

1959 Present: Basnayake, C.J., and Pulle, J.

GUNAPALA, Appellant, and HIGH LEVEL ROAD OMNIBUS CO.,
LTD., Respondent

S. C. 446—D. C. Colombo, 30,438

Workmen's Compensation Ordinance—Section 60—Workman's duty to elect between common law remedy and statutory remedy.

Where a workman employed under A institutes an action in a civil court against B for damages in respect of an injury caused by B's servant, section 60 of the Workmen's Compensation Ordinance does not preclude him from maintaining the action against B if, during the pendency of the action, he accepts compensation from his employer A.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with Miss Maureen Seneviratne, for Plaintiff-Appellant.

E. F. N. Gratiaen, Q.C., with H. W. Jayewardene, Q.C., S. J. Kadirgamar and L. C. Seneviratne, for Defendant-Respondent.

January 23, 1959. BASNAYAKE, C.J.—

The appellant instituted this action on the 13th November 1953 against the respondent, the High Level Road Omnibus Company, a company incorporated under the Companies Ordinance No. 51 of 1938. He alleged that on or about 21st February 1952 a servant employed by the

respondent as a driver of an omnibus, in the course of his employment under the Company and driving omnibus bearing registered No. IC 587, drove it negligently on a highway without reasonable consideration for the other users on it and at the junction of Havelock Road and Park Road collided with lorry bearing registered No. CL 7982 driven by the appellant and caused serious injury to him. He claimed as damages a sum of Rs. 18,000. The respondent filed answer on 5th February 1954. On 29th March 1954 the appellant wrote to the Supervising Officer, Unemployment Relief Works, where he was employed, bringing to his notice the fact that he had sustained severe injuries in the collision and appealed to him to obtain reasonable compensation. On 29th April 1954 the appellant addressed a letter to the Commissioner of Workmen's Compensation Claims bringing to his notice the fact that he was in dire straits and asked for financial assistance. In consequence of this representation, his employer, the Government, decided to admit liability to pay compensation for 10% loss of earning capacity under the Workmen's Compensation Ordinance, and entered into a memorandum of agreement dated 13th June 1955 accepting liability in a sum of Rs. 490 and on that very day paid that sum to the appellant. On 27th January 1956 the respondent amended his answer and pleaded among other matters that the appellant was not in law entitled to maintain this action for damages in a court of law as he was barred from doing so by operation of section 60 of the Workmen's Compensation Ordinance. At the trial the only matter which was contested was whether the appellant was in law entitled to maintain this action and to recover any damages. After hearing the evidence of Dr. Milroy Paul who deposed to the physical condition of the appellant after the accident and the submissions of counsel on the question of law the learned District Judge held that the appellant was not entitled to maintain this action. The only evidence produced by the respondent was that of the Additional Assistant Crown Proctor who deposed to the fact that a demand had been made from the respondent by the Crown for a sum of Rs. 490 being the amount of compensation paid to the appellant.

Learned counsel for the appellant submitted that the learned District Judge was wrong in holding that under section 60 of the Workmen's Compensation Ordinance he was not entitled to maintain this action. We are of opinion that the submission of learned counsel is sound and that the learned District Judge is wrong in holding that the appellant's action was barred by the statute. The section reads as follows :—

“Nothing in this Ordinance contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a civil court an action for damages in respect of the injury against the employer or any other person ; and no action for damages shall be maintainable by a workman in any court of law in respect of any injury—

(a) if he has instituted a claim to compensation in respect of the injury before a Commissioner ; or

(b) if he has agreed with his employer to accept compensation in respect of the injury in accordance with the provisions of this Ordinance.”

We agree with learned counsel for the appellant that the moment the appellant instituted the instant action in the District Court he lost his right to compensation under the Workmen's Compensation Ordinance because the Ordinance expressly denies the right to compensation under it to a workman who institutes an action in a civil court for damages in respect of any injury against his employer or any other person. Upon the institution of this action the appellant ceased to be entitled to the compensation he received. The agreement marked P6 which the Crown entered into with the appellant is not an agreement which the parties could have validly entered into under the statute. The appellant has received a sum of money from the Crown which he is not entitled to receive under the Workmen's Compensation Ordinance. The execution of the agreement and the receipt of the money have no legal effect on the civil action which the appellant had instituted. An employee who institutes an action for damages in a court of law in respect of any injury and thereafter enters into an agreement with the employer though not entitled to do so under the Workmen's Compensation Ordinance is not barred by section 60 from maintaining his action.

We therefore set aside the order of the learned District Judge. The learned District Judge has assessed the damages in a sum of Rs. 15,000 and that assessment is not challenged. We accordingly enter judgment for the appellant in a sum of Rs. 15,000 with costs both here and in the court below.

PULLE, J.—I agree.

Appeal allowed.
