and *Knipe v British Railways Board* [1972] 1 QB 361 ("*Knipe*") all dealt with s 29(1) of the UK Workmen's Compensation Act 1925 (c 84) which is not in terms the same as s 18(*a*) of the Act. The former states:

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such person negligence or wilful act as aforesaid.

8 Nevertheless, I accepted the proposition stated in [7] above. In the case before me, Mr Hanam accepted that when Kamis collected the cheque for $11,025 from QBE, he was aware of his

right to claim damages at common law as an alternative to compensation under the Act. The alleged mistake was that Kamis had thought that the $11,025 was the interim payment he was to receive in respect of his claim for damages. Mr Hanam also stressed that Kamis was not making a claim against Wanin, his employer, but against Nasir, his co-worker. This was important because s 33(2)(*a*) of the Act has another prohibition. It states:

> 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;

Under s 33(2)(*a*), an injured workman cannot even file or continue with an action against his employer if he has applied for compensation under the Act.

9 The point made by Mr Hanam assumed that an action against a co-worker employed by the same employer as the plaintiff workman did not run afoul of s 33(2)(*a*) and that the co-worker came within the meaning of "some person other than the employer" under s 18. Mr Goh also assumed this and hence the submissions of both counsel before me proceeded on the former and the latter premises. I should mention that, on further reflection, it occurred to me that if such premises were correct, then there might be a loophole for a plaintiff to avoid s 33(2)(*a*) and proceed under s 18(*a*), when the claim for compensation and the action for damages are targeting the same employer or the same employer's insurers. Although Nasir was the named defendant in this action, Kamis appeared to be targeting Wanin's insurer, Asia, in respect of Asia's policy for the lorry. In the claim for compensation, Wanin was liable as employer under the Act and QBE was the insurer. I say no more in view of the premises on which submissions were presented.

10 As regards the application of the concept of ignorance or mistake to preserve a workman's right to claim damages, Mr Hanam conceded that all the cases he had relied on did not address the question as regards the retention of the compensation which a worker had received by mistake if he wished to continue with his action for damages. The district judge appears to have been of the view that even if there had been a genuine mistake on the part of Kamis, and assuming that he could rely on that mistake to avoid the consequences of s 18(*a*), Kamis would still have to return the $11,025 if he wished to carry on with the action for damages, although she did not say so expressly. It was common ground that the Act does not address the issue of receiving compensation under a mistake. I was of the view that a workman who has received compensation under a mistake of the kind alleged by Kamis may avoid the consequence of the mistake (assuming the mistake is genuine) by returning the compensation he has received.

11 The second affidavit of Kamis, which was filed after the decision of the district judge, alleged that he was unable to return the $11,025 as he had spent it. He said that he had made several withdrawals from his bank account as he was in need of money as he had lost his job and could not find permanent work. He had used the $11,025 to pay various persons from whom he had borrowed money. He also alleged that as at the date of the execution of his second affidavit (on 29 July 2005), he had no money.

12 Mr Hanam sought to persuade me that it was not necessary for Kamis to return the $11,025 before being allowed to continue with his action for damages. He submitted that as and when Kamis obtained judgment against Nasir, the court could order Nasir to pay the entire judgment sum less the interim payment of $5,000 to the Public Trustee and order the Public Trustee to reimburse QBE for the compensation of $11,025 and then pay the balance to Kamis after making payment of Kamis' solicitor-

and-client costs. That would ensure that there would be no double recovery by Kamis which s 18(*a*) was meant to address.

13 As regards my question as to whether such an approach would open the floodgates to non-genuine cases of mistake, Mr Hanam submitted that there were special facts in Kamis' case which not every litigant could avail himself of:

(a) there was a genuine mistake on Kamis' part;

(b) Kamis had in fact turned down a "without prejudice" offer, made through Nasir's solicitors, of about $30,000 before Kamis collected the cheque for $11,025;

(c) Kamis' understanding of English was poor and not many people would have such a lack of understanding of English; and

(d) Kamis was genuinely unable to repay the $11,025.

14 I was of the view that if an injured workman is not required to return the compensation he has received before being allowed to continue with his action for damages, this will lead to abuse. It will encourage workmen to remain silent about the fact that they have recovered compensation while maintaining an action against some person other than the employer. When they are found out, they then allege that they received the compensation under a mistake and then carry on with the action for damages while at the same time retaining the benefit of the compensation. I did not think that that was the scheme envisaged under the Act. I also noted that Mr Hanam's suggestion about payment to the Public Trustee had assumed that the injured workman would succeed in his action for damages and obtain a judgment for a sum no less than what he had already received by way of compensation. That is not always the case.

15 I was of the view that if the court is not able to summarily determine the allegation of mistake in favour of or against a workman who has received compensation, then the compensation must first be repaid before the workman is allowed to continue with his action for damages. Indeed, there will still have to be an eventual finding about the allegation of mistake before the main claim can continue. An order may have to be made for cross-examination of deponents and to allow subpoenas to be issued for the purpose of determining the preliminary point about mistake before a further step is taken to pursue the main claim under the action. The order can be made at the hearing to strike out or at the stage when directions are sought or at some other appropriate stage, but should be made as soon as possible.

16 In the case before me, Mr Hanam was not suggesting that I could summarily determine the allegation of mistake in favour of Kamis. However, he asserted that it could not be summarily determined against him. Even if that was the case, I was of the view that Kamis still had to repay the compensation. If he could do so, the $11,025 could be returned to QBE or held in a stakeholder's account pending a finding on the allegation of mistake. However, Kamis had said that he had no money to make the repayment.

17 As regards the special "facts" asserted by Mr Hanam, I was of the view that the first three were part of the allegation of mistake and could not be used to avoid repayment. Furthermore, whether Kamis had been offered a higher sum as damages before receiving the $11,025 was neither here nor there. As regards the argument that not many people would have the same lack of understanding of English as Kamis, it must be remembered that the Act does not apply to all and sundry but to workmen as defined in the Act. The reality is that the workmen who have availed and

who will avail themselves of the Act often do not have a good grasp of the English language. I did not see anything special about the allegation of poor English.

18 Accordingly, as Kamis was not repaying the $11,025, that was one of my reasons for dismissing his appeal. The other reason was that there was, in fact, no mistake on Kamis' part.

19 On this question of fact, I noted that after Wanin had given notice of the accident to MOM, MOM had sent a form direct to Kamis. In that form, Kamis was to elect whether he wanted to claim compensation under the Act or damages under the common law by placing a tick in the relevant box. The line next to the box for the claim for common law damages had the words "(Please refer to Note 3 below)". Note 3 stated that one could not claim both workmen's compensation and common law damages. The form was returned duly completed with an election to claim compensation. It had been signed by Kamis and dated 29 August 2002.

20 On 9 September 2003, Kamis instructed Ms Viviene Kaur Sandhu to make a claim for damages. She then wrote to Asia. On 9 December 2003, Asia made a "without prejudice" offer of $23,200 which was apparently not accepted.

21 Ms Sandhu said that she met up with Kamis on 19 December 2003 to obtain detailed instructions and at the same time to advise him not to proceed with the workmen's compensation claim and to inform MOM and/or Wanin of his decision if he was contacted, as he had appointed solicitors to claim damages.

22 In the meantime, Kamis' employment had been terminated on 12 November 2003. Between February 2004 and 28 June 2004, Kamis went for two medical examinations in respect of his claim for compensation. There was also further correspondence between Asia and his solicitors which showed that a further offer of $32,700 from Asia was rejected.

23 On 29 June 2004, Ms Sandhu wrote to Asia's solicitors to seek an interim payment of $10,000 as Kamis was in need of money. Asia did not agree to make an interim payment of $10,000. Subsequently, there was an oral conversation between solicitors for Kamis and for Asia on 19 August 2004. This was followed by a fax dated 20 August 2004 from Ms Sandhu giving an ultimatum for Asia's solicitors to revert by 26 August 2004 on the question of an interim payment. On 1 September 2004, Asia's solicitors wrote to agree to an interim payment of $5,000. Ms Sandhu said she informed Kamis of this over the telephone and explained to him that Asia had rejected the request for $10,000 but had agreed to $5,000.

24 In the meantime, MOM had assessed Kamis' claim for compensation, which had not been withdrawn, at $11,025. Kamis was notified by MOM of MOM's second (and final) assessment by a letter dated 4 August 2004. Kamis did not deny that he had had a conversation with Ms Sandhu on or about 1 September 2004. However, he said he could not remember if she had mentioned the amount of the interim payment and, if she did, he could not remember the amount.

25 As events transpired, QBE had written to Kamis, also on 1 September 2004, to inform him that a cheque for $11,025 was ready for his collection. Kamis received QBE's letter shortly thereafter. He said he thought the $11,025 cheque was the interim payment.

26 On 6 September 2004, Kamis went to QBE's office. He signed a form acknowledging receipt of the sum of $11,025 "being workmen's compensation" and collected the cheque for that sum. However, he said that he was not told at QBE's office what the payment was for nor was the form explained to him. He still thought the $11,025 was the interim payment.

27 Kamis said that in late September 2004, he received a call from his solicitors informing him that they had received a cheque for $5,000 for him. Kamis said he thought this was another interim payment as his solicitors had told him previously that Asia had offered over $30,000 to settle his claim. So he went over to his solicitors' office and collected the cheque for $5,000.

28 Subsequently, Asia's solicitors learnt that on 6 September 2004 Kamis had received $11,025 as compensation. The solicitors wrote on 22 December 2004 to Kamis' solicitors to seek the return of the $5,000. Kamis said that his solicitors called him to seek his explanation and he then told them that he had thought the $11,025 was an interim payment.

29 Mr Hanam submitted that because the discussions about the $5,000 interim payment and the correspondence from MOM and QBE about the $11,025 compensation payment occurred around the same time, there was confusion. He submitted that the issue about the mistake could not be summarily decided and the court should not go through a minute and detailed examination of the facts at this stage, relying on *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374 ("*Gabriel Peter*").

30 I agreed that the power to strike out should not be exercised by a minute and protracted examination of the facts but it could be exercised in plain and obvious cases as was also acknowledged in *Gabriel Peter*.

31 According to Kamis himself, he was in dire need of money. The sum of money he wanted to receive as interim payment was therefore important to him. I was of the view that at the time when Ms Sandhu had spoken to him on or about 1 September 2004, he could not have forgotten that the request for $10,000 had been rejected and that he was going to receive $5,000 instead as interim payment. In my view, he must have known that the $11,025 was a completely different sum meant for a different purpose.

32 My view was reinforced by the following facts. Kamis was aware of his alternative avenues, *ie*, to obtain compensation or damages but not both. Kamis did not tell or inquire of his solicitors about QBE's letter of 1 September 2004 regarding collection of the cheque for $11,025 when he received the letter even though Ms Sandhu had recently told him about the $5,000 interim payment. He also did not tell or inquire of his solicitors about the $11,025 payment when he was later told by them to collect the cheque for $5,000. Neither did he ask why there was a second interim payment when he had never asked for or been told that there would be such a payment. If indeed Kamis had been confused when he received the cheque for $11,025, he must have realised the truth when he was called to collect the cheque for $5,000. Yet he continued to remain silent about the $11,025. Lastly, at all material times, Kamis did not disclose to his solicitors any of the relevant correspondence from MOM or QBE regarding his workmen's compensation claim or seek their advice on such correspondence even though he had taken the trouble to appoint solicitors to act for him. In my view, all the above omissions were deliberate.

33 I was of the view that it was plain and obvious that Kamis had not made a mistake when he received the cheque for $11,025 and when he continued to retain it after collecting the cheque for $5,000. Accordingly, the appeal was dismissed with costs.